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I. ISSUE

This memorandum examines how lead-based paint on outdoor structures is treated under Delaware’s Hazardous Substance Cleanup Act (“HSCA”) and related federal environmental laws, including when it becomes a regulated hazardous substance, what triggers cleanup authority, and the role of Delaware’s Department of Natural Resources and Environmental Control (hereinafter “DNREC”). Further, it examines how Delaware law can be amended to provide remediation standards for outdoor structures containing lead-based paint.

II. Federal Framework

A. What is Lead-Based Paint and When is There a Lead-Based Paint Hazard?

Under the Toxic Substance Control Act (“TSCA”), lead-based paint is paint or surface coating containing lead in excess of 1.0 milligrams per centimeter squared or 0.5 percent by weight.¹ This is the same definition in the Delaware Childhood Lead Poisoning Prevention Act.² According to 15 U.S.C. § 2681(9), a “lead-based paint hazard” is “any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soils, lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects...”³ This indicates that lead-based paint becomes a hazard when it is released into the air as dust, into the soil, or through deterioration (peeling, chipping, or cracking) of the paint, causing adverse health effects.

¹ 15 U.S.C. § 2681(9).

² 16 Del. Admin. Code § 4459 – 2.0.

³ 15 U.S.C. § 2681(10).

B. TSCA Remedial Measures

TSCA defines the reduction of toxic substances as remedial measures designed to reduce or eliminate human exposure to lead-based paint through processes such as abatement or interim controls.⁴ The interim controls are a set of measures designed to reduce temporary human exposure or potential exposure to lead-based paint.⁵ Specifically, it includes “specialized cleaning, repairs, maintenance, painting, temporary containment, and ongoing monitoring of lead-based paint hazards or potential hazards.”⁶ Furthermore, these interim controls indicate that when there is likely or temporary exposure, remedial measures can be taken to reduce the risk of lead-based paint hazards. This provides a remedial framework for addressing exposures, or likely exposures, to lead-based paint.

C. CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) is the federal law for the cleanup of hazardous waste sites, including the emergency releases of hazardous substances.⁷ The Delaware state law, HSCA, is based on CERCLA.

III. HSCA

HSCA requires the immediate containment and removal of hazardous substances that threaten public health and welfare and the environment, and allocates funds to assist facilities in cleaning up hazardous substances.⁸ HSCA regulates hazardous substances upon their release or threatened release into the environment.⁹ The purpose of HSCA is to encourage private owners

⁴ 15 U.S.C. § 2681(13).

⁵ *Id.* at 8.

⁶ *Id.*

⁷ 42 U.S.C. § 9601 et. seq.

⁸ 7 Del. C. § 9102 et seq.

⁹ *Id.* at § 9103 (16).

of these contaminated facilities to remedy and/or eliminate the threat of release or imminent threat of release of hazardous substances.¹⁰

A. What is a Hazardous Waste?

HSCA defines a hazardous substance as any hazardous waste defined in Title 7 Chapter 63, defined in CERCLA, or deemed hazardous by the Secretary of the State.¹¹ Chapter 63 defines hazardous waste as a solid waste “which because of its quantity, concentration, or physical or chemical characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating irreversible illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed.”¹² Lead-based paint is a hazardous substance under HSCA when it becomes solid waste by being discarded or deteriorating into dust or debris and exhibiting a hazardous characteristic, typically toxicity from lead (at or above 5.0 mg/L). Further, both lead and numerous lead compounds are identified on the regulatory list of CERCLA’s hazardous substances.¹³ Lead-based paint, therefore, is a hazardous waste under HSCA because lead is listed as a CERCLA hazardous substance, and discarded lead-based paint is likely to exhibit a toxicity characteristic.

B. What is the release or imminent threat of release?

As previously mentioned, HSCA regulates hazardous substances upon their release or threatened release into the environment. HSCA defines a “release” as “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or

¹⁰ *Id.* at § 9102 (b).

¹¹ 7 Del. C. § 9103 (15).

¹² 7 Del. C. § 6302 (8).

¹³ 40 C.F.R. § 302.4.

disposing into the environment.”¹⁴ Furthermore, HSCA defines an “imminent threat of release” as a potential for a release that requires “action to prevent or mitigate damage to the environment or endangerment to public health or welfare which may result from such a release.”¹⁵ When an outdoor structure with lead paint undergoes abatement, removal, and/or demolition, it is likely to release toxic materials into the environment and endanger the health and welfare of those around the structure. DNREC implements HSCA by using risk-assessment–based screening levels for releases of contamination during site evaluation and remedial investigations. According to the United States Environmental Protection Agency (“EPA”), the screening level for lead contamination of concern in residential soil is 200 mg/kg (parts per million), and is 100 mg/kg for areas with multiple lead sources.¹⁶ DNREC has adopted these EPA screening levels for lead in residential soils.¹⁷

C. Compliance under HSCA

DNREC has a regulatory responsibility to take action regarding hazardous substances.¹⁸ According to the regulations, DNREC is responsible for the preservation of the environmental quality of the air, land, and water of Delaware.¹⁹ DNREC must regulate the lead-based paint facilities when the hazard is not being addressed or regulated by other external laws and regulations, or there is a release or imminent threat of release.²⁰

¹⁴ *Id.*

¹⁵ 7 Del. C. § 9103.

¹⁶ U.S. Env’t Prot. Agency, Residential Soil Lead Directive for CERCLA Sites and RCRA Hazardous Waste Cleanup Facilities (2025) (<https://www.epa.gov/superfund/residential-soil-lead-directive-cercla-sites-and-rcra-hazardous-waste-cleanup-facilities>).

¹⁷ DNREC, Hazardous Substance Cleanup Act, Screening Level Table Guidance, Revised December 2025 <https://documents.dnrec.delaware.gov/dwhs/remediation/HSCA-Screening-Level-Table-Guidance.pdf>.

¹⁸ 7 Del. Admin. Code §1375.

¹⁹ *Id.* at §1375-1.1.2.

²⁰ *Id.* at 1.2.2, 1.2.2.2.

DNREC must also establish an inventory that identifies hazardous substance release facilities through a notification and an inventory requirement for governing hazardous substance cleanup.²¹ Facilities with a release or imminent threat of release may be identified through reports and investigations done by DNREC, state, local, or federal agencies, and other reporting sources, including potentially responsible parties, impacted public/neighboring facilities, contractors, and other people who may have information about existing releases.²² A notice of potential liability may be published if a potentially responsible party cannot be found, serving as notice of the release or imminent threat of release of lead-based paint.²³ Furthermore, for remedial investigations, the remedial action objectives will be developed by the potentially responsible party, the person conducting the investigation, or DNREC, taking into account factors such as land use, use of surrounding properties, and any applicable local, state, or federal laws and regulations.²⁴ This regulation, as a whole, requires DNREC to respond to the threat of release, or imminent threat of release, of lead-based paint from outdoor structures by establishing compliance standards through pre-assessment screening, investigation, identification, reporting, and public notice.

D. Voluntary Cleanup

HSCA governs the Voluntary Cleanup Program (“VCP”), which is a compliance alternative to regulatory enforcement.²⁵ It allows a current owner of a contaminated facility to voluntarily enter into a legal and administrative agreement to remediate the facility in response to the imminent threat of, or a release of, hazardous substances.²⁶ Pursuant to the VCP, the owner is

²¹ *Id.* at 3.2.

²² *Id.* at 3.2.1.2, 3.2.1.4.

²³ *Id.* at 4.3, et seq.

²⁴ *Id.* at 11.1, et seq.

²⁵ 7 Del. Admin. C. §1375.8.2.2.2.

²⁶ 7 Del. Admin. C. §1375.2.0.

responsible for clean-up and oversight costs to settle their liabilities.²⁷ To assist with the remediation process, DNREC provides a list of certified consultants and contractors, which is required under HSCA.²⁸ DNREC must be involved in the VCP when there is an imminent threat of, or a release of, hazardous material that may put individuals' health at risk.²⁹

IV. Title 16, Chapter 30M

In 2018, the Delaware General Assembly passed Chapter 396 (“Bill”), which amended the Delaware Code relating to the use of lead-based paint on outdoor structures.³⁰ By enacting the Bill, Delaware established Chapter 30M to Title 16 (“Chapter 30M”), a section of the Delaware Code designed to safeguard public health by outlawing lead-based paint on all outdoor structures.³¹ Chapter 30M regulates conduct by banning the application of lead paint on outdoor structures and authorizes administrative penalties for violations, but does not authorize the investigation, remediation, or environmental response authority over structures covered by lead paint at the time of its passage. It defines important terms such as lead paint that fall under this chapter. “Lead Paint” refers to paint that contains “lead or lead compounds...in excess of 90 parts per million (ppm) by weight on the total nonvolatile content of the paint,” which is a federal standard under the Consumer Product Safety Improvement Act (hereinafter “CPSIA”).³² This federal standard is reflected in Chapter 30M within the Delaware Code.

Under Section 2 of the Bill, the Department of Health and Social Services (“DHSS”) must develop regulations to govern the ban on the application of lead-based paints from outdoor

²⁷ 7 Del. Admin. C. §1375.9.2.

²⁸ *Id.*

²⁹ 7 Del. Admin. C. §1375.1.0 et seq.

³⁰ 81 Del. Laws c. 396 (2018).

³¹ 16 Del. C. Ch. 30M §3001M.

³² 16 C.F.R. Part 1303. (Part 1303- Ban of Lead – containing paint and certain consumer products bearing lead - containing paint).

structures by January 1st, 2020.³³ One of the purposes of the legislation is to minimize the public health risk posed by the application, future weathering, and/or removal of lead paint.³⁴ Pursuant to Section 2, DHSS is responsible for developing regulations; however, both DHSS and DNREC must coordinate efforts, whenever feasible, in implementing this Bill.³⁵

A. Proposal of 4459C Lead-Based Paints on Outdoor Structures

In February 2026, DHSS published a proposed regulation, 4459C, to implement Chapter 30M pursuant to the Bill's legislative mandate, which requires the agency to establish a comprehensive framework to ban the use of lead-based paint on outdoor structures.³⁶ The purpose of the proposed regulations is to establish standards governing the use of lead-based paint on outdoor structures and create procedures for enforcement.³⁷ Pursuant to the proposed regulation, owners of outdoor structures must comply with reporting requirements by maintaining records demonstrating that the paint used is non-lead-based.³⁸

For compliance purposes, owners of outdoor structures must keep records, either physically or electronically, demonstrating that the paints used are non-lead.³⁹ This is important because it creates compliance and enforcement standards for new and ongoing use of lead-based paint on outdoor structures. Specifically, under §3.2, it requires inspection and maintenance of structures previously painted with lead-based paint that are now painted over with non-lead paint.⁴⁰ The requirement ensures that the outdoor structures with lead-based paint that are encapsulated are properly maintained to avoid a release through chipping or exposure.⁴¹ Unfortunately, the

³³ 81 Del. Laws c. 396 (2018).

³⁴ Id. at §2.

³⁵ Id.

³⁶ Lead-Based Paints on Outdoor Structures, 16 Del. C. §4459C (proposed February 1, 2026).

³⁷ Id.

³⁸ Id.

³⁹ Id. at 4.0.

⁴⁰ Id. at 3.2.

⁴¹ Id.

regulation does not require the removal of pre-existing lead-based paint on outdoor structures or the reporting of its weathering, which could result in a release. Consistent with the principle established in the *re Appeal of DNREC*, “an administrative agency may not adopt regulations, which are inconsistent with the provisions of the enabling statute or out of harmony with, or extend the limits of, the Act which created it.”⁴² Therefore, any regulation pursuant to Chapter 396 must be consistent, in harmony, and not extend the limits of the law.

Therefore, to mitigate the gap in the law, a section (3.3) could be added to this regulation. This section could provide clarity about ensuring that owners of lead-based painted structures comply with the upkeep, maintenance, and remediation of the outdoor structure subject to HSCA. Such reference is necessary to ensure that DNREC’s statutory authority and responsibilities for hazardous substance oversight, remediation standards, and enforcement are fully implicated, and that both DNREC and structure owners are subject to consistent requirements for the removal and remediation of lead-based paints. Currently, the division of health is accepting comments until Monday, May 4th, 2026, which could be an opportunity to expand 4459C to include the aforementioned language for section 3.3 of the proposed regulation.⁴³

V. Conclusion

To effectively address lead-based hazards from outdoor structures with lead-based paint, property owners need to comply with HSCA. One possible approach to clarify remediation standards would be to revise the pending regulation to address outdoor structures containing lead-based paint. Another approach is to amend 30M to specifically address existing lead-based paint on outdoor structures. If 30M is amended to address existing lead-based paint on outdoor

⁴² 401 A.2d 93 (1978).

⁴³ Lead-Based Paints on Outdoor Structures, 16 Del. C. §4459C (proposed February 1, 2026) at 3.2.

structures, regulatory authority to carry out the new provision would be explicitly authorized. The implementation of these recommendations, will create clearer compliance standards to protect public and safety. Ultimately, Delaware law could be amended to provide remediation standards for outdoor structures containing lead-based paint, either through the pending regulation or through amending 30M.