




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 19 2015

**MEMORANDUM**

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

SUBJECT: Standard for Supplemental Environmental Projects in Administrative Settlements Resolving Lead-based Paint Violations under TSCA Sections 402, 404, 406(b) and the Section 1018 Lead Disclosure Rule

FROM: Kenneth C. Schefski, Acting Director  
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Office of Civil Enforcement 

TO: Regional Counsel  
Regional Enforcement Managers  
Regional Lead Program Managers

This memorandum reiterates and clarifies that construction projects proposed to be Supplemental Environmental Projects (SEPs) in administrative enforcement settlements that resolve lead-based paint (LBP) violations must comply with the LBP abatement requirements under 40 C.F.R. Part 745, Subpart L. Compliance with Subpart L applies to all construction SEPs included in settlements that resolve violations of Toxic Substances Control Act (TSCA) Sections 402, 404, or 406(b); violations of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act (known as the § 1018 lead disclosure rule); or violations of their respective implementing regulations at 40 C.F.R. Part 745. This clarification also pertains to both of the limited exceptions to the minimum penalty required under the updated EPA SEP Policy (the SEP Policy),<sup>1</sup> as explained in the 2004 § 1018 Minimum Penalty Exception Memorandum (§ 1018 Exception)<sup>2</sup> and the 2012 TSCA LBP Minimum Penalty Exception Memorandum (TSCA LBP Exception).<sup>3</sup>

**I. SUMMARY**

Compliance with the abatement requirements for lead-based paint has been the standard for all LBP construction SEPs since 2004.<sup>4</sup> Following EPA's issuance of the Renovation, Repair and Painting

<sup>1</sup> Memorandum by Cynthia Giles, *Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy* (Mar. 10, 2015)(the *SEP Policy*) ; <http://www2.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy>. The *SEP Policy* supersedes OECA's 1998 SEP Policy but makes no substantive changes relevant to this LBP SEP memorandum. See Memorandum, S. Herman, *Issuance of Final Supplemental Environmental Projects Policy and SEP guidance attached thereto* (Apr. 10, 1998).

<sup>2</sup> Memorandum by Thomas V. Skinner, *Supplemental Environmental Projects In Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases* (Nov. 23, 2004)(§ 1018 Exception).

<sup>3</sup> Memorandum by Cynthia Giles, *Exception to the Minimum Penalty Requirements for Proposed Supplemental Environmental Projects in Administrative Matters Resolving Violations of TSCA Sections 402, 404 and 406(b)*(Dec. 14, 2012)(TSCA LBP Exception); <http://intranet.epa.gov/oeca/oce/slpd/guidance%20documents/seppeanltyexceptiontsca402404406-12142012.pdf>.

<sup>4</sup> EPA's LBP SEP exceptions also allow certain non-construction SEPs (blood-lead level screening and/or treatment for non-Medicaid children). This memorandum does not address non-construction LBP SEPs.

(RRP) Rule, 40 C.F.R. Part 745 Subpart E, some respondents have proposed to perform SEPs that comply with RRP requirements, rather than perform abatement consistent with the more rigorous protocol at 40 C.F.R. Part 745 Subpart L. Whether a proposed LBP construction project qualifies as a SEP depends upon which protocol the respondent will follow in executing the work.<sup>5</sup> For purposes of approving a proposed LBP construction SEP, only those projects performed in compliance with all applicable Subpart L abatement requirements can be included in a settlement as a SEP. See Table 1.

As explained below, abatement continues to be the standard for LBP construction SEPs because: (a) abatement provides the requisite environmental benefit to merit inclusion in settlement as a SEP and the penalty mitigation that the SEP Policy provides, whereas renovation does not; and (b) the cost of abatement is already accounted for by allowing an even further reduced minimum required penalty of only 10 percent (10%) of the Gravity-based Penalty (GBP) otherwise due under the applicable LBP enforcement response and penalty policy (ERPP).<sup>6</sup>

Table 1. SEP Eligibility			
Proposed Project	Work Will Comply with:	Can it be a SEP?	SEP Penalty "Discount"
Any type of LBP construction project (e.g., window replacement, etc.)	RRP Rule (Subpart E)	→ No	→ Not Applicable
	Abatement Requirements (Subpart L)	→ Yes	→ Yes - Minimum Penalty Required is 10% of GBP, plus any economic benefit that stemmed from the violation

## II. BACKGROUND

The SEP Policy establishes the framework and standards for all SEPs. The SEP Policy requires that settlements with SEPs include a minimum penalty of 25% GBP, or 10% GBP *plus* economic benefit, whichever is greater.

As described above, EPA's § 1018 Exception and TSCA LBP Exception allow further reductions in the required minimum penalty in a settlement with a qualifying SEP. Both exceptions: (a) adopted abatement as the requisite standard for LBP construction SEPs; (b) required eliminating LBP and lead hazards; and (c) based the additional penalty reduction on the public health benefits and the cost to respondents of performing abatement.

<sup>5</sup> For example, window replacements where LBP is present may be performed as either a renovation (subject to Subpart E rules) or an abatement (subject to Subpart L requirements, including clearance testing).

<sup>6</sup> Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy (Dec. 2007); Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-based Paint Activities Rule (LBP Consolidated ERPP)(Apr. 2013).

### III. DISCUSSION

#### For LBP Construction SEPs, Only Abatement Fully Satisfies the Environmental or Public Health Benefit Requirements in the SEP Policy

The SEP Policy requires that projects provide significant, quantifiable benefits to “improve, protect or reduce risks to public health or the environment” that may not otherwise have occurred in settlement of the violations and is not otherwise achievable under applicable laws. Because the SEP Policy applies to a wide variety of regulatory programs, it does not specify what degree of improvement, protection or reduction should be required to achieve such benefits in different contexts.

The decision about what work is sufficiently beneficial to qualify as a SEP is program-specific, and such determinations are guided by the specific goals and authorities of the relevant program. The LBP SEP eligibility is grounded in the concept that an acceptable SEP must *reduce to zero* the likelihood of prospective violations, adverse impacts or risks. SEPs must meet EPA’s goals for “eliminating” lead hazards, “ending” lead poisoning, “making properties lead-safe,” promoting projects to “prevent lead poisoning,” and obtaining “significant and measurable . . . health benefits.”

Abatement is the sole LBP response capable of attaining adequate environmental and public health benefits to justify a SEP, because it requires elimination of LBP (by removal, encapsulation, etc.) as well as independent clearance testing to confirm this outcome. RRP-compliant renovation does not obtain this result (and is not intended to do so). Therefore, abatement provides the benefit required for LBP construction SEPs, whereas renovation does not. Although RRP-compliant construction should prevent the generation of lead-dust from the instant project, it does not entail clearance testing to ensure that a property is left LBP- and dust-free.<sup>7</sup> Furthermore, RRP-compliant renovations allow LBP to stay in place and as such remain susceptible to deterioration or disturbance. By contrast, abatement projects are intended to, and do, eliminate LBP and provide clearance verification. Hence, requiring abatement fulfills EPA’s intent to obtain permanent protectiveness in all LBP construction SEPs, whereas allowing renovations does not.

### IV. CONCLUSION

For the foregoing reasons, to qualify as an LBP construction SEP, a proposed project in a § 1018 or TSCA LBP administrative enforcement settlement must comply with the abatement requirements at 40 C.F.R. Part 745 Subpart L. As such, although a project (such as window replacement) may be *regulated* as a renovation under Subpart E, it may not be performed as a SEP unless it is *performed* in accordance with the more rigorous protocol for abatements under Subpart L.

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<sup>7</sup> The ERPPs include two examples which should not be *mis*interpreted as allowing renovation SEPs, i.e.:

- “Renovation (such as window or door replacement) that includes removal of components containing lead-based paint and/or lead-based paint hazards from target housing, followed by clearance testing as defined in 40 CFR 227(e)(8).”
- “Risk assessment of target housing or child-occupied facilities to identify lead-based paint hazards, followed by correction of any hazards identified.”

Appendix D to § 1018 ERPP and TSCA LBP ERPP. The term “renovation” in the former example is a misnomer since the example describes abatement (removal of LBP components followed by clearance testing) – and neither example should be misconstrued to suggest that a renovation (or interim controls) can be performed as a SEP.

Questions about TSCA lead-based paint administrative enforcement settlements should be directed to Chief, Chemical Risk Reporting and Enforcement Branch, Waste and Chemical Enforcement Division.

cc: Chief, Chemical Risk Reporting and Enforcement Branch/WCED  
Regional and Headquarters SEP Coordinators