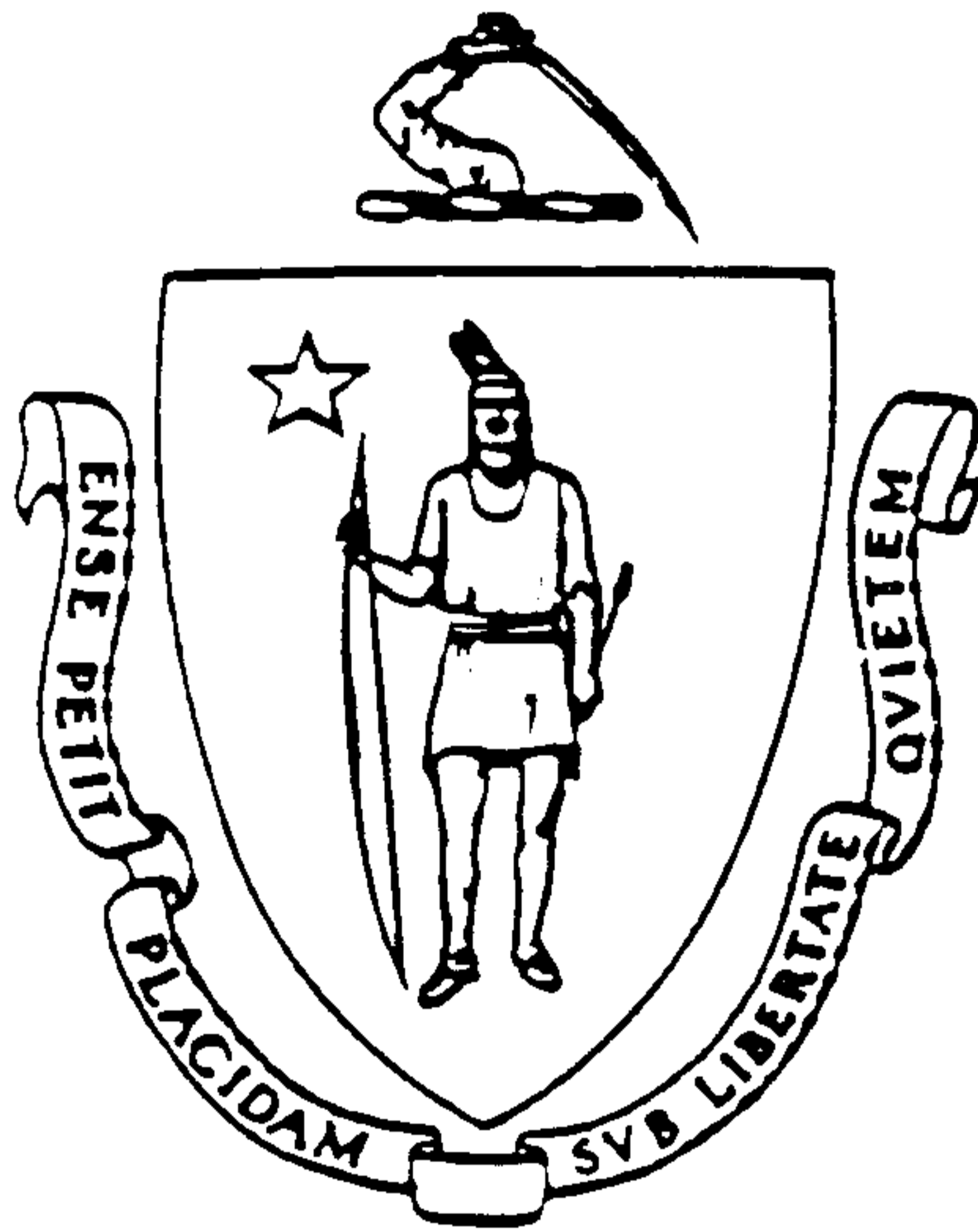
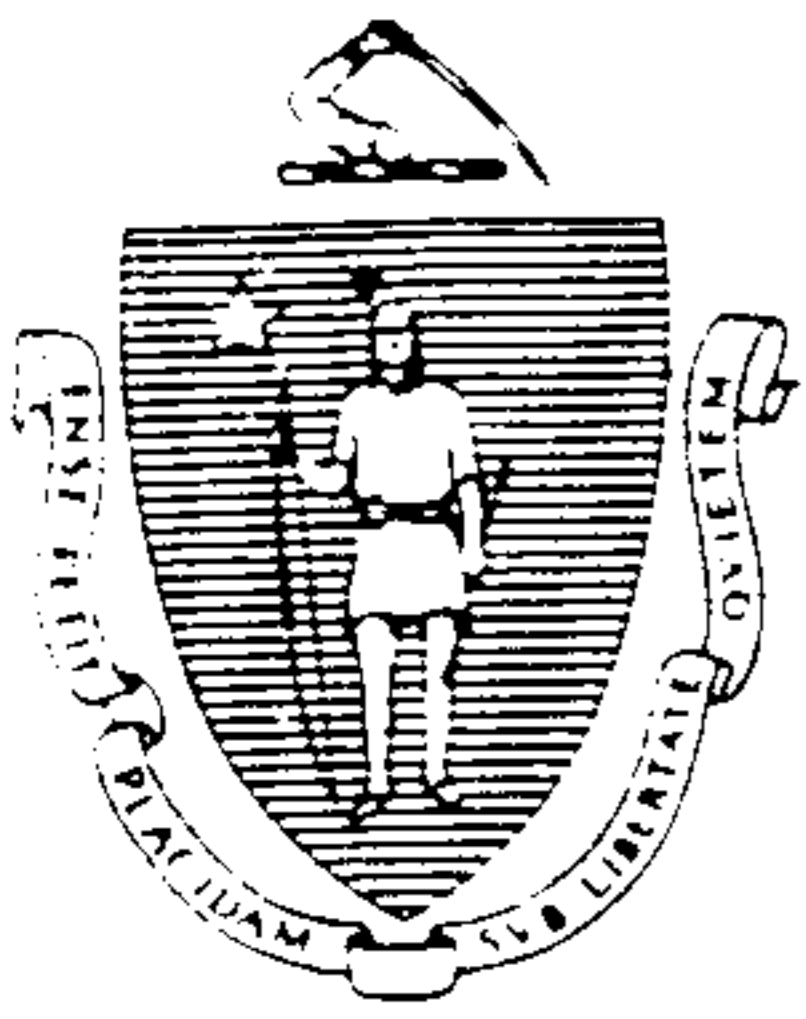


**SCOTT HARSHBARGER
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS**



**REPORT OF THE ATTORNEY GENERAL'S
LEAD POISONING TASK FORCE**

AUGUST 1992



The Commonwealth of Massachusetts

Office of the Attorney General

One Ashburton Place,

Boston, MA 02108-1698

SCOTT HARSHBARGER
ATTORNEY GENERAL

(617) 727-2200

September 2, 1992

Dear Members of the Lead Poisoning Task Force:

Your participation on the task force has been invaluable to me and my staff in educating us about the continuing hazard of lead poisoning to the children of our Commonwealth and the complexities of enforcing the lead laws. While recognizing that the financial burden of lead abatement cannot be borne solely by current property owners and after careful consideration of the conclusions contained in the report, I believe that the following recommendations should be implemented in order to increase compliance with the lead law and further reduce the incidence of childhood lead poisoning.

1. The current abatement requirements should basically be left in place. With deleading costs currently estimated at \$3500 per two-bedroom unit, increasing available tax credits to \$2500 per unit should be a major incentive for deleading by many property owners. Loan programs already in operation are also helping. The current law requires that owners get rid of lead for once and for all. It would be a mistake to replace this with a new system of temporary measures which will put owners into a cycle of major expenditures for repairs, inspections, and insurance and yet still have lead paint potentially endangering children's health in hundreds of thousands of housing units.

2. Property owners who do undertake abatement, however, should be entitled to a letter of compliance which would abrogate strict liability.

3. Deleading should be required as a condition of the transfer of property intended for residential rental units. Mortgagees should be allowed to require as a condition of the mortgage that deleading occur within a short but reasonable amount of time after transfer. In order to make deleading affordable for buyers, banks and other home mortgage lenders must provide

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financing for deleading at the time of the purchase of the property which is amortized over the same period as the purchase money mortgage. By this mechanism many more rental units will be deleading at the time that the owner is most able and inclined to undertake the work. Knowing that deleading will be required, the buyer will figure the cost of deleading into the purchase price and will not be willing to pay as much for property containing lead. As a result, some of the cost will be absorbed by the seller.

4. In conjunction with the above, and also for the benefit of single family home buyers, disclosure forms concerning lead paint and inspections should be given to prospective buyers at the time an initial purchase offer is made so that the buyer is still in a position to call off the purchase or, at least renegotiate the price.

5. The Department of Labor and Industries must continue to provide adequate staffing to oversee deleading. The quality of licensed deleading has improved measurably in the last few years; very few children have been poisoned as a result of deleading performed by licensed contractors. On the other hand, substantial numbers of children continue to be poisoned each year as a result of deleading and renovations undertaken by owners and unlicensed contractors. It is crucial that DLI have enough inspectors to continue to monitor licensed contractors and to uncover much more of the unlicensed deleading which is occurring. In addition, licensed contractors and inspectors should be encouraged to participate in self-policing of the industry.

6. Under a new law which became effective on July 1, home improvement contractors must be registered with the Secretary of Public Safety. The Secretary should provide copies of regulations and other educational materials concerning lead hazards to all contractors who register.

7. The Attorney General must be prepared and willing to investigate and prosecute allegations of illegal deleading, fraudulent inspections and other non-compliance with the lead law.

8. Department of Public Health regulations must be amended to specify that all post-abatement inspections be conducted by an entirely independent inspector so as to eliminate potential collusion between contractors and inspectors.

9. Lead poisoning continues to have its greatest impact in the poorest areas of our large cities. Outreach to parents in such neighborhoods should be increased and should include materials

translated into several languages. Such materials should be distributed by health clinics, day care centers, community centers and religious organizations.

10. The Attorney General and other law enforcement agencies must take a firm stand against and be ready to prosecute owners who seek to avoid compliance with the lead law by discriminating in rentals against families with young children. This includes tactics like advertising that an apartment contains lead and requiring rental applicants to provide information about children's blood lead levels.

11. A source of funding must be established to pay for temporary housing for children who have been poisoned and for the relocation of families during deleading. The insurance industry should explore the possibility of making voluntary contributions to set up such a fund.

12. An immediate ban on the use of lead paint on all metal structures must be implemented and protocols developed for the education and training of non-residential lead abatement workers. The Advisory Committee should strongly consider a broader ban on the use of lead paint in all non-residential settings.

Sincerely,



Scott Marshbarger

REPORT OF THE ATTORNEY GENERAL'S
LEAD POISONING TASK FORCE

AUGUST 1992

Task Force Subcommittee Co-Chairpersons

Subcommittee I - Identification and Response to Children at Risk
Bettye Freeman
Karen Zweig

Subcommittee II - Residential Removal and Disposal of Lead
Martin Levin
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Subcommittee III - Non-Residential Lead Removal and Disposal
Karen McGuire

Subcommittee IV - Funding and Liability Issues
Robert Tommasino
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STATEMENT OF THE ATTORNEY GENERAL

In urban areas lead remains a leading environmental hazard and one that is particularly dangerous because it affects children in ways that are debilitating, insidious and irreversible. Attorney General Scott Harshbarger has made the enforcement of the state's lead statutes one of his major environmental priorities. During the course of his first eighteen months in office, he initiated both civil and criminal proceedings against persons who put children at risk by violating the lead paint laws. It soon became clear to the Attorney General, however, that enforcement is not the only or even the most effective means of addressing the problem of lead poisoning in the Commonwealth. While poisoning is still persistent in deteriorated housing in inner city neighborhoods, property owners claim that they simply cannot afford the tremendous costs of lead removal, and state and municipal agencies also lack the funds to ensure that deleading and inspection is properly performed. In addition, in non-residential settings lead paint is still being legally applied and removed in ways that pose potentially serious health risks.

The Attorney General therefore decided to form a statewide task force to identify and recommend steps to deal with these and related issues. Established in December of 1991, the task force is comprised of representatives of state and federal

agencies, local boards of health, the major industries involved including insurance, real estate, banking and deleading contractors, public interest advocacy groups, attorneys representing both plaintiffs and defendants, as well as health care professionals, neighborhood associations and others.

The Attorney General's goal in forming the Task Force was to assemble together individuals from a variety of backgrounds who could articulate their concerns and bring to bear their unique perspectives, knowledge, and creativity to the problem. The Attorney General recognized from the outset that given the diverse perspectives of the task force members, it was unlikely that the group would be able to reach consensus on major changes in the operation of the lead law or agency regulations. Some came to the task force believing that significant portions of the statute should be revised, while others came believing that the law has been greatly successful in reducing childhood lead poisoning and only requires some minor fine tuning. To the extent that the task force has been able to make specific recommendations on particular issues, it is with the caveat that they do not necessarily reflect the positions of all of the individual task force members.

The task force met on a regular basis from December 1991 through the first six months of this year. It focused on such goals as coordinating agency regulatory efforts, broadening the reach of educational information concerning the hazards of lead

paint, considering modifications to the lead law's provisions for liability and damages which might provide more incentives for property owners to come into compliance and identifying previously untapped or underutilized sources of funding for deleading.

To facilitate meaningful dialogues on these and other topics, four subcommittees were formed. The subcommittees were: 1) the screening and identification of children at risk; 2) the residential removal and disposal of lead paint; 3) lead paint in non-residential settings; and 4) funding and liability issues. The task force has served as a forum for an exchange of information and viewpoints. The Attorney General hopes that the open and at times heated exchanges that occurred in the context of the subcommittee meetings were as educational and enlightening for the task force members as they were for him and the Office. He is immensely grateful for the time and energy which the members devoted to the task force meetings and the composition of this report. The recommendations contained in the report will, of course, be given great consideration in all decisions concerning lead poisoning initiatives undertaken by the Office. The Attorney General also proposes to reconvene the task force this fall, for the purpose of implementing many of the subcommittees' recommendations.

EXECUTIVE SUMMARY

Screening and Identification of Children at Risk

Early detection of lead poisoning is vital. Although lead screening of children under six is mandated by statute, achieving truly comprehensive screening will require special efforts to reach families who have limited access to health care. This is a crucial endeavor because these are often the same families at the highest risk for lead poisoning. Basic information about lead poisoning must be widely distributed to families, with particular emphasis on outreach to non-English-speaking and low literacy populations. The education of pediatricians statewide regarding lead poisoning and the lead law is also fundamental to prevention and early detection.

The removal of lead paint from a child's environment is a key element in the treatment and prevention of lead poisoning. A parent who suspects the presence of lead in her apartment must be able to obtain a quick and accurate lead inspection. If lead is present, moreover, the parent should be able to enforce the statute in a way that is effective and affordable, with the cooperation of court personnel and without need of engaging an attorney. In instances where a child has already been poisoned, tenants should be allowed to pay monthly rent into an escrow account so that funds will be available to pay

for deleading if the owner fails to make timely arrangements to delead.

The courts and other law enforcement personnel must also be aware of and work to prevent the increasingly common discrimination against families with children by property owners who do not want to delead rental units. Property owners should not be allowed, for instance, to advertise that their units contain lead paint or to require children of prospective tenants to provide blood test results in order to discourage families with children from renting apartments.

Poisoning prevention could also be enhanced by ensuring that families considering the purchase of property be informed of the possibility of lead paint very early in property transactions. Information about lead inspections should be imparted to buyers when the initial offer is made so that it can be taken into consideration before a purchase and sale agreement is signed.

The recommendations of this Subcommittee were made with the keen awareness that, in many instances, additional resources will be required. The Subcommittee offers its recommendations in the spirit of comprehensively dealing with a public health problem that holds enormous and serious health consequences for families in Massachusetts.

Residential Removal and Disposal of Lead

When property owners do undertake deleading it is imperative that the job be done correctly. Improper deleading has been implicated as the cause of several cases of childhood lead poisoning. Deleading, moreover, is expensive; as consumers, owners need to be assured that they are receiving high quality services. Property owners and their tenants must be able to rely on the accuracy of both initial and post-abatement lead inspections, first to indicate what and where deleading is needed, and then to verify that it was properly done.

The Subcommittee on Residential Removal and Disposal of Lead thus considered whether lead inspectors are properly qualified and whether the methods that they use to conduct inspections are reliable and adequate. Because the considerations applicable to initial inspections and post-abatement inspections vary, the Subcommittee considered these questions in both contexts.

There was a general consensus that the classroom training of inspectors is adequate but that "hands on" training programs for inspectors must be enhanced. The Subcommittee also advocates mechanisms to increase the accountability of inspectors. Such mechanisms include reinspections on a random basis and civil penalties as enforcement tools.

In the case of post-abatement inspections, quality assurance problems are created if the inspector is associated with, or has a relationship with, the contractor who performed the abatement. To assure the quality of post-abatement inspections, they should be conducted by an independent inspector both before and after the containment is dismantled.

The Subcommittee also considered the merits of alternative technologies such as atomic absorption spectrophotometry, XRF, and sodium sulfide tests. The technologies differ in reliability and cost. Post-abatement inspection methodologies cannot depend merely on technical tests but should incorporate dust wipes to ensure compliance. There should be further research to develop reliable inspection technologies.

Lead in Non-Residential Settings

While the application of lead in residences has now been prohibited for many years, lead paint continues to be applied in certain non-residential settings. There are also substantial gaps in the regulation of lead removal in non-residential settings, causing potential risks of poisoning to both children and workers. The Subcommittee on Lead in Non-Residential Settings therefore focused on two topics: 1) banning new application of lead paint on metal structures and 2) improving training of non-residential deleaders.

Removal of lead-based paint during maintenance of metal structures (bridges, water towers, etc.) poses a significant threat to workers, public health and the environment. In evaluating the need for and feasibility of a ban on the new application of lead paint, the Subcommittee considered such factors as health effects to workers, environmental harm, current practice in Massachusetts and elsewhere, and the availability of non-lead alternatives. The Subcommittee concluded that a ban of new application of lead paint on metal structures is a sensible means of eliminating threats to health and the environment associated with subsequent maintenance activities.

The Subcommittee also evaluated existing training and education of lead abatement contractors and their employees. While state regulations require training for residential deleaders, there are no requirements specifically geared for non-residential workers. Currently approved courses for residential abatement workers are not adequate for non-residential workers due to the added safety measures needed when dealing with non-residential structures. The Subcommittee, therefore, recommends that protocols for education and training of non-residential lead abatement workers be developed as soon as possible.

Subcommittee on Liability and Funding

The state's lead law imposes strict liability on property owners when children under six become lead poisoned while residing in housing owned by them and containing lead paint. In the last few years, certain events have coincided to cause owners to seek changes in the liability provisions of the lead laws. First, real estate values have generally decreased across the state; second, insurers have been permitted to exclude coverage for lead poisoning from standard liability policies and to offer it separately at substantial cost; and third, suits by poisoned children against owners have generally been on the rise.

As a result owners may not have the resources to undertake deleading and have to choose whether to pay for expensive insurance or do without insurance in the face of increasing concern about their potential liability. The Subcommittee on Liability and Funding recognized that this situation was not simply the owners' "problem" because if property owners fail to delead children are more likely to be poisoned. And, although the availability of liability insurance is much less important than the prevention of poisoning in the first place, a poisoned child should be compensated for his or her injuries.

Thus, the Subcommittee sought solutions both in terms of finding sources of funding to help property owners pay for deleading and amending some of the liability provisions

contained in the statute. These include the provisions for strict liability and treble damages, parental liability, who should be held to be an "owner" under the law, deleading on transfer of property, and various insurance coverage problems. The Subcommittee was extremely mindful, however, that relief for property owners not be provided at the cost of increasing the risks of lead poisoning to children.

While the members of the Subcommittee were not always able to reach agreement as to the best means of addressing the issues identified, the Subcommittee's meetings were valuable in defining the issues, finding common ground and providing the forum for a very open exchange of viewpoints. Furthermore, the Subcommittee was able in some instances to recommend limited modifications to the current state of the law to ameliorate the identified problems. One focus of the recommendations was on providing owners with an additional incentive to delead by protecting them from strict liability where they had delead or (in the case of larger apartment buildings) submitted specific plans for deleading to the state. The proposed amendments also include clarifying the definition of "owner" and modifying the extent of strict liability in conjunction with a redefinition of the duties of landlords.

Through the Subcommittee's working groups on funding issues, a variety of presently available and anticipated public and private funding sources were identified. Public funding

sources include grants, loans, and tax credits. The Massachusetts Housing Partnership and Massachusetts Bankers Association have been working on a loan guarantee fund and the development of a secondary market for the placement of lead abatement loans. The identification and development of further funding sources will remain key to coping with the lead paint problem in Massachusetts.

REPORT OF THE SUBCOMMITTEE ON
SCREENING AND IDENTIFICATION OF CHILDREN AT RISK

I. INTRODUCTION

Lead poisoning continues to be a major threat to children in the Commonwealth despite the fact that we have had one of the strongest laws in the country on the books since 1971. In the Commonwealth's poor inner-city neighborhoods, where much of the housing stock is both old and in deteriorated condition, lead poisoning may effect as many as half of the children under six. In 1991, the Center for Disease Control announced that blood lead levels as low as 10 micrograms per deciliter may be dangerous to children, thus suggesting that many more children are at risk than previously believed.

The Subcommittee undertook its work with the assumption that an approach to lead poisoning that begins with screening children's blood lead levels is fundamentally wrong. Any comprehensive program to eliminate this problem requires an emphasis on effective preventative measures. This report therefore contains many recommendations that go beyond merely identifying and responding to children at risk. These are intended to create a situation where all parents are aware of the dangers of lead poisoning, can readily obtain accurate blood testing for their children and lead testing of their residences, and can take affirmative steps to get lead safely removed when it is found. The subcommittee recognizes that the solutions being proposed will, in many instances, require additional resources.

II. PROBLEMS IDENTIFIED AND SOLUTIONS PROPOSED

A. Screening and Identification of Children At Risk

1. Problem - many children lack access to health care.

The vast majority of preschool children are screened for lead poisoning as part of their routine pediatric preventive health care. However, if the Childhood Lead Poisoning Prevention Program (CLPPP) depends entirely on screening done by health care providers, those children with limited access to health care are in danger of being excluded. Efforts to reach those children who are not being screened should be increased since early detection is so vital.

Recommendations:

Existing screening data should be analyzed to identify high risk underserved populations.

Targeted door-to-door screening efforts in high risk areas have been successful in the past. These efforts should continue, along with the introduction of new methods to reach underscreened populations, such as new immigrants.

Screening efforts should also be focused on children of deleaders and other occupations that may place them at special risk. To accomplish this goal, pediatric lead screening information should be incorporated into Hazardous Communication programs. In addition, occupational health medicine, obstetrics and fertility clinics should be advised concerning risks of lead exposure to spouses and children of deleaders and others who work with lead.

Outreach to pediatric health care community regarding screening regulations should be enhanced.

2. Problem: EP is not a reliable test for lead

There is a need to make sure all blood tests for lead poisoning are analyzed for lead, in addition to Erythrocyte Protoporphyrin ("EP".) E.P. is the measure of the ability of a child's body to produce hemoglobin. In moderately elevated lead levels, hemoglobin production is decreased, and as a result, EP goes up. Blood levels of 10-20 mcg/dl, however, do not impact hemoglobin production, so a child with a lead level between 10-20 will have a normal EP level. Thus, E.P. tests will not identify children with relatively low, but potentially dangerous, blood lead levels.

Recommendations:

CLPPP should revise mandatory screening regulations to require health care providers to obtain direct lead analysis on all samples.

A mandatory state certification process for laboratories performing lead analysis should be developed. Results of laboratory proficiency testing should be available to health care providers and consumers.

Recommended follow-up protocols which clarify when a venous sample or a capillary sample is

appropriate should be developed and disseminated.
(For example: All capillary blood levels equal to or greater than 15 mcg/dl should be confirmed by venous testing.)

Training programs should be developed to increase the number of pediatric phlebotomists and to improve the venous blood testing technique.

Better procedures for fingerstick tests should be developed to reduce the number of false positive tests. Federal research projects regarding testing are in progress, and the results should be disseminated as they become available.

B. Education

1. Problem: Many parents do not understand lead poisoning.

Parents lack sufficient information about lead poisoning. Education of parents is key to lead poisoning prevention.

Recommendation:

Parents can play an important role in preventing lead poisoning. They can make sure their children are tested, take steps to reduce their children's ingestion of lead, get lead testing done in their homes and apartments and take steps to have lead removed.

Updated written materials need to be widely distributed to inform parents about lead poisoning, its effects, sources, hazard reduction measures, the lead law, and the need for testing of children under the age of six. These materials should be appropriate for use by low-literacy populations and should be distributed through health care centers, day care providers, pre-school programs, community based organizations, pediatricians, and other locations where parents are likely to be reached.

2. Problem: Educational materials are not available in many languages.

There are large numbers of non-English-speaking people in the Commonwealth. Often, new immigrants live in high-risk areas and are therefore in

particular need of information regarding lead poisoning. Very few materials are available to reach these populations. There are also many people with little or no ability to read.

Recommendation:

Written materials need to be developed in various languages. All materials need to be appropriate for low literacy populations, and must be culturally and linguistically appropriate. Minimally, there is a need for materials in the following languages: Spanish, Vietnamese, Khmer, Haitian Creole/French, Cape Verdean/Portuguese, Chinese, Russian and Lao.

The materials to be translated include the following, in order of priority: general educational materials, tenant's rights and owner responsibilities, property transfer notification package, legal notices, inspection reports.

There is also a need for the development of non-written educational material to reach those who are not literate in any language. Such materials could be presented in the following formats:

television and radio public service announcements and talk shows, telephone hot-lines, video presentations, and materials for use in adult literacy programs.

3. Problem: Pediatricians need to play a larger role.

Pediatricians (including those in suburbs) often lack information about or downplay the importance of screening, the meaning of test results, prevention steps, the lead law, and the importance of the health care provider's role in communicating this information to patients.

Recommendation:

Continuing education regarding lead poisoning and the lead law should be fostered, and professional health care organizations should encourage their members to attend regionally-sponsored continuing education conferences, seminars or workshops dealing with this issue.

C. Inspections and Deleading

1. Problem: Lead inspections are expensive.

Removing lead paint from a child's environment is a key element in the treatment of lead poisoning and is the most effective way of preventing lead poisoning. Low-income parents often lack the means of getting their homes tested. Other than in the cases of poisoned children, tenants typically face obstacles in obtaining no-fee lead inspections.

Recommendations:

Local boards of health should perform lead determinations and enforce the law according to state regulations.

Cities and towns should explore offering fee-for-service lead inspections. The fees could be used by local boards of health to fund education and free lead inspections for those who cannot afford to pay.

DPH should work with local boards of health to periodically provide training for new board of health employees in becoming lead inspectors. Each board of health should have at least one inspector licensed to perform lead determinations.

Tenants should have the right to withhold the cost of lead inspections from rent when there is a child or children in the home under the age of six, provided that the tenant requested a letter of compliance and did not receive one within fourteen days of the request (or if tenants have expended their own money for a lead inspection, this amount can be deducted from rent). If this right cannot be implied under current law, then legislation which entitles tenants to withhold the cost of inspection from rent should be enacted.

2. Problem: Landlords often fail to pay for deleading.

Tenants lack the means of taking affirmative steps to ensure that monies are available to pay for the cost of deleading in instances where the landlord is unwilling or financially unable to do so.

Recommendation:

In addition to other remedies, there needs to be a readily-available mechanism to enable tenants to make voluntary payment of rent into an escrow account. The proceeds of such account would accumulate until the balance is sufficient to pay the cost of deleading. Such a program might be administered by a public or nonprofit agency, or by individual banks.

3. Problem: Enforcement of the lead law can be expensive and difficult.

Parents lack the means of enforcing the lead law on their own, without hiring an attorney. State and local officials generally only seek to enforce the law after a child is already poisoned.

Recommendation:

A packet containing materials to instruct parents about the legal steps required to enforce compliance with the lead law would provide a valuable service to families. If such a packet were developed and made readily available, prohibitive legal expenses would be reduced for families. Such materials could be prepared by the Office of the Attorney General.

The packet might include an outline of the necessary steps for implementing lead testing and legal action, and sample documents to initiate a court action, to open an escrow account for withholding rent, etc. The packets should be available in courts and other appropriate locations. Cooperation of court personnel would also be necessary to facilitate pro se enforcement efforts.

4. Problem: Illegal deleading by owners is often dangerous.

Property owners often undertake illegal deleading and/or undertake "deleading" through renovation projects, thus disturbing lead-painted surfaces and potentially poisoning occupants, neighbors and workers.

Recommendations:

Building inspectors should require submission of a lead determination report prior to issuing a

building permit in a unit constructed prior to 1978, if lead-painted surfaces are to be disturbed.

Any store selling paint should be required to post a notice alerting buyers to the lead poisoning hazards that exist whenever lead-painted surfaces are disturbed.

5. Problem: Dangerous lead dust may be left by deleaders.

Deleading, even when done properly, can create hazardous lead dust which is difficult to clean up and difficult to detect on visual reinspection. Deleading, moreover, is not always done properly and inspectors may issue compliance letters for units that have been illegally or improperly delead. The occupants and workers may have been exposed to dangerous levels of lead during the process, and the unit and the occupants' belongings may have been contaminated.

Recommendation:

DPH Should revise its regulations to require that dust samples be taken before any unit can be declared in compliance with the lead law. This would also necessitate the implementation of a state certification process to monitor quality assurance of all laboratories

Inspectors, deleading contractors and consumers should be informed of the procedures available for reporting illegal inspections and/or deleading activities.

The Attorney General should prosecute a high profile case to deter fraudulent issuance of compliance letters.

6. Problem: Families need safe alternative housing during the deleading process.

Because of the extreme hazards created during the deleading process, the Massachusetts Lead Law requires families to relocate during deleading and clean up. This typically takes 4 to 7 days. In many cases, families are able to stay with friends or relatives. However, for some families, particularly those with

more than one child, this solution is not practical or possible. There is a need to have deleadaded alternative housing.

Recommendations:

The state CLPPP should issue regulations clarifying that the property owner is responsible for paying for or providing alternative housing during deleading. In the interim, tenants should be informed that housing courts have held owners responsible for costs of relocation, including hotels, meals and transportation.

Tenants should be clearly informed of their right to withhold rent and use that money to pay for alternative housing.

State funding should be made available, through MHFA or other sources, to assist tenants with relocation when the property owner is unable to pay these costs.

State and/or local governments and/or private nonprofit agencies should be encouraged to establish shelters that can be used as temporary housing during deleading. Banks with foreclosed properties that are difficult to sell could be enlisted to help in this effort.

7. Problem: Tenants may need emergency lead remediation.

Families awaiting deleading are often forced to remain in unsafe housing for extended periods of time.

Recommendations:

Readily available financial assistance to pay the costs of deleading are essential.

Interim measures to reduce the most obvious lead hazards should be developed and funded to make the housing unit safer until such time as the full deleading takes place.

D. Enforcement

1. Problem: Court personnel are not always knowledgeable about the workings of the lead law.

Court personnel are not always sufficiently educated about the provisions and importance of the

lead law. Typically pro se tenants have difficulty enforcing their rights under the lead law unless a local board of health is involved.

Recommendations:

A comprehensive effort should be made to educate clerks and court personnel concerning the lead law, so they will have the ability to answer questions and make appropriate referrals.

Judges need to be educated so they will be prepared to issue orders for preventive deleading, alternative housing during deleading, emergency cease work orders, etc.

The Department of Public Health, local code enforcement agencies and/or advocates should meet with Chief Justices of Housing Courts and District Courts to explain issues and the possibility of more pro se litigants coming to court.

2. Problem: Families with young children often face rental discrimination.

Some landlords deal with the lead law by simply refusing to rent their lead-containing properties to families with children under six. These families are often faced with discrimination in trying to find rental housing. The fair housing laws which prohibit such discrimination are difficult to enforce.

Recommendations:

MCAD, the Attorney General, and local Fair Housing Commissions staff should receive training about the lead law and regulations, and prohibitions against discrimination against families with children.

MCAD investigations of cases of discrimination against families with small children should include routine inquiry about the presence of lead paint as a possible basis for discrimination.

Information regarding the law against discrimination based on lead paint should be publicized.

The Attorney General should prosecute high profile cases emphasizing lead paint discrimination,

including suits against owners, real estate brokers and rental agents.

3. Problem: Prospective property buyers receive information about lead too late.

The Property Transfer Notification Package was designed to impart information about the dangers of lead paint to prospective home buyers. Buyers, however, do not usually receive this information until the signing of the Purchase and Sale Agreement when it may be too late for the buyer to reconsider purchase of the property, or to figure the cost of deleading into the cost of the property.

Recommendations:

Presentation of lead inspection information should be required at the offer stage, rather than at signing of the Purchase and Sales Agreement. A statement pertaining to the lead law and regulations should be inserted in the offer form.

The Attorney General's office should look for test cases where a buyer has not been informed of the lead inspection option.

REPORT OF THE SUBCOMMITTEE ON
RESIDENTIAL REMOVAL AND DISPOSAL OF LEAD

I. INTRODUCTION

The Subcommittee on Residential Removal and Disposal of Lead has had the active participation of representatives of the federal, state, and local governments, the housing and financing community, and private businesses engaged in lead paint abatement. The Subcommittee was convened to consider issues related to the removal and disposal of lead paint, new technologies in lead abatement, and the role of criminal and civil enforcement with respect to residential lead paint problems. The Subcommittee determined that its mandate was so broad that it would not be able to make any meaningful progress in a six month period unless it narrowed its focus. Therefore, for the purpose of this report, the Subcommittee focused on four questions relating to lead paint inspections. The Subcommittee intends to continue to meet to consider the remaining issues on its agenda.

II. BACKGROUND

Chapter 773, the Acts of 1988, mandated that the Department of Public Health (DPH) license individuals to conduct lead paint inspections. The Childhood Lead Poisoning Prevention Program (CLPPP) developed and implemented a program to license lead paint inspectors. The program requires classroom and hands-on training, a written examination administered by CLPPP, and a field apprenticeship prior to issuance of the license. The CLPPP inspector training program was the first such government program in the country.

Since 1988, CLPPP has licensed twelve private training providers and approximately 500 private and public lead paint inspectors. The Department of Labor and Industries (DLI) has also licensed approximately 500 lead abatement contractors. During this time DLI's budget and staff have been significantly reduced.^{1/} In addition, revenue retainment accounts intended to be used to increase staff for DPH and DLI have been eliminated.

Over the last two years, the general public has become increasingly aware of the public health threat to children

^{1/} Currently, CLPPP utilizes federal funds to staff three full-time positions to provide training and monitoring services to oversee public and private lead paint inspectors.

from lead paint poisoning. The demand for lead paint inspections and lead abatement has increased dramatically in response to requirements established by insurance companies, lenders, and housing agencies and the advice of law firms representing clients.

Although problems and complaints related to lead inspections exist, DPH states that only three reported cases of lead poisoning have been traced to improper lead paint inspections. In each case, DPH has initiated disciplinary action to revoke the inspector's license. Seventy-five percent of all complaints have either been responded to or resolved. However, increased resources would enable DPH to respond to these complaints in a more timely and comprehensive fashion. Nor does DPH have adequate resources for quality assurance monitoring of lead inspections for which no complaints have been received. Furthermore, DLI has reported that substantial lead abatement activity takes place wholly outside the regulatory system. This is also due to insufficient enforcement resources.

Given the growing demand for reliable lead paint inspections, it is more important than ever to insure the accuracy of lead paint inspections, and give state and local agencies the legal and financial wherewithal to respond to the lead paint hazard.

III. SUMMARY OF MAJOR REQUIRED ACTIONS

- A. Provide increased legal authority and financial resources to state and local agencies who are responsible for administering lead paint programs and regulations.
- B. Improve the existing system of lead paint regulation in the areas of training and monitoring of lead paint inspectors and lead abatement contractors and enforce existing regulations.
- C. Consider new regulations designed to insure the technical reliability of lead inspections.
- D. Increase resources to owners in the form of tax incentives and financial resources to eliminate the lead paint hazard.

IV. SPECIFIC RECOMMENDATIONS^{2/}

A. Training

1. Require all lead paint inspectors to take continuing education and training.
2. Modify field or "Apprentice" training to require a certain number of hours for testing on different types of surfaces.
3. Increase training of public sector employees working for local and state public health, and housing rehabilitation and financing agencies.

B. Monitoring

1. Increase monitoring of lead paint inspectors and lead abatement contractors and workers by conducting spot inspections and increasing monitoring in response to complaints. Such monitoring efforts should be accomplished through the implementation of a program in which inspector trainees, supervised by certified monitors, perform follow-up spot inspections. The program should be financed by fixed fees paid by the trainees in return for field training required for licensure.
2. Implement a lead paint inspection report tracking system which networks information presently available to DPH and DLI.

C. Enforcement

1. DPH and DLI should be given administrative penalty authority, and local boards of health should be given authority to issue "tickets" fining improper

^{2/} Several concerns raised earlier in Subcommittee meetings were addressed by CLPPP policy statements (February 15, 1992), or in proposed amendments to 105 CMR 460. These include the following:

1. Required reporting of compliance inspections.
2. Attachment of initial lead paint inspections and reinspection reports to Letter of Compliance.
3. Prohibition of payment from lead abatement contractor to lead paint inspector for reinspection.
4. Improve testing and inspection methods.

lead inspections. All fines and penalties should be earmarked for additional enforcement and abatement activities.

2. Municipalities that would like to regionalize lead paint inspection and enforcement responsibilities should be encouraged and assisted in overcoming barriers to regionalization.
3. Post-abatement reinspections both before and after abatement containment is dismantled should be required.

D. Promoting Reliable Technologies

1. Consider requirement that all lead paint inspectors own or have access to XRF analyzers and sodium sulfide solution to carry out inspections.
2. Develop laboratory standards for "dust wipe" analysis, and require such analysis as part of lead paint reinspection after abatement.
3. Encourage research and development of on-site dust inspection.

E. Other Recommendations

1. Consider whether additional measures are necessary/practicable for addressing the potential conflict of interest between abatement contractors and lead inspectors.

V. REPORT OF THE SUBCOMMITTEE

A. Issues Considered

With respect to the accuracy of lead paint inspections, the Subcommittee focused on the following four questions:

1. Is the person making the initial inspection or determination of the presence of lead paint in residences qualified to do so?
2. How is the initial lead paint inspection or determination being made?
3. Is the person making the final abatement reinspection qualified to decide whether the lead paint has been removed in compliance with the lead paint law?
4. How is the final abatement reinspection being made?

B. Conclusions

1. Is the person making the initial inspection or determination of the presence of lead paint in residences qualified to do so?

- a. Training

Training for lead paint inspectors includes lecture, manual materials, and a test for certification. DPH issues an 80 page directive stipulating the contents of the training manual to be used. Manuals published by different companies are not identical, but must cover the substance specified by the directive. Inspectors must then work with a "master", whom they pay, before receiving licensure.

The consensus of the group is that the lecture/manual/testing are adequate, but that there is not adequate "hands on" training. Moreover, the quality of masters varies greatly, as do the fees masters are permitted to charge. One person noted that, to become a master, one has to prove he has performed 75 inspections, but need provide no assurance that the inspections were done properly. It was suggested that field training or supervision of both masters and inspectors be required, with requirements keyed to hours on each surface tested, and testing methods used, rather than number of inspections. Another person suggested the master system is simply a system of "legalized extortion", whereby persons of questionable ability can charge exorbitant amounts of money to permit trainees to fulfill the legal training requirements. There was a consensus that all masters should be reevaluated and that both masters and inspectors be required to take continuing education and testing.^{3/}

Finally, EPA advised that it is working with a number of regional training centers to develop course models for inspectors and abatement workers, and that federal money is available to establish model training programs. A grant was recently made to UMass-Amherst for this purpose. It was noted that although the course models will attempt to be adapted to the needs of the states, they will be developed under federal

^{3/} Generally, greater standardization and increased rigor of training was thought to be one remedy to insure consistency and quality of inspections from the point of initial inspection through reinspection. One Subcommittee member who has conducted trainings stated he requires 45 hours of field inspection training, supplemented by 8 hours of taped lessons on the health hazards of lead. Testing includes questions on health hazards. This member believes that such training impresses upon the student the need to perform sound reinspections.

guidelines. These guidelines differ in some respects from Massachusetts requirements. For example, federal guidelines differ as to which surfaces must be abated and the minimum level of lead on the surface that will require abatement. As well, although EPA is still researching a variety of forms of field testing, the present sense is that primary reliance will be on the XRF, with sodium sulfide used as an alternative under some circumstances. There is concern at the state level that sole reliance on the XRF may not be the most cost effective way of making reliable lead determinations.^{4/}

A minority view was expressed that the lecture/manual/testing are not adequately standardized--that books and lectures vary greatly from class to class. Besides the inconsistent inspection techniques this fosters, it is detrimental when questions about inspection methods are raised in court enforcement proceedings.

b. Accountability

Because lead inspections can have significant monetary, as well as health, implications, it was suggested that some procedure be established to insure accountability among lead inspectors. For example, where property managed or owned by MHFA is inspected, MHFA will perform a follow-up determination to judge whether the inspection and abatement and reinspection (if any) were done properly. HUD also requires each public housing authority to hire lead paint coordinators whose job it is to insure that inspections of their properties are done correctly. A representative from a private company stated that he insures accountability by requiring that any inspector have proper insurance and indemnifies the company, and by performing follow-up reinspections.

The group generally subscribed to the idea of follow-up reinspections as a preferred method of promoting accountability. If private inspectors know that their work may be subject to monitoring on a random basis, they will have a sense that they may be held legally and/or financially accountable for the accuracy of their work.^{5/} To implement

^{4/} Concern was expressed that health agencies from small cities and towns are not able to afford the XRF. Movement to exclusive reliance on XRF would effectively take such small cities and towns out of inspection and enforcement.

^{5/} DPH at one time had the authority to retain revenue to hire "lead police" to monitor inspections. This authority has been eliminated due to budgetary constraints. DPH presently uses CDC funds to support three staff positions for monitoring and training inspectors.

this monitoring program, the Subcommittee recommends that the present master program be modified to require those who wish to continue as masters to meet standards of competence set by DPH and receive certification as inspection monitors. Such certified monitors would be able to charge a fixed fee to inspector trainees. Under the coordination of DPH, the monitors with their trainees would conduct the follow-up inspections on a random basis.

At present, DPH, DLI, and local code enforcement lead inspectors can seek criminal fines, but such fines are rarely imposed by the Court. DPH and DLI can also revoke licenses, which is both draconian in its effect and, with respect to revocation of inspectors' licenses, legally difficult to accomplish. An additional way of assuring some accountability would be to give local boards of health, DPH, and DLI authority to issue civil penalties for improper lead paint inspections, perhaps by the issuance of "tickets". As with motor vehicle tickets, payment of lead paint tickets could be a condition of continued licensure. It was noted, however, that only those boards which have DPH licensed code enforcement inspectors are permitted to perform lead inspections. It is estimated that only about half of local boards have such inspectors. One way of addressing this problem would be to encourage voluntary regionalization of municipal lead inspection responsibilities.

Accountability might also be enhanced by permitting enforcement authorities to proceed through civil as well as criminal complaint, and by giving DPH and DLI administrative penalty authority. Fines from all of these enforcement activities should be earmarked for lead abatement related activities by the enforcing authorities.

Another way of improving accountability is by increasing resources available to strictly enforce current requirements for lead inspection reports and compliance letters. Such reports and letters have been standardized and indicate whether total removal, covering, or making the lead painted surface intact is required. In addition to the current requirements, the Subcommittee recommends that the property owner be required to sign the inspection report, that every compliance letter be required to incorporate the inspection report, that the total number of pages of the letter and attached report be noted on the letter, and that each compliance letter must bear a seal (like a notary's seal) which will establish its authenticity.

A paper trail system should be implemented through which compliance is tracked. Although such "tracking" recommendations raise substantial personnel and resource issues, it is strongly recommended that some sort of "master tracking network" be

developed to insure accountability. Information tracked would include inspection reports, notification given to DLI of intent to delead (which some suggested should be 10 days in advance of deleading rather than the present 5, to permit DLI to monitor the deleading where appropriate), lead paint waivers signed during real estate transactions, certificates of compliance, and the identities of inspectors, deleaders, property owners, and tenants involved. Such information should be available to both DLI and DPH through a single, networked tracking system. (Currently, DLI and DPH maintain separate data collection systems which are not networked.) The creation of such a written, accessible record would insure that responsible parties are held accountable, and protect those parties who have either acted to comply with the lead paint law or who have received a waiver.

2. How is the initial lead paint inspection or determination being made?

The question of how the initial lead paint inspection or determination is and should be made raises both technical and policy issues. The consensus of the group is that the proposed amendments to 105 CMR 460.020 and 460.740 address most issues regarding the technical means for determining the presence of lead. The group stated neither the XRF nor Sodium Sulfide method is sufficient by itself, because both can give false positives or false negatives. However, when used together, these methods are generally reliable.

"Atomic Absorption Spectrophotometry" ("A.A.S."), and "Laboratory XRF", both of which can be performed only in a laboratory, provide the most definitive lead content analysis. The A.A.S. test is expensive and can only be used with the permission of the Director of the Lead Poisoning Program. It is recommended that the use of A.A.S. be permitted by private parties where large monetary investment hinges on the lead paint determination, such as when remodeling is planned. It is also recommended that proposed DPH regulation 105 C.M.R. 460.020, which authorizes general use of the less expensive Laboratory XRF, be approved.

When and whether sodium sulfide should be permitted, for reasons of public policy, as the sole test method, created some controversy within the Subcommittee. For example, a number of individuals expressed the opinion that sodium sulfide should be used as the test method of preference, because it is inexpensive and provides only occasional false positives and false negatives. On the other hand, the federal government does not accept the sodium sulfide method, because it is not quantitative, i.e., it does not reveal the quantity of lead present in the paint. DPH

stated that its studies have established that the level at which sodium sulfide reacts with lead is typically a level at which there is danger to children. DPH is also exploring the use of companion chemicals, such as radizanate, which, when used with sodium sulfide, would eliminate false positives. Finally, several persons suggested that sodium sulfide should be used by inspectors to make the threshold determination whether there is any lead present at all, and then it should be left to the private parties to pay for quantification with the more expensive XRF.

The Subcommittee supports further research into the various technologies to assist in resolving this policy issue.

3. Is the person making the final abatement reinspection qualified to decide whether the lead paint has been removed in compliance with the lead paint law?

The training concerns expressed above apply equally to inspectors conducting post-abatement inspections.

In addition, there are substantial concerns regarding the potential for conflict of interest on the part of post-abatement inspectors (hereinafter, "reinspectors"). Although, under current regulations and DPH policy, the abatement company may not perform or pay for the post-abatement inspection, the company can arrange for the hiring of the reinspector. An abatement company may be concerned that if a good reinspector is hired, the reinspection may reveal that the job is not complete. According to the Subcommittee, this result may occur for such reasons as: 1) the reinspector inspects areas not previously inspected, or inadequately inspected, by the initial inspector; 2) the abatement company has not properly abated the lead surfaces. Where an abatement contractor has time and cost concerns regarding the possibility of having to do additional abatement work, it may have a motive to arrange for a reinspector which it "knows" will return a good report.

The MHFA prohibits the abatement contractor from even choosing the reinspector, and requires that the original inspector must reinspect. In this way, the same inspector is singly liable for both identifying lead contaminated surfaces and for determining that they have been adequately abated.

The Subcommittee emphatically stated that there is an inherent conflict of interest between the abatement contractor and the reinspector. It therefore recommends the exploration of methods, even beyond those now instituted by DPH regulation and policy, to assure the independence of the reinspector.

The possibility of collusion between the abatement contractor and the reinspector is somewhat mitigated by the legal accountability of the reinspector. It is the reinspector who will be the inspector of record attesting to the safety of the residence. Hence, if the reinspector does a poor job and approves a residence which still contains dangerous levels of lead, the reinspector may be liable for resulting injury.^{6/}

Finally, it is proposed that reinspections be required both before and after the containment area is dismantled. Presently, reinspection normally occurs only after the containment has been taken down. Considerable time and expense may be involved if the reinspection shows additional abatement is required, because the abatement contractor must reinstall the containment. By requiring reinspection before dismantling the containment, the abatement company can more quickly and cheaply address problem surfaces. Final reinspection after dismantling is necessary simply to insure that significant lead has not been deposited by any contamination which may have occurred to the containment itself. Dismantling of the containment before the recommended reinspection should result in imposition of a monetary penalty on the abatement contractor. (Again, there was the suggestion that DLI be given 10 days advance notice of the job, so government inspectors can respond before the containment is dismantled.)

4. How is the final abatement reinspection being made?

Unlike the initial determination, there was little confidence expressed in the technology used to make the final reinspection. It is permissible to have lead in substrate and still be in compliance with the lead paint law. This is because the lead in paint can seep into many surfaces making it impossible to remove completely without actually replacing or permanently covering the surface. If technical testing means were to be employed, the presence of lead in substrate might result in positive test results. Hence, both the XRF and sodium sulfide tests may reveal positive readings for lead even though the area tested is in total compliance with the lead paint law.

^{6/} As noted above, the Subcommittee also supports strict enforcement of the recently enacted regulation requiring that the initial inspection report be attached to the compliance certificate, along with information on how each surface was abated. Not only does this requirement help insure sound reinspections, it also protects both the property owner and the reinspector from attempts to impose liability as a result of post-abatement alterations.

Since there are no reliable testing methods available, the Subcommittee generally agreed that reinspections are as much an art as a science. An experienced reinspector will use a copy of the initial lead inspection report as a punchlist to verify, visually, that lead paint on all questionable surfaces has been removed, replaced, or covered.

Several members of the Subcommittee stated that every reinspection should include "lead dust wipes". This procedure requires the reinspector to take wipe tests of surfaces and send the dust to a laboratory for analysis. Although such tests can be somewhat expensive and time consuming, it was stressed that they are the best way to 1) insure that it is safe for the tenants to move back into the residence; 2) protect the contractor and reinspector from liability; 3) protect the property owner and its agents from liability. The remaining Subcommittee members noted that no analytical laboratory standards have yet been established with respect to the lead dust wipes. They agree that once such standards are established, lead dust wipes should be a required part of every reinspection.^{7/}

Generally, the Subcommittee recommends additional research and development of inexpensive, quick and effective clearance technologies. For example, the time and expense presently associated with lead dust wipes would be eliminated with the development of a "lead check cloth", which changes color on contact with lead. In addition, standards are presently being developed to test for dust in carpeting which, if not cleaned, will remain a health threat to children. Such clearance technologies would have beneficial health and economic impacts on the lead abatement and reinspection process.^{8/}

^{7/} The Department of Public Health is presently considering whether to require dust tests for every deleading project.

^{8/} One member of the Subcommittee expressed the view that increased regulation, monitoring, and use of technologically complicated tools, with their accompanying costs, are not the most effective means of addressing the public health threat posed by lead paint. According to this view, Massachusetts should look to other states which do not require abatement of all lead covered surfaces, but only those surfaces which have loose, chipping paint. Because compliance would be more economically and technologically feasible, private efforts at compliance would be more widespread.

REPORT OF THE SUBCOMMITTEE ON
LEAD IN NON-RESIDENTIAL SETTINGS

I. INTRODUCTION

The Subcommittee on Lead in Non-Residential Settings focused on issues related to lead paint apart from its application in homes. The non-residential category is broad in scope -- encompassing everything from commercial buildings to bridges. While issues of concern are numerous, the Subcommittee chose to focus on two topics: 1) banning new application of lead paint on metal structures and 2) improving training of non-residential deleaders.

II. IDENTIFICATION OF THE PROBLEM

A. Use of Lead Paint in Non-Residential Settings

Under Massachusetts law, it is illegal to use lead paint on houses and other residences. See Mass. Gen. Laws c. 111, §196(a). The use of lead-containing paint in residential applications also has been banned by the federal Consumer Product Safety Commission. See 16 C.F.R. §1303. Lead paint, however, may be applied in commercial buildings or to metal structures such as bridges, watertowers, railways, ships and lighthouses. See Mass. Gen. Laws c. 111, §196(b) and 105 CMR §§460.300(5) and (7).

One of the characteristics of lead paint that makes it useful on iron and steel structures is that it prevents corrosion. In addition, lead paint will not crack easily with wear, weather or temperature change.

B. Workers at Risk

Significant lead exposures can arise from spray painting bridges and other structures with lead-based paints and primers, from removing lead-containing paint from surfaces during restoration, and from demolition activities.

Members of the Subcommittee stressed that removal of lead paint during maintenance or restoration activities poses one of the greatest health threats to workers. The most common method currently used to remove paint is wet or dry abrasive blasting with some form of containment. An effective containment system significantly reduces air-borne particulates outside of the containment area, thereby protecting the environment and public health. For workers inside the

containment structure, however, the level of exposure to the materials increases significantly.

C. Health Effects of Lead Exposure

Lead poisoning may occur when workers inhale or ingest lead dust and fumes. The frequency and severity of medical symptoms correspond to an increase in the concentration of lead in the blood. Common symptoms of acute lead poisoning are loss of appetite, nausea, vomiting, stomach cramps, constipation, difficulty in sleeping, fatigue, moodiness, headache, joint or muscle aches, anemia and impotence. Severe health effects of acute lead exposure include damage to the nervous system, kidneys and reproductive system. See "Preventing Lead Poisoning in Construction Workers", NIOSH Alert, Centers for Disease Control, U.S. Department of Health and Human Services (April 1992) [available from NIOSH, 4676 Columbia Parkway, Cincinnati, OH 45226].

Research also indicates that in utero exposure to lead levels in a mother's blood lower than those considered safe for adults and children may increase the risk of prematurity, low birth weight, or minor congenital anomalies. See "In Utero Lead Exposure," Maternal Child Nursing (March/April 1990, Vol. 15, No. 2).

D. Relevant Exposure Criteria and Regulations

1. Permissible Air Exposure Limits

In 1978, OSHA promulgated a standard regulating occupational exposure to inorganic lead in general industry. See 29 CFR §1910.1025(c). Under this standard, the permissible exposure limit for inorganic lead is 50 micrograms per cubic meter of air as an 8-hour time-weighted average. The employer is required to provide respirators when exposure to lead is not controlled below this limit by other means. See 29 CFR §1910.1025(f). Many industries, including agriculture and construction, are exempt from OSHA's lead standard for general industry. For instance, this standard would not apply to such construction activities as removal of lead paint from metal structures.

Several states have instituted programs to protect construction workers from the hazards of

occupational lead exposure. Maryland, for example, requires that exposure to lead during construction activities not exceed 50 micrograms per cubic meter as an 8-hour time-weighted average.

Massachusetts has not established a permissible exposure limit applicable to lead exposure in the construction industry. The Department of Labor and Industries ("DLI"), however, is currently revising its Structural Painting Safety Code, 442 CMR §11.00 et seq.^{9/}

DLI's draft does establish certain minimum levels of respiratory protection that must be provided to employees depending on the type of lead paint removal operations. See 442 CMR §11.08(7). Use of abrasive blasting techniques, for instance, would require a higher level of respiratory protection than manual scraping.

2. Blood Lead Monitoring

Current DLI regulations applicable to residential deleading projects require employers to monitor blood lead levels of workers. See 454 CMR §22.04(5). The regulations prohibit a person whose blood lead level is above 60 ug/dl from engaging in residential deleading. See 454 CMR §22.05(5)(d). DLI's draft revisions to the Structural Safety Painting Code require employers to provide blood lead monitoring to all workers engaged in spray application or removal of paint containing dangerous levels of lead within three months before work begins. See 441 CMR §11.09(5). Blood level analysis is also required for all employees who wear respiratory protection or must work in confined spaces. See 441 CMR §11.09(1) and (3)(e). The draft prohibits anyone from engaging in structural painting when his or her blood averages above 35 ug/dl over three tests or greater than 40 ug/dl for a single test. See 441 CMR §11.09(6).^{10/}

^{9/} Draft regulations are available from the Department of Labor and Industries, 100 Somerset Street, Boston, MA 02108. DLI anticipates promulgation of the regulations this summer.

^{10/} Members of the Subcommittee suggested that the removal standard applicable to residential settings (i.e., the regulation at 454 CMR §22.05(5)(d) prohibiting an employee with a blood lead level over 60 ug/dl from working on a project) be

(footnote continued)

OSHA regulations governing general industry require employee removal if blood lead levels reach 60 ug/dl, or if an average of the last 3 blood lead tests (or the average of all blood tests over the past 6 months, whichever is longer) is at or above 50 ug/dl. See 29 CFR §1910.1025(k). Removal is not required if the last test is below 40 ug/dl. Id. The OSHA regulations require the employer provide the removed employee with up to 18 months of earnings and other benefits. See 29 CFR §1010.1025(k)(2).

Unlike the OSHA standard for general industry, the construction standard does not require medical monitoring of workers exposed to lead or removal of workers from the job when they show elevated concentrations of lead in the blood.

3. Occupational Lead Poisoning Registry

In order to assist in the identification and treatment of workers exposed to lead, Massachusetts law also requires laboratories which perform blood lead testing to report cases of elevated blood lead levels for individuals over the age of 15 to the Occupational Lead Poisoning Registry. See 454 CMR §23.02. An elevated blood lead level is defined as 15 ug/dl. See 454 CMR §23.03.

In the first six months of its operation, the Registry received approximately 554 reports of blood lead levels above 25 ug/dl. 385 of the 554 were between the ages of 25 and 39. 539 were male and 15 were female. The majority of individuals with blood lead levels over 40 ug/dl indicated they worked in the construction industry (defined as including deleading activities).^{11/}

(footnote continued)

lowered to correspond with the proposed 35 ug/dl non-residential removal standard. Representatives of labor on the Subcommittee also suggested that employees be entitled to wages and benefits during the period of required removal.

^{11/} Additional information about the Blood Lead Registry is available from the Division of Occupational Hygiene, Department of Labor and Industries, 1001 Watertown Street, West Newton, MA 02165.

4. Use of Bid Specifications to Require Worker Safety

The Connecticut Department of Transportation has included requirements regarding worker health and safety in contract specifications. In particular, the Department requires that contractors comply with provisions of OSHA's general industry standards. Contractors, for instance, must follow the medical monitoring and employee removal provisions set forth in 29 CFR §1910. In addition, the Department requires that the permissible exposure limit to inorganic lead is the general industry standard of 50 micrograms per cubic meter.

Some Massachusetts agencies are beginning to incorporate health and safety requirements into bid specifications. The Massachusetts Department of Highways, for example, references applicable OSHA and DLI regulations. No agencies we contacted, however, require implementation of a health and safety plan as detailed as the Connecticut Department of Transportation, and none have required that their contractors comply with OSHA's general industry standards. The Subcommittee feels that, in the absence of specific statutory or regulatory requirements, Massachusetts agencies should incorporate more detailed requirements regarding worker health and safety into bid specifications.

III. BANNING APPLICATION OF LEAD PAINT ON METAL STRUCTURES

As removal of lead-based paint during maintenance work poses such a threat to workers, the Subcommittee evaluated banning new application of lead paint on metal structures. We recommend adoption of a ban.

A. Existing Legal Framework

Current state law prohibits the application of lead based paints and glazes (those containing more than 0.06% lead by weight) to interior or exterior surfaces in dwelling units, toys, furniture, or eating or drinking utensils. See Mass. Gen. Laws ch. 111, §196(a). The Director of the Childhood Lead Poisoning Prevention Program, however, with the concurrence of the majority of an advisory committee appointed by the governor, may exempt certain lead-based paint not intended for use in residential premises and not sold

to the general public on a retail basis when he finds that the use of these paints will not result in the exposure of children younger than six years of age. Regulations at 105 CMR §460.300 exempt lead primers for structural metals not exposed to occupant contact, vehicles, and watercraft, 105 CMR §460.300(5). An obvious means of banning application of lead paint on metal structures, therefore, would be to repeal this exemption.

B. Experience in Other States

We were unable to find other states that have expressly proscribed by statute or regulation the application of lead paint on metal structures. Some agencies in a number of states, however, have adopted policies prohibiting new application of lead paint. Information collected by a private consulting firm, C/P Utilities Services Company in Hamden, Connecticut, indicates that agencies in Colorado, Kansas, Missouri, Maryland, New Jersey, Oklahoma, Oregon, Virginia, Wisconsin and Texas no longer use lead paint on public projects.

C. Current Practice in Massachusetts

We contacted a number of government authorities in Massachusetts including the Massachusetts Turnpike Authority, the Massachusetts Division of Capital Planning and Operations, Massport, the Massachusetts Bay Transport Authority, the Metropolitan District Commission, and the Massachusetts Highway Department. Informal conversations indicated all of these bodies have policies against new application of lead paint. The Highway Department does continue to apply lead-containing paint for yellow traffic lines because the paint must be able to withstand seasonal temperature changes.

Representatives of private industry on the Subcommittee indicated that the private sector also has voluntarily reduced use of lead-containing paints.

D. Alternatives

Alternatives to lead-based paint include organic and inorganic zinc-rich, vinyl, urethanes, and epoxy mastics. We did not have much information on the relative performance, health risks and environmental impacts of lead-based paints versus these non-lead alternatives.

In terms of health risks, urethanes that contain isocyanates could pose a greater threat than lead to worker health and safety. Members of the Subcommittee felt that the threat posed by isocyanates, however, would be during the mixing process, prior to chemical curing of the mixture. Removal of urethanes prior to repainting would not pose as great a threat as removal of lead-containing paints. More information is needed about the health risks of alternatives to lead-based paint.

Representatives of private industry on the Subcommittee did not think that the alternatives should cost more than lead-containing paints. Several of the Massachusetts agencies we contacted indicated that urethanes and epoxies were not more expensive to purchase than lead-containing paints.

There is a wide range of comparative performances of non-lead alternatives. Members of the Subcommittee agreed that performance is highly dependent on proper surface preparation prior to repainting. A recent study published in the Journal of Protective Coatings & Linings regarding performance of 5 different non-lead coatings systems indicated that all systems performed better with proper surface preparation.^{12/} Because of the high cost of proper removal and disposal of lead-containing paints, many public projects are not properly prepared for repainting. Members of the Subcommittee felt such an approach to maintenance was shortsighted.

E. Necessity of Ban

As the public sector seems to have largely stopped new application of lead paint, the Subcommittee questioned whether an explicit ban of new application of lead-based paint on metal structures would be necessary. Subcommittee members noted that lead is merely one of many hazardous substances to which painters are exposed. Since both the public and private sectors have decreased use of lead paint, these members argued that resources should be focused on issues other than the ban.

^{12/} "Beneficial Procrastination: Delaying Lead Paint Removal Projects by Upgrading the Coating System," J. Prot. Coatings & Lin. 48, 53-55 (March 1992).

The majority of members felt the ban should be adopted. A number of government agencies have demonstrated that use of non-lead alternatives is feasible. Further, the ban would eliminate many of the problems associated with removal of lead paint -- exposure to workers, public health threat, damage to the environment. Enforcement should not prove onerous as there has been a voluntary shift to the use of alternatives. Finally, the ban should encourage further development of alternatives to lead paint.

IV. IMPROVED TRAINING AND EDUCATION OF CONTRACTORS AND EMPLOYEES

The Subcommittee also evaluated training and education of contractors and employees. We recommend that training requirements geared to non-residential projects be developed as soon as possible.

Both federal and state law mandate some training of employees. OSHA's Respiratory Protection Standard 29 CFR §1910.134 requires employers to train employees on the proper use of respirators and their limitations. OSHA's construction standard, 29 CFR §1926.21, requires that a potentially exposed employee be informed generally of the hazards of lead and be trained in the precautions to take when working around it. Under the OSHA Hazardous Communication Standard, 29 CFR §1910.1200, employers using lead or lead-containing products must develop and make available a written hazard communication program and a list of hazardous chemicals. Material safety data sheets and labels must also be available. Pursuant to 29 CFR §1910.1025(1), training must be provided to employees subject to lead exposure greater than 30 micrograms per cubic meter. Topics covered include adverse health affects of lead exposure and the use and limitations of respirators.

Under current Massachusetts law, DLI regulations require training for residential deleaders, contractors and supervisors. See 454 CMR §22.06. The training must consist of 2.5 days of training for the deleader, 3 days of training for the supervisor, and 4 days for the contractor. One full day must be devoted to hands on practice. See 454 CMR §22.06(2)(b). Residential deleaders must receive instruction in the following areas: safe work practices, health risks, precautionary measures, personal protective devices, prevention of contamination and medical monitoring. See 454 CFR §22.06(3)(a). Supervisors must also receive training regarding federal, state and local regulatory requirements, supervisory techniques, lead inspection reports, and federal, state and local lead disposal requirements. See 454 CFR §22.06(3)(b). Contractors must receive all training required for deleaders

and supervisors, as well as instruction regarding insurance and liability and recordkeeping required by federal, state and local regulations. See 454 CFR §22.06(3)(c). The required training is provided by training providers certified by DLI. See 454 CFR §22.06(4).

DLI's revisions to the Structural Painting Safety Code include a provision for employee training for work involving confined spaces. See 441 CMR §11.07(3). An employee required to work on a confined space project must demonstrate abilities such as rescue of co-workers and use of emergency escape respiratory protection. The draft, however, does not include specific training requirements for non-residential lead abatement.

Members of the Subcommittee expressed concern as to whether the current DLI-approved lead courses for residential abatement projects were appropriate for non-residential contractors. Most felt that the course for non-residential lead paint abatement must be more technical than the residential course due to the added safety measures needed when dealing with non-residential structures (e.g., bridges, tanks, etc.). Most Subcommittee members felt strongly that a course designed specifically for non-residential abatement must be developed. Suggested topics to be covered in a non-residential course included confined space entry, rigging, containment construction, personal air sampling, relevant RCRA regulations and relevant OSHA regulations.

Several members of the Subcommittee thought the non-residential training requirements should be included in DLI's forthcoming revisions to the Structural Safety Painting Code. Others felt that the existing residential training requirements at 454 CMR §22.06 could be amended to include non-residential training requirements. This approach would consolidate all training requirements and permit simultaneous amendment of the residential training requirements. Regardless of where the regulations are promulgated, the overriding sentiment of the Subcommittee was that protocols be developed as soon as possible.

V. DISPOSAL ISSUES

The Subcommittee touched on disposal issues regarding the disposal of lead paint, spent abrasives and other debris generated during surface preparation of previously painted structures. While the Subcommittee did not focus on disposal issues, it is important to highlight recent federal and state regulatory changes in this area.

Under federal law, the Resource Conservation and Recovery Act includes the Third Land Disposal Restrictions which regulate the treatment of many hazardous wastes and their subsequent disposal. See 40 CFR §268.35. Lead based hazardous wastes generated from paint removal operations are among the wastes regulated by the Third Land Disposal Restrictions. If the waste fails the Toxicity Characteristic Leaching Procedure (TCLP), the testing procedure used to determine if the waste exhibits the characteristic of toxicity, it must be disposed of in a hazardous waste landfill. Otherwise, wastes must be treated either to a specified concentration or by using a specified technology prior to disposal in landbased facilities such as landfills. The waste must contain less than 5 milligrams per liter lead to pass the TCLP. Obviously, the restriction will increase disposal costs.

On the state side, the 1987 amendments to Mass. Gen. Laws c. 21A, §17 require the Department of Environmental Protection ("DEP") to promulgate regulations on methods for covering or removing soil containing dangerous levels of lead. The Department of Public Health has defined a dangerous level of lead as soil that contains 1,000 parts per million lead and that the Director determines poses a danger to a child under six. See 105 CMR §460.020. DEP is currently developing regulations that should address remediation and disposal options, the question of when lead contaminated soil is classified as a solid or a hazardous waste, other technical issues and risk assessment questions.

VI. CONCLUSION

The Subcommittee applauds those state agencies that have voluntarily stopped new applications of lead paint and that have started to incorporate worker health and safety provisions into bid specifications. The Subcommittee, however, feels that public bid specifications should incorporate more detailed worker health and safety provisions. In addition, the Subcommittee recommends the ban of application of lead paint on structural steel. Individual Subcommittee members had various concerns regarding the draft Structural Safety Painting Code. Overall, the Subcommittee felt the draft addresses several major inadequacies in existing law. Finally, the Subcommittee feels the gap in supervised training of non-residential abatement contractors and deleaders must be addressed.

REPORT OF THE SUBCOMMITTEE ON
LIABILITY AND FUNDING

I. INTRODUCTION

The members of the Subcommittee on Liability and Funding issues have diverse backgrounds and represent diverse interests. The membership includes representatives from the banking industry, real estate industry, rental housing industry, children's advocates, and several public agencies that have responsibilities that effect housing and lead poisoning in the state. The Subcommittee's primary focus was on the danger to children posed by lead paint in residences. While there are other sources of lead poisoning, the discussions focused on residential lead paint because that area raises the most concerns about the current status of liability under the present lead law and need for funding to effectuate compliance with that law.

From the outset, there was consensus among the members of the Subcommittee on two points: 1) there is room for improving the current legal framework governing lead paint in dwellings; and 2) there is a need to develop funding sources to allow property owners to come into compliance with the lead law. Among the members of the Subcommittee there is diversity of opinion as to how well the current lead law is working and the extent of changes that should be made in the present law.

Supporters of the present lead law cite the enormous progress that has been made since the lead law was first enacted in 1971. They point to statistics showing that, prior to 1970, 25% of the children residing in urban centers in Massachusetts had lead poisoning. By 1975, when the first full year of state-wide screening for lead was instituted, 8% of the 100,000 pre-school children screened had lead levels of over 40 mcg/dl. By 1990, less than 1% of Massachusetts children had lead levels of over 25 mcg/dl. Despite the presence of relatively old housing stock in Massachusetts, the state now has one of the lowest rates of childhood lead poisoning in the country, with only 3 lead poisoned children per 1,000, as opposed to a national rate estimated to be between 10 and 15 children per 1,000. (These estimates do not reflect the new Center for Disease Control guidelines, which lowered the threshold for lead poisoning to 10 mcg/dl.) Supporters of the current lead law point to strict liability as one of the primary tools that has made the Massachusetts lead law effective in addressing the problem of lead poisoning in children.

Other members of the Subcommittee urged substantial changes in the current lead law. They noted that although Massachusetts

has had one of the strictest lead laws in the country for twenty years, only about 70,000 dwelling units have been delead out of an estimated 1.2 to 2.5 million units still in need of deleading. They argue that the imposition of strict liability on the owners of dwellings where lead poisoned children reside has not resulted in the preventative deleading of residential units, but has only unfairly imposed the entire financial burden of caring for lead poisoned children on one segment of society. They point out that many of the current property owners did not own the buildings when they were painted with lead over twenty years ago or, if they did, were typically unaware of the dangers of lead paint at that time.

There is little doubt that property owners in Massachusetts are currently forced to choose between risking strict liability if a resident's child becomes lead poisoned and the prohibitive costs of abatement and insurance. Many property owners borrowed 80 - 90% of the purchase price to buy their properties. With the decline of real estate values in Massachusetts, the existing debt often equals or exceeds the current value of the property. That makes it virtually impossible for some property owners to borrow the \$5,000 - \$20,000 necessary for lead abatement. Indeed, some property owners cannot even afford to sell their property to avoid the lead law's strict liability because they could not pay off the mortgages that would become due upon the sale.

Furthermore, as of December 1991, property insurers can exclude lead paint liability from their general liability coverage for buildings containing under five units. Although property insurers are delighted to offer lead coverage "riders" for the next five years, the rates for a \$100,000 rider ranges from about \$300 for a single unit to \$700 for four units. In today's economic climate, moreover, it is very difficult for property owners to pass on additional insurances costs to tenants. If the costs are passed through, the persons who will be the most effected by it will be the tenants who are least able to pay.

In any event, the availability of affordable insurance coverage does nothing to forward the goal of providing safe residential units for children. It simply means that, once a child becomes poisoned, there will be a pool of assets from which the child can seek to recover. The members of the Subcommittee were in agreement that the primary purpose of the lead law should be to foster the creation of a safe environment for children so that they do not become poisoned in the first place.

It is against this background that the Subcommittee selected topics for discussion. The objective of the discussions was to identify problem areas under the present lead law liability framework and develop possible solutions to the problems. The Subcommittee met on a regular bi-weekly basis from February through May to discuss the topics set forth below. In addition to those regular bi-weekly meetings, the Subcommittee broke down into smaller working groups that focused on possible funding sources for property owners who undertake lead abatement.

II. ISSUES

Strict Liability

One of the major topics addressed by the Subcommittee was whether there should be changes in the provisions of the current lead law under which owners of property containing lead paint are held to be strictly liable when a child under six residing in their building suffers lead poisoning. On this topic the individual members of the Subcommittee had a wide range of opinions.

Some members thought that there should be no change. In support of that position the following reasons were offered:

*Prior to the adoption of the lead law in 1971, it was illegal under the state sanitary code for there to be lead paint in dwellings inhabited by children. That provision of the code had little effect on reducing the incidence of childhood lead poisoning in the state. Only after the enactment of the lead law with its strict liability provisions was there any significant reduction in lead poisoning.

*In the absence of strict liability property owners can avoid their responsibilities by simply not inspecting for lead. If a child is poisoned the owner can easily claim that she/he was not negligent in failing to abate the lead because she/he did not even know it was there.

*The successful litigation brought by plaintiffs under the strict liability standard has helped to raise public awareness about childhood lead poisoning. That, in turn, has made parents more careful to protect their children from lead exposure and provided an incentive for property owners to delead residences.

On the other hand some members of the Subcommittee advocated the virtual elimination of strict liability. In support of their position, the following reasons were offered:

*Strict liability has resulted in relatively few residential units in the Commonwealth being deleaded and has unfairly burdened only one segment of society -- property owners -- with the financial responsibility for harm caused by lead.

*Children who become poisoned have adequate means to recover for any harm caused by property owners through traditional tort remedies and G.L. c. 93A.

*Strict liability is not the driving force behind the reduction of lead poisoning in the state. It only becomes a factor after a child has become poisoned. Rather, the reduction in the incidence of lead poisoning is attributable to a variety of causes, including the elimination of lead in gasoline, general parental awareness about the dangers of lead resulting in less ingestion of paint, and the screening of children for lead.

Between these two extreme positions, the membership of the Subcommittee reflected a continuum of opinions about the degree to which the strict liability provisions of the lead law should be modified. Notably, representatives of the real estate, banking and rental housing industries advocated creating an exception to imposition of strict liability where residential lead paint is intact and not peeling or flaking. Other members of the Subcommittee found this suggestion unacceptable because it is not uncommon for children to become poisoned by chewing on surfaces with intact lead paint and ingesting this lead.

With one exception, that being the representative of the Massachusetts Rental Housing Association (MRHA), the members of the Subcommittee were able to reach a consensus on some modifications to the strict liability provisions of the current law. These changes are designed to encourage the abatement of lead in buildings by rewarding property owners who bring their buildings into compliance with the state's lead law by relieving them of the burden of strict liability. The proposed modifications carve out exceptions to strict liability where: 1) an owner receives a letter from the Department of Public Health or other authorized inspector confirming that he/she is in compliance with the state lead law; 2) an owner has an abatement plan approved by Public Health; 3) a new owner brings a property into compliance with the state lead law within 60 days of acquiring it or a bank brings a property into compliance within 6 months of foreclosure.

The consensus of the Subcommittee on these "carve-outs" to strict liability reflects a compromise of the various interest groups represented. Real estate interests, banking interests, rental property owners and the insurance industry would like

much broader changes to strict liability under the lead law until a less expensive alternative to paint removal, such as an encapsulant, is approved by the Department of Public Health. On the other hand, children's advocates, tenant interest groups, plaintiffs' attorneys, and environmental/health advocates do not want to undermine the relative success of the present law. The "carve-outs" reflect modifications to the current law that the latter groups can live with. They are a step on the right road, but do not go far enough, as far as the former groups are concerned.

In addition to the "carve-outs", members of the Subcommittee concurred with a proposed modification to the type of damages to which strict liability would apply under G.L. c. 111, §199(a). Under the proposal, strict liability would only be applicable to the damages suffered by a child under six years of age at the time of the poisoning. This proposed change to "damages" under §199(a) would allow a poisoned child to recover the same damages that he/she can presently recover under strict liability, such as pain and suffering, medical expenses, and lost earning capacity. However, it would eliminate recovery in those situations where 1) a child six or over becomes poisoned in a house where a child under six resides; 2) a parent of a healthy child suffers emotional distress because of concern for the child residing in a lead-contaminated house; and 3) a parent of a poisoned child seeks to recover for loss of consortium. The proposed change would also limit the possibility of recovering the costs of alternative housing and related costs while awaiting, or during, deleading.

The Subcommittee debated the proposal at length and was particularly concerned about limiting the recovery of the cost of alternative housing. Because of that concern the members of the Subcommittee, with the exception of MRHA, were willing to go along with the proposal only if there was a compensating change in the section of the law addressing the duties of landlords. The Subcommittee accepted the proposal on the condition that there be a specific duty imposed on landlords under G.L. c. 111, §197 to provide for alternative housing and related costs while awaiting, or during, deleading. Even with that addition to §197, some members of the Subcommittee, notably the Department of Public Health, had reservations about the proposed change and reserved the right to modify or revoke their tentative approval of the language.

The "carve-outs" on which the Subcommittee reached consensus, proposed changes to "damages" under G.L. c. 111, §199, and property owners' duties under G.L. c. 111, §197 are attached to this report as Appendix A.

Treble Damages

The Subcommittee also discussed the possibility of modifying the provision of the current law that mandates the trebling of damages when a property owner fails to comply with the lead law after being notified under G.L. c. 111, §194 of dangerous levels of lead on his/her property. The membership of the Subcommittee was divided on this issue in the same way that it was on the issue of strict liability. Members of the Subcommittee who advocated the retention of treble damages in the lead law cited its utility as an incentive for property owners to comply with the law. On the other hand, Subcommittee members who favored its elimination cited largely the same reasons that were offered in support of eliminating strict liability.

While members of the Subcommittee were aware of only one instance in which treble damages had actually been awarded, many believed that the potential for a treble damage award in lead poisoning cases is significant. Relatively few lead poisoning cases have actually gone to trial in Massachusetts. The vast majority of lead poisoning claims are settled, and the potential for treble damages can have a substantial effect on the settlement value of an action. Nevertheless, because treble damages are only available under the lead law after a property owner has been notified of dangerous levels of lead on her/his property and failed to correct the situation, they are not a factor in all cases as is strict liability. In those instances where a property owner receives a G.L.c. 111, §194 notice and she/he simply does not have the money to comply with the law, the imposition of treble damages may be an unfair burden. Notwithstanding those instances, since c. 111, §194 notices often are issued after a poisoned child has been identified as living in a residence, some members of the Subcommittee viewed the possible imposition of treble damages as a valuable legal tool to spur property owners to come into compliance precisely in the situations where it is most important. Given the differing opinions of Subcommittee members, no consensus was reached on this topic.

"Ankiewicz" and Parental Liability

The current posture of parental liability in Massachusetts allows for parents to be sued for damages resulting from injury to their children through the ingestion and inhalation of lead paint. In Ankiewicz v. Kinder, the Supreme Judicial Court held that landlords who are sued in lead paint liability cases may bring third party contribution actions against the parents of injured minor plaintiffs. Property owners who are named as defendants in lead paint cases are increasingly bringing such contribution claims.

Much of the Subcommittee's discussion focused on the practical effects of allowing landlords to join parents as defendants in actions for contribution. Although there is to date no comprehensive study on the issue, such a practice potentially has an obvious chilling effect on parents filing lead liability suits on behalf of their injured children. The Subcommittee discussed several issues related to the central issue of whether such contribution claims should be permitted. The discussions touched on abuse of legal process by both plaintiff and defense bar, the risk of confusing juries with the contribution issue, current scientific evidence on the means by which children ingest lead paint, and the role of guardians ad litem in lead paint litigation.

The consensus of the Subcommittee, again with the exception of MRHA, was that the current posture of parental liability under the Ankiewicz decision is unacceptable. Several (5) members of the Subcommittee advocated legislation that would confer complete immunity on parents in lead paint litigation. The majority of the Subcommittee (11 members) thought that the issue should be addressed by the compromise proposal expressed in section 23(c) of House Bill No. 1129. Under that compromise, a property owner who is held liable for damages arising from an instance of childhood lead poisoning can still bring an action for contribution against parents, but only in a separate action after judgment has entered against the owner.

The Definition of "Owner"

Some members of the Subcommittee, notably those representing real estate interests, urged modifying the definition of "owner" under the lead paint statute. The modifications were proposed to address two problem areas that real estate interests see developing under the current definition of "owner".

The first problem occurs when a property owner enters into an agreement under which a prospective buyer rents the home with an option to buy at an agreed upon price. Apparently, agreements of this type are increasingly common in Massachusetts as there are long inventory times for residential properties, and mortgage lenders are more rigorous than they have been in the past about the percentage of the purchase price that they require as a down payment to qualify for loans. Such arrangements provide sellers who have been unable to move their properties with income to cover carrying costs, and give buyers additional time to amass enough capital for a down payment.

Once the prospective buyers are in the house as tenants, however, they sometimes demand that the premises be deleaded. At the end of the rental period, the tenants exercise their

option to buy at the previously agreed price. Thus, the seller has been forced to make a substantial capital improvement over and above the fixed purchase price. To address this predicament, the real estate representatives on the Subcommittee proposed expanding the definition of "owner" to include renters who hold an option to purchase.

While such a situation is obviously ripe for manipulation by scheming buyers and may be very inequitable to sellers who did not intend to go into the rental business but simply wanted to sell their house, most members of the Subcommittee were resistant to changing the definition of "owner" to address this situation because it would also adversely effect honest prospective buyers. It was posited that those honest buyers who happen to learn during their rental period that they are living in a house where their children's health is at risk should have the same remedies as any other tenants. This is particularly true in those situations where the prospective buyer cannot, or does not, exercise the option to purchase at the end of the lease. Rather than changing the definition of "owner", the consensus of the Subcommittee was that the scenario of the scheming prospective buyer could be addressed by amending the lead paint notification provisions so that they would be triggered when a lease with an option to buy is entered into. Then, if the parties are on notice that lead paint is or may be present, the purchase price in the option could be renegotiated to take into account the cost of deleading.

The second problem that real estate interests advocated addressing by modifying the definition of "owner" is the possible inclusion of property managers under that term. In King v. Hunneman Real Estate Corp., the Suffolk County Superior Court held that property managers may be held liable under the lead paint law as "owners". The current definition of "owner" under the Department of Public Health's lead paint regulations parallels that in the state sanitary code, and includes persons who have charge or control over residential property. The Hunneman court held that since a fact finder could conclude in some instances that a property manager has control over the property, she/he can be held liable as an "owner" under the lead law. The situations that real estate interests are most concerned about are those in which a person or company manages a property but may not have the authority or capital to engage in costly lead abatement. Their concern is that, under the holding of Hunneman, a building superintendent who may have responsibility for renting apartments or for general property maintenance, may be liable for enormous damages resulting from lead poisoning. Apart from the unfairness of such a situation, if property managers can be held liable under the lead paint law, it may be difficult to find qualified persons who are willing to manage residential properties.

Most members of the Subcommittee were unwilling to modify the definition of "owner" to completely exclude property managers. The members suggested that, in those situations where there is an absentee landlord who totally delegates responsibility for the operation of a building to a building manager, including the authority to make large capital improvements, it may well be appropriate to hold the property manager liable for failing to bring the building into compliance with the lead law. Furthermore, excluding property managers under the lead paint statute and regulations would create an inconsistency with the state sanitary code. Most members of the Subcommittee believed that the concerns of real estate interests could be addressed by modifying the definition of owner to make clear that it only covers those persons who have charge or control with respect to compliance under the sanitary code lead paint law. The consensus of the Subcommittee was that owners could agree to indemnify property managers in their management contracts, if potential lead paint liability made it difficult to find qualified property managers. The modified definition of "owner" upon which the Subcommittee was able to reach consensus is attached as Appendix B.

Insurance Issues

Several issues involving the role of the insurance industry were discussed by the Subcommittee. Central to those discussions was the availability of affordable liability insurance to cover the risks associated with lead paint. To some extent, the constriction of affordable property liability coverage has been a catalyst to recent legislative proposals to modify the lead paint law. Two years ago, the insurance industry began to retreat from the property liability market in Massachusetts by selectively nonrenewing and refusing to write new policies on residential properties containing rental units that were built prior to 1965 unless the owner had a letter of compliance. In response to the industry's refusal to provide liability coverage for such older rental properties, the Commissioner of Insurance approved a compromise proposal under which property and casualty insurance companies would be permitted to exclude lead paint coverage if they offered an option to buy back such coverage for an additional premium charge. That approval was issued in the form of a bulletin to property and casualty insurance companies in December 1990. The insurance companies began phasing in the exclusion in December 1991 for new policies and renewals written after that date.

As a result of that exclusion of lead paint coverage under personal liability policies, the premium of a typical homeowner's insurance policy dropped approximately \$35 per year. However, for insureds who choose to exercise the buy-back

option, the additional lead paint rider costs from about \$300 for a single family home to approximately \$700 for a four-family property for \$100,000 of coverage. Thus, although personal liability insurance coverage for lead paint is now available, it is relatively expensive. Informal surveys by the Massachusetts Rental Housing Association indicate that only 3% of property owners elect to purchase lead coverage under the buy-back provision. Obviously, there may be reasons other than cost that few homeowners elect to purchase the buy-back. Such reasons include the absence of children at the property or that the property does not contain lead paint.

Furthermore, for many companies, there is no obligation to provide lead paint coverage. While a regulated insurance company writing a policy for buildings with five or more units that excludes lead coverage must offer a buy-back, surplus lines insurers are not subject to state regulation. Surplus lines companies may write liability policies without any lead poisoning coverage. In some instances, banks have refused to provide mortgage loans to prospective buyers of multi-family buildings unless they obtain lead paint coverage. The inability to retain coverage for buildings with five or more units has caused potential sales of these buildings to fall through. Purchasers of such buildings have been left to resort to complete cash or purchase money mortgage transactions.

Another area of discussion was the availability of liability insurance for lead paint inspectors and abatement contractors and whether those professions commonly carried such insurance. Subcommittee members were concerned that if there is a move away from strict liability through the use of compliance letters and abatement plans, it will be increasingly important to make sure that residences are properly inspected and delead. If compliance letters are written for units which are improperly inspected, children who are lead-poisoned in those units may have great difficulty recovering damages from a property owner who has a compliance letter or abatement plan. Therefore, the Subcommittee considered whether poisoned children would be able to recover damages for their injuries from negligent inspectors and contractors.

Neither lead paint inspectors or contractors are currently required to carry liability insurance as a condition of licensure. Although to date there has been no formal survey as to what percentage of inspectors carry such insurance, informal reports indicate few inspectors have liability insurance. Similarly, there is little formal data on the percentage of contractors with liability insurance, but informal reports suggest that many contractors do not have such insurance. While the information available to the Subcommittee indicated that

liability insurance was probably available to contractors through the surplus lines market, the figure quoted for an annual premium on such a policy for contractors having twenty-five employees that specialize in lead abatement was \$60,000. Although policies covering contractors with fewer employees would cost less, premiums for liability coverage may be prohibitive for most small lead abatement contractors.

If liability insurance were to be a condition for licensure, it appears that either small abatement contractors would be forced out of business or, if the cost of insurance was passed on to customers, the already high cost of abatement would be increased. Neither eventuality is likely to have a positive effect on preventative deleading of residences. If insurance coverage were required as a condition of licensure, or if more contractors purchased insurance due to liability fears, increased demand might drive down rates. However, at the present time, such insurance does not appear to be generally affordable and available.

Deleading on transfer

The Subcommittee gave serious consideration to the notion of requiring lead law compliance upon the transfer of property. The "smoke detector model" was the paradigm considered as a means to accomplish transfer deleading. Under that model, when a purchaser sought to register a deed, she/he would have to present a certificate from a licensed lead inspector or authorized public health official showing that the residence had been delead.

Members of the Subcommittee who advocated the "smoke detector model" offered four reasons in support of its adoption. First, since residential properties change hands on an average of every five years, an enormous number of residences would be brought into compliance with the lead law within a relatively few years. Secondly, at the time of transfer there would be money available to abate the lead. If a buyer knows that in addition to the purchase price the buyer will need another \$15,000 to delead the property, she/he can borrow the additional money as a bridge loan or as part of the mortgage loan. Thirdly, at least with respect to single family homes, there is usually a period of vacancy upon transfer during which time the lead can most safely be abated. Finally, there would be no need for the creation of an additional bureaucracy to assure compliance. County registry of deeds officials simply would not register the new deed without the abatement certificate in the same way that they currently require smoke detector certificates.

Real estate and banking representatives spoke against the model. They argued that it would deflate the value of buildings on transfer because to keep within loan guidelines buyers would have to put up larger down payments. Buyers without young children and with no plans for children would be forced to pay for deleading when their family situation does not require it. The real estate and banking representatives also argued that the proposal would tend to force out entry level buyers. For example, if bank loan criteria will only permit a \$75,000 loan on a \$100,000 house, a buyer who needs to do a \$10,000 abatement on transfer will have to put up a \$35,000 down payment instead of \$25,000. Forcing out entry level purchasers will lower liquidity in the market and further deflate an already deflated real estate market. Furthermore, banking interests objected to being put in the posture of policing deleading on transfer. While technically it would be the obligation of the buyer to present the abatement certificate to the registry, as a matter of practice it is the bank's attorney who packages the closing documents and files them with the registry of deeds. Although banks would like a clear legislative statement that they do not have to make loans on residences that contain lead, they do not want deleading on transfer mandated.

As a possible solution to the concerns of the real estate and banking interests, the Subcommittee discussed a possible compromise position where transfer deleading would only be required for non-owner occupied rental housing. Most entry level purchasers are not buying rental properties, and this modification would spare single home purchasers without children from the expense of deleading. However, if transfer deleading is limited to rental housing there will rarely be the overlap of vacancy occurring at the time of transfer, and the logistics of deleading large apartment complexes become quite problematic. While a solution to this problem might be an integration of abatement plans with transfer deleading, the Subcommittee could not decide on what sort of remedy there should be if the property owner did not carry out the abatement plan. While transfer deleading is an attractive concept as a means of accomplishing preventative deleading, the practicalities of implementing it require substantial further development.

III. FUNDING RESOURCES: Lead Paint Abatement Resources Available in June 1992

The following is a list of existing sources of funding for lead abatement activities.

Federal

U.S. Department of Housing and Urban Development (HUD):

- * Office of Lead Paint Abatement and Lead Poisoning Prevention: Congress established this office in 1991 and

appropriated \$47 million in FY92 for lead paint abatement in private housing, both owner occupied and investor owned. Eligible applicants are cities with populations over 50,000 or states which have state or federal certified inspection and abatement programs. HUD anticipates awarding 12-15 grants; competition for the funds is expected to open in July.

- * Office of Public and Indian Housing: Public housing modernization funds are used for lead paint testing and abatement in public housing. Local Housing Authorities are the eligible applicants and must apply competitively for the funds.
- * Community Development Block Grant: Funds can be used for lead paint abatement activities for low- and moderate-income households. Funds are awarded on a formula basis to entitlement cities and states.

State

- * Massachusetts Housing Finance Agency: \$10 million is available currently for deleading 1-4 unit owner-occupied houses. Program includes interest-write downs and 0% deferred loans to income eligible families. The interest subsidy comes from the conversion of SBLI funds. MHFA's HILP (Home Improvement Loan Program) gives loans for a variety of home improvement activities, including lead paint, to low and moderate-income owner occupied housing.
- * Massachusetts Housing Partnership and Massachusetts Bankers Association: These two groups are designing a \$1 million loan guarantee fund for lead paint abatement in investor-owned housing. The funds will guarantee the top 35% of the loan, but not provide any interest write-down. The program should be launched formally in the near future.
- * Tax Credits: The Commonwealth currently allows for a \$1,000/unit tax credit for lead paint abatement. To receive the credit, owners must get a certificate from a licensed deleading inspector.

IV. POTENTIAL FUTURE RESOURCES

The following is a list of potential funding resources discussed by the Subcommittee.

Federal

- * Senator Cranston of California has introduced comprehensive lead poisoning prevention legislation that contains a provision for \$500 million for lead paint abatement activities. His bill has been attached as Title X of the Cranston-Gonzales National Affordable Housing Act reauthorization bill currently pending in Congress. It is unclear whether Congress will take up the bill this year.

State Proposals

- * **Tax Credits:** Included in a bill pending in the General Court is a proposal that calls for increasing the tax credit to \$2,500 for lead paint abatement or for window replacement. Tax credit could be carried over for up to seven years, or could be assigned.
- * **Sales Tax:** Enact a 1% tax on paint sales to provide a funding mechanism for abatement programs for low-income citizens.
- * **Housing Bond Bill:** The proposed \$25 million bond package in H 1894 would expand the current MHFA low-interest loan and grant programs, with 50% of loans to be directed at multi-family dwellings and non-profit housing projects.
- * **Subsidized loan program:** Establish a \$25 million line-item appropriation for the creation of state-subsidized loan program for middle-class taxpayers. This program would allow for a direct reduction in the interest rate of loans generated by the banking industry and would be further off-set by the tax credit outlined in item #1, thereby effectively creating a no-interest loan program.

Private Resource Proposals

- * Authorize the creation of the Massachusetts Lead Insurance Fund which would act as a private mortgage insurance fund on traditional loans underwritten for lead abatement where the loan-to-value ratio exceeds 80% and the property is owner occupied.
- * Working with the insurance industry, develop a program whereby loans written and serviced by the banking industry are purchased for investment by the insurance industry.
- * Initiate discussions with the secondary mortgage market (i.e., Freddie Mac, Fannie Mae) to create new low-interest second mortgage instruments for abatement.

- * Establish new state requirements which would mandate that all recipients of public monies, including mutual funds and MMDT, be required to set aside certain monies for deleading loans.

- * Identify the Executive Office of Communities and Development as the key agency with respect to developing consumer information materials on the available public and private resources for lead abatement.

APPENDIX A

"CARVE-OUTS"

New Beginning to Section 199 on Civil Liability of Owners

(a) Except as provided in section one hundred and ninety-nine-B [on secured lenders], the owner of any residential premises shall be liable for all damages caused by his failure to comply with subsection (a) of section one hundred and ninety-six [prohibiting use of lead paint] and section one hundred and ninety seven [requiring deleading in units housing pre-school children], provided that:

(1) the owner of any residential premises for which a letter of compliance has been obtained under the provisions of section XXX and who has continued to comply with the requirements of this chapter, the regulations issued pursuant thereto and the letter of compliance shall not be liable for damages under this section, including punitive damages, caused by exposure to dangerous levels of lead which occurs after the date of the letter of compliance;

(2) the owner of any residential premises for which an approved abatement plan has been obtained under the provisions of section XXX and who has continued to comply with the requirements of the abatement plan shall not be liable for damages under this section, including punitive damages, caused by exposure to dangerous levels of lead which occurs after the date of the approval of the abatement plan; and

(3) the new owner of any residential premises which has undergone a change of ownership as a result of which a child under six years of age is or will be a resident shall not be liable for damages under this section, including punitive damages, if such new owner complies with the requirements of this chapter within sixty days after becoming the owner.

(b) Except as provided in section one hundred and ninety-nine-B [on secured lenders], the owner of any residential premises who has received an order to correct violations from the director, a board of health or local code enforcement agency and who has failed to take the required actions by the deadlines contained in the order, as such deadlines may be modified by the enforcement authority or a court, shall in addition to the provisions of the preceding paragraph be subject to punitive damages, which shall be treble the actual damages found. The owner of any residential premises who fails to comply with an abatement plan approved under the provisions of XXX shall similarly be subject to punitive damages, which shall be treble the actual damages found.

DAMAGES AND LANDLORD DUTIES

Subcommittee IV is willing to support the following change in Section 199(a), on the condition that the proposed change Section 197(a) is adopted at the same time.

Proposed change to Section 199(a):

After the first use of the word "damages" insert "to a child under six years of age at the time of the poisoning".

Proposed change to Section 197(a):

At the end of the subparagraph insert the sentence, "Owners are obligated to pay for the reasonable cost of alternate housing, or provide such housing, and related additional costs for tenants with children under the age of six until the unit is in compliance with this chapter."

APPENDIX B

New Beginning to Section 197 on Duties of Owners

(a) Whenever a child under six years of age resides in any residential premises constructed prior to 1978 in which any paint, plaster or other accessible material contains dangerous levels of lead, the owner shall remove, cover, replace or encapsulate said paint, plaster or other material as required by this section so as to make it lead-safe for children under six years of age. Whenever any such residential premises containing said dangerous levels of lead undergoes a change of ownership and as a result thereof a child under six years of age is or will become a resident therein, the new owner shall remove, cover, replace or encapsulate said paint, plaster, or other material as required by this section so as to make it lead-safe for children under six years of age.

(b) For the purposes of this section and sections one hundred and ninety to one hundred and ninety-nine-B, "owner" means every person who alone or jointly or severally with others (i) has legal title to any dwelling unit, residential premises, or residential property; (ii) has charge or control of any dwelling unit, residential premises or residential property with respect to compliance with the sanitary code or this chapter, in any capacity including but not limited to an agent, executor, administrator, trustee or guardian of the estate of the holder of legal title; or (iii) is an estate or trust of which such dwelling unit, residential premises or residential property is a part or the grantor or beneficiary of such an estate or trust; or (iv) is the association of unit owners of a condominium, which shall be considered an owner solely with respect to common areas and exterior surfaces and fixtures; provided, however, that the term "owner" shall not include a secured lender except to the extent provided by section one hundred and ninety-nine-B of this chapter.

New Paragraph in Section 197A on
Property Transfer Notification

Existing section 197A of chapter 111 would be amended by inserting the following after the first sentence of paragraph

(b):

Effective January 1, 1993, all persons leasing residential premises constructed prior to 1978 with an option to purchase such premises shall, prior to the signing of the lease with an option to purchase, provide a copy of the form and other materials prepared pursuant to subsection (a) to the lessee/prospective purchaser.

New Section 199B on Secured Lenders

(a) No secured lender shall be considered an owner for purposes of sections one hundred and ninety to one hundred and ninety-nine-B unless and until such secured lender has acquired legal title pursuant to applicable law, at which point he shall be considered an owner; provided that, a secured lender who has acquired legal title pursuant to applicable law shall be liable in any action brought pursuant to section one hundred and ninety-nine only to the following extent:

(1) Within six months after acquiring legal title to a residential property containing four or fewer dwelling units or within twelve months after acquiring legal title to a residential premises containing five or more dwelling units, such secured lender shall either (i) obtain a letter of compliance, (ii) receive approval for an abatement plan pursuant to section XXX, or (iii) transfer the property following the procedures required by section one hundred and ninety-seven A. A secured lender who takes any one of such actions within the specified time period shall not be liable for damages under section one hundred and ninety-nine, provided that the secured lender continues to comply with the requirements of the lead law and regulations and the letter of compliance or continues to comply with the requirements of the abatement plan, as appropriate. A secured lender who does not take one of such actions within the specified time period shall be fully liable for damages under section one hundred and ninety-nine.

(2) Notwithstanding the provisions of this paragraph, during the first six months after acquiring legal title to a residential property containing four or fewer dwelling units and during the first twelve months after acquiring legal title to a residential property containing five or more dwelling units, such secured lender shall be required to take the actions required by any order to comply with the requirements of sections one hundred and ninety through one hundred and ninety-nine B of this chapter received from the director, a board of health or code enforcement agency. Any such secured lender who fails to take the actions required by the deadlines contained in such order, as such deadlines may be modified by the enforcement authority or a court, shall be subject to damages as provided for by section one hundred and ninety-nine.

(b) A secured lender who has acquired legal title pursuant to applicable law of a residential premises constructed prior to 1978 in which any paint, plaster or other accessible material contains dangerous levels of lead may recover from the mortgagor any monies expended in bringing the premises into compliance with

sections 190 through 199B of this chapter, provided that the mortgagor shall not be liable for such contribution if the mortgagor establishes that no child under six years of age resided in the residential premises while the premises were owned by the mortgagor.

(c) For the purposes of this section, the term "secured lender" means a person who holds indicia of ownership (including but not limited to a mortgage, deed of trust, lien, security interest, assignment, pledge or other right or encumbrance against real or person property) primarily to protect a security interest in a dwelling unit, residential premises or residential property.

APPENDIX C: TASK FORCE MEMBERS

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