

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE
Revised

House Bill 644

(Delegates Oaks and Niemann)

Environmental Matters

Judicial Proceedings

Environment - Reducing the Incidence of Lead Poisoning

This bill makes various changes to the Reduction of Lead Risk in Housing Law administered by the Maryland Department of the Environment (MDE). Among other things, the changes (1) expand the application of the law to owners of residential rental property built between 1950 and 1978 beginning January 1, 2015; (2) increase the annual registration fee from \$15 to \$30; (3) alter the definition of “abatement” to include renovation, repair, and painting in specified properties built before 1978; (4) authorize MDE to adopt regulations related to abatements involving renovation, repair, and painting of lead-containing substances in specified properties; (5) repeal an existing presumption that an affected property owner not in compliance with risk reduction provisions has failed to exercise reasonable care, and instead establish the admissibility of evidence that an owner was or was not in compliance with the risk reduction provisions for purposes of determining reasonable care; and (6) require a party that does not act in good faith in making specified allegations or denials to pay attorney’s fees and other reasonable costs.

The bill takes effect June 1, 2012.

Fiscal Summary

State Effect: Special fund revenues increase significantly beginning in FY 2013 as a result of the increase in the registration fee and from the collection of additional lead-free certificate fees anticipated to be collected, as discussed below. Special fund revenues increase to a greater extent beginning in FY 2015 as the number of property owners required to pay registration fees increases significantly. Special fund expenditures increase beginning in FY 2013 for MDE to hire additional personnel to conduct outreach with property owners and lead paint service providers and for associated communication costs. Special fund expenditures increase to a significantly greater extent beginning in FY 2015 for additional personnel, equipment, and contractual costs necessary to expand

the current Lead Poisoning Prevention Program and to implement new regulations. While a reliable estimate cannot be made at this time, it is likely that special fund revenues exceed special fund expenditures. Although the bill takes effect June 1, 2012, it is assumed that State finances are not materially affected in FY 2012.

Local Effect: Local health department expenditures increase to the extent the department opts to exercise the additional authority to order abatements under the bill. However, any such increase may be reduced to the extent that MDE exercises the authority granted by the bill to enforce the terms of local abatement orders. Costs may increase significantly for locally owned housing entities that become subject to regulation or to comply with more extensive abatement orders as a result of the bill. Local government revenues may increase significantly as a result of additional grant funding provided by MDE.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Affected Property

The bill expands the definition of “affected property” under the Reduction of Lead Risk in Housing Law to include rental property constructed between 1950 and 1978 beginning January 1, 2015; currently, the law only applies to rental property constructed before 1950, unless a residential rental property owner elects to participate in the program. However, the bill exempts properties built between 1950 and 1978 from the law requiring the owner of affected property to ensure that 50% of the owner’s properties have satisfied the risk reduction standard by February 24, 2001, and that 100% of the properties have satisfied the standard by February 24, 2006.

Annual Registration Fees

The bill increases the annual registration fee for an affected property from \$15 to \$30.

Abatements

The bill authorizes MDE or a local health department to order an abatement following an environmental investigation in response to a report of a lead-poisoned person at risk. Currently, only a local jurisdiction is authorized to do so. The bill also expands the scope of property subject to an abatement order, from residential property, to also include a

child care center, family child care home, or preschool facility. The bill also authorizes MDE to enforce the terms of an abatement ordered by a local jurisdiction or local health department in a civil or administrative action. Finally, the bill alters the definition of an “abatement” under the current lead accreditation law to include the renovation, repair, and painting of a lead-containing substance in a residential, public, or commercial building built before 1978, and it authorizes MDE to adopt regulations governing standards and procedures for abatement involving the renovation, repair, and painting of lead-containing substances, including a requirement for lead-dust testing.

Judicial Standards and Procedures

The bill repeals a rebuttable presumption that an affected property owner not in compliance with risk reduction provisions has failed to exercise reasonable care in an action seeking damages caused by the ingestion of lead. The bill establishes the admissibility of evidence regarding whether an owner was in compliance with the risk reduction provisions for purposes of determining reasonable care during the period of residency of the person at risk. Finally, if a party to an action for damages arising from ingestion of lead does not act in good faith in making allegations or denials regarding the time and place of residency or visitation at the affected property, the bill requires a court to require that party or the party’s attorney, or both, to pay reasonable costs, including attorney’s fees, to the other party.

Current Law/Background:

Reduction of Lead Risk in Housing Law

Chapter 114 of 1994 established the Lead Poisoning Prevention Program within MDE. Chapter 114 establishes a comprehensive plan to regulate compensation for children who are poisoned by lead paint, treat affected residential rental properties to reduce risks, and limit liability of landlords who act to reduce lead hazards in accordance with various regulatory requirements.

If a landlord complies with the regulatory provisions, Chapter 114 provides liability protection, through a qualified offer, by limiting compensation to children who resided in the rental unit to not more than \$7,500 for all medically necessary treatments and to not more than \$9,500 for relocation benefits, for a total of \$17,000. Compliance with Chapter 114 includes having registered with MDE, having implemented all lead risk reduction treatment standards, and having provided notice to tenants about their legal rights and specified lead poisoning prevention information. The liability protection provisions of Chapter 114, however, have been rendered invalid by a recent Maryland Court of Appeals decision.

Various administrative and civil penalties apply to violations of the Reduction of Lead Risk in Housing Subtitle. Any penalties collected are paid into the Lead Poisoning Prevention Fund. That fund, which is administered by MDE, also consists of any fees collected by MDE under the Reduction of Lead Risk in Housing Subtitle and moneys received by grant, donation, appropriation, or from any other source. MDE must use the fund to cover the costs of specified duties and responsibilities of MDE and the Lead Poisoning Prevention Commission. For each fiscal year, MDE must use at least \$750,000 from the fund for community outreach and education programs and enforcement efforts.

Lead Accreditation

In general, unless a person is accredited by MDE, a person may not act as a contractor to others who provide lead paint abatement services or engage in the inspection of lead-based paint hazards. MDE may create exceptions to the accreditation requirement under specified conditions. An individual who acts only as a worker or project designer need not be accredited, but must be trained.

MDE is required to set reasonable fees for the accreditation of persons who provide lead paint abatement services sufficient to cover its direct and indirect costs of administering the Accreditation of Lead Paint Abatement Services Subtitle. Under current regulations, application fees generally range from \$125 to \$300. Those fees, as well as specified penalties, must be deposited in the Lead Accreditation Fund, which is used by MDE for activities that are related to processing, monitoring, and regulating the accreditation of lead paint abatement services and for program development of these activities.

Court of Appeals Deems Liability Limitation Unconstitutional

In a decision filed October 24, 2011 (*Jackson, et al., v. Dackman Co. et al.*, No. 131, September Term 2008), the Court of Appeals ruled that the limits on landlord liability in Chapter 114 are unconstitutional because the provisions violate Article 19 of the Maryland Declaration of Rights. Article 19 protects a right to a remedy for an injury and a right of access to the courts. The court stated that the test to be applied under an Article 19 challenge is whether the restriction on a judicial remedy was reasonable. The court found that the \$17,000 remedy available under Chapter 114 was “miniscule” and, thus, not reasonable compensation for a child permanently damaged by lead poisoning. Therefore, the court held the limited liability provisions under Chapter 114 to be invalid under Article 19 because a qualified offer does not provide a reasonable remedy.

Owners of pre-1950 rental units that are in compliance with Chapter 114 and owners of rental units built between 1950 and 1978 that voluntarily opted to comply will be impacted by the court’s decision, as they will no longer have the liability protection

previously afforded to them. However, it is not yet clear how landlords, along with tenants, will be impacted by the decision, including whether or how courts will consider compliance with the Reduction of Lead Risk in Housing Law when determining whether a landlord has exercised due care.

MDE 2011 Lead Study

Chapter 610 of 2011 required MDE to conduct a study in consultation with members of the General Assembly and representatives of several State and local agencies and organizations reflecting the interests of landlords, housing owners, lead poisoning prevention advocates, and others. The study was required to evaluate processes that reduce the incidence of lead poisoning in both affected and nonaffected properties, including rental properties built from 1950 through 1977 and owner-occupied properties. The study group met seven times between July and December of 2011 and made recommendations regarding six different issues, which are contained in a report issued on December 31, 2011.

Delegation Authority for MDE to Implement Federal RRP Rule

The study group examined the U.S. Environmental Protection Agency's (EPA) Renovation, Repair, and Painting (RRP) rule, which requires renovation companies to be registered and follow lead-safe work practices while doing renovation in pre-1978 constructed homes. Maryland has required accreditation for workers doing lead abatement, which includes lead risk reduction work in pre-1950 rental properties. However, the federal rule also covers renovation in homes built pre-1978. Since the federal rule can be delegated to the states, the study group agreed that Maryland should seek delegation for MDE to implement and enforce the RRP rule. Although some members of the study group expressed concern as to the scope of a future State program and funding to implement the program, it was recommended that MDE should seek delegation of authority from EPA to implement the RRP rule.

Expansion of Reduction of Lead Risk in Housing Law to Rental Units Built Between 1950 and 1978

The study group considered expanding the properties subject to the State's Reduction of Lead Risk in Housing Law to also include rental housing built between 1950 and 1960 or to cover all rental housing built prior to 1978. Members of the study group representing property owners expressed concern about this expansion of regulation given the recent Court of Appeals decision that overturned the limited liability protections of the State's lead law for property owners. The study group recommended further examination of this issue following a more detailed study by MDE and the Department of Health and Mental Hygiene of blood lead testing data.

Funding to Support Current Law Program and Any Future Expansion

The study group discussed the long-term decline in funding for MDE's Lead Poisoning Prevention Program, which has been caused in significant part by a reduction in federal funds. Moreover, the study group discussed the likelihood that these federal sources of funding will be reduced further in the next several fiscal years. Thus, the study group found that, not only will additional funding sources be needed to support any recommended expansion of the program, but greater funding will also be needed to sufficiently administer the current program. Several sources of additional funds were discussed, including increasing the program's current registration fee and establishing a fee on each gallon of paint sold. The study group recommended increasing the registration fee from \$15 per unit to \$30 per unit.

Lead Poisoning in Children

According to the federal Centers for Disease Control and Prevention (CDC), adverse health effects exist in children at blood lead levels less than 10 micrograms per deciliter. No treatments are known to lower the blood lead levels for children with lead levels less than 10 micrograms per deciliter. Measuring blood levels below the 10 micrograms per deciliter threshold is difficult. Therefore, although CDC warns there are no safe blood lead levels, the 10 micrograms per deciliter threshold is the standard measure at which statistics are reported.

According to the most recent data available, the number of children in Maryland with elevated blood lead levels has continued to decrease since the onset of the program. At the State level, out of the 114,829 children age six who were tested for lead in 2010, 531 (0.5%) were found to have blood lead levels greater than or equal to 10 micrograms per deciliter. This compares with 23.9% in 1993, the first year in which these data were tracked, and is the eighteenth straight year in which the rate has dropped in Maryland. According to MDE, lead paint dust from deteriorated lead paint or home renovation is the major source of exposure for children in Maryland.

State Revenues: Although a reliable estimate cannot be made at this time, special fund revenues for the Lead Poisoning Prevention Fund and Lead Accreditation Fund may increase by about \$2.7 million in fiscal 2013, and by about \$5.7 million in fiscal 2015, which reflects the current registration cycle and the bill's compliance deadline for newly affected properties, under the following assumptions:

- the owners of about 165,000 rental units built between 1950 and 1978, which is half of the estimated 330,000 such units, will pay the \$30 annual registration fee (owners of 135,000 units will pay the \$30 fee beginning in fiscal 2015 and owners

of 30,000 units that currently opt in will pay a \$15 increase beginning in fiscal 2013);

- owners of the other 165,000 rental units built between 1950 and 1978 will instead pay a \$10 processing fee for obtaining a lead-free certificate, with half paying the fee in fiscal 2013 and half in fiscal 2014;
- about 90,000 owners of rental properties built before 1950 will pay a \$15 increase in the fee under the bill;
- there are currently about 85,000 properties that have been certified as lead-free or limited lead-free; and
- accreditation fee revenues increase by 25% in fiscal 2013 as additional lead paint abatement service providers are accredited as a result of the implementation of regulations that address standards and procedures for renovations, repairs, and painting services, as authorized by the bill.

Future year revenues likely increase to a lesser extent as the significant number of rental property owners that initially obtain a lead-free certificate beginning in fiscal 2013 do not pay registration or certificate processing fees in future years. Further, the number of registered rental properties is expected to decrease each year as additional units are certified as lead-free or as some properties are abandoned or demolished. The increase in lead accreditation fee revenues may vary significantly from this estimate as there is considerable uncertainty regarding the number of additional lead abatement service providers that may seek accreditation and when this may occur.

Special fund revenues could also increase due to the application of existing penalties to the provisions of the bill. Any such increase cannot be reliably estimated at this time, but it could be significant beginning in fiscal 2015 since the bill expands the universe of regulated entities on January 1, 2015.

State Expenditures: Special fund expenditures increase significantly, primarily to handle the expanded universe of properties subject to regulation under the bill and to implement a program consistent with the federal RRP rule. While a reliable estimate of the additional expenditures necessary to implement a programmatic expansion of this magnitude cannot be made, MDE has provided an estimate, which may provide context as to the potential for increased costs.

According to information provided by MDE, special fund expenditures may increase by about \$411,409 in fiscal 2013. This estimate reflects the cost of hiring five administrative specialists to handle the outreach and education in preparation for expanding the scope of the Lead Poisoning Prevention Program and for implementing standards and procedures for abatement involving renovation, repair, and painting. The estimate includes salaries, fringe benefits, one-time start-up costs, and ongoing operating costs. The estimate also includes significant communication costs associated with the

outreach effort. Finally, the estimate assumes that the additional personnel are hired beginning July 1, 2012.

Special fund expenditures may increase by an estimated \$2.7 million beginning in fiscal 2015 for MDE to expand the Lead Poisoning Prevention Program to handle the additional residential properties that will be subject to regulation under the bill as well as to oversee the additional lead paint service providers and trainers subject to the new renovation, repair, and painting regulations adopted pursuant to the bill. The estimate includes salaries, fringe benefits, two automobiles, specialized lead-detection equipment, contractual assistance for outreach and data entry, and ongoing operating expenses. The estimate also reflects \$800,000 annually in additional grants, which MDE advises that it would provide to local governments with the additional fee revenue generated by the bill. Finally, the estimate reflects the January 1, 2015 implementation date for expanding the scope of affected properties under the bill.

	<u>FY 2013</u>	<u>FY 2015</u>
Positions	5	14
Salaries and Fringe Benefits	\$244,209	\$696,858
Contractual Assistance	0	858,350
Grants to Local Governments	0	800,000
Communications	147,750	152,862
Specialized Equipment	0	70,000
Automobile Purchase and Operations	0	47,619
Other Operating and Start-up Costs	<u>19,450</u>	<u>65,394</u>
Total State Expenditures	\$411,409	\$2,691,083

Future year expenditures estimated by MDE reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses. To the extent that MDE's workload decreases once the initial development of the renovation, repair, and painting regulations have been completed, MDE expenditures could decrease somewhat.

Local Revenues: As noted above, to the extent funds are available, MDE advises that it would provide additional grant funding to local governments for outreach and education activities. Thus, local grant revenues may increase significantly.

Local Expenditures: Although the bill does not require local health departments to issue abatement orders, to the extent local health departments use the authority provided by the bill, expenditures may increase for that activity. For example, Carroll County advises that if it were to use the bill's authority to issue abatement orders, it would require significant additional staffing. Expenditures may also increase as the bill expands the scope of properties subject to abatement orders to include a child care center, family

child care home, or preschool facility. Any increase in local expenditures may be reduced to the extent MDE exercises its authority under the bill to enforce the terms of an abatement ordered by a local government.

Local government expenditures for locally owned rental properties (such as housing authorities) may increase significantly, as the bill expands the universe of regulated property under the lead law. Thus, additional units likely become subject to regulation and must comply with the risk reduction treatments and other requirements of the lead law beginning January 1, 2015. Locally owned housing entities may also incur additional expenditures related to the expanded scope of abatement orders.

Small Business Effect: The bill expands the application of the Reduction of Lead Risk in Housing Law to owners of rental property built between 1950 and 1978 beginning January 1, 2015. There are an estimated 330,000 rental units built between 1950 and 1978. Thus, many additional small business rental property owners are required to register with MDE, pay the registration and other fees, comply with currently required tenant notice and information disclosure requirements, and undertake risk reduction treatments at each change in occupancy and whenever otherwise required. Although these small business rental property owners may incur a meaningful increase in compliance costs, the bill may reduce the number of legal actions that landlords face due to the required payment of attorney's fees and reasonable costs by party (or attorney, or both) that does not act in good faith in making specified allegations.

The bill may also have a meaningful impact on small business contractors engaged in lead inspection, abatement, renovation, or renovation training activities. These contractors may realize a meaningful increase in the demand for their services. However, the bill authorizes MDE to adopt regulations pertaining to renovation, repair, and painting, which will likely result in an increase in costs to pay accreditation fees for some contractors that may not have previously been regulated.

The bill expands the scope of properties subject to abatement orders to include child care centers, family child care homes, and preschool facilities. Thus, any small businesses engaged in these services may be meaningfully impacted by the additional authorization for regulatory enforcement.

Additional Information

Prior Introductions: None.

Cross File: SB 947 (Senator Gladden) - Rules.

Information Source(s): Baltimore, Carroll, Cecil, Montgomery, and St. Mary's counties; State Department of Assessments and Taxation; Maryland Department of the Environment; Department of Housing and Community Development; Department of Health and Mental Hygiene; Comptroller's Office; Maryland Association of County Health Officers; Maryland Association of Counties; U.S. Centers for Disease Control and Prevention; Department of Legislative Services

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