

# ECONOMIC HAZARDS OF ENVIRONMENTAL JUSTICE FOR LOWER-INCOME HOUSING TENANTS

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## INTRODUCTION

Proponents of environmental justice have long been aware that minorities and low-income individuals often “bear a disproportionate share of environmental costs.”<sup>1</sup> This situation is highlighted by the affordable housing crisis in the United States. Providing affordable housing that is environmentally sound requires balancing a number of interests: landlord property rights, tenant civil rights, and the federal government’s duty to enforce its own environmental regulations. Reconciling the need for greater landlord participation in lower-income housing programs with the need for compliance with often burdensome federal environmental regulations can be a difficult, complex, and costly process. The costliness of federal efforts is particularly concerning in light of the strong calls to lower federal spending. These facts indicate that there is a great need for the federal government to adopt a long-term and cost-effective solution: a comprehensive plan that will incentivize compliance with environmental regulations without making participation in vital lower-income housing programs unpopular among landlords.

### A. *Current Background*

Environmental regulations on housing are difficult for the federal government to enforce on behalf of individuals who rely on lower-income housing programs.<sup>2</sup> When lower-income housing providers fail to comply with such regulations, tenants often cannot fight for their environmental

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<sup>1</sup> RACHEL MASSEY, ENVIRONMENTAL JUSTICE: INCOME, RACE, AND HEALTH 1 (2004), available at [http://www.e3network.org/teaching/Massey\\_Environmental\\_Justice.pdf](http://www.e3network.org/teaching/Massey_Environmental_Justice.pdf).

<sup>2</sup> See Frank P. Braconi, *Environmental Regulation and Housing Affordability*, 2 CITYSCAPE: J. POL’Y DEV. & RES. 81, 81 (1996).

rights without risking the even greater danger of homelessness.<sup>3</sup> According to the United States Department for Housing and Urban Development (“HUD”), “610,042 people were homeless on a given night” in January 2013.<sup>4</sup> Of these people, 222,197 (36%) were homeless people in families.<sup>5</sup> Furthermore, “[130,515 (58%)] of all homeless people in families were children.”<sup>6</sup> Lack of affordable housing has been cited as one of the leading causes of homelessness among both individuals and families with children.<sup>7</sup> Affordable housing has long been a problem in the United States. HUD notes that “[t]he economic expansion of the 1990s obscured certain trends and statistics that point to an increased, not decreased, need for affordable housing.”<sup>8</sup> Further exacerbating the situation is the fact that as a result of the recent recession from which the United States economy is still recovering, “[r]ents are rising faster than inflation, widening the spread between housing costs and wages.”<sup>9</sup> A recent Harvard study further noted that “since 2008, more than 4.4 million homeowners facing foreclosure have turned to the rental market, increasing demand for low-income housing” at a time when “government budget cuts have led to a shrinkage in the supply of subsidized housing.”<sup>10</sup>

By offering affordable housing, federally sponsored programs are an important means of preventing homelessness. HUD notes that “[t]he generally accepted definition of affordability is for a household to pay no more than 30 percent of its annual income on housing”<sup>11</sup> and that “[f]amilies who pay more than 30 percent of their income for housing are considered cost

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<sup>3</sup> See William Tucker, *How Housing Regulations Cause Homelessness*, 102 NAT'L AFF. 78, 81 (1991).

<sup>4</sup> U.S. DEP'T OF HOUS. & URB. DEV., THE 2013 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2013), available at <https://www.hudexchange.info/resources/documents/ahar-2013-part1.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> THE U.S. CONF. OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 26 (2012), available at <http://usmayors.org/pressreleases/uploads/2012/1219-report-HH.pdf>.

<sup>8</sup> *Affordable Housing*, U.S. DEP'T HOUS. & URB. DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordablehousing/](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/) (Jan. 21, 2015), archived at <http://perma.cc/R8EQ-33ZR> [hereinafter *Affordable Housing*].

<sup>9</sup> Walter Kurtz, *The Dark Side of Rising Rental Costs in the US*, PRAGMATIC CAPITALISM (Oct. 20, 2013), <http://pragcap.com/the-dark-side-of-rising-rental-costs-in-the-us>, archived at <http://perma.cc/ZFY6-M6XU>.

<sup>10</sup> *Harvard Report Shows Urgent Need for Low-Income Rental Housing*, LOCAL INITIATIVES SUPPORT CORP. (July 1, 2013), <http://www.lisc.org/content/publications/detail/21045>, archived at <http://perma.cc/KT2F-RW4A>.

<sup>11</sup> *Affordable Housing*, *supra* note 8.

burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care.”<sup>12</sup> HUD further notes that “[a]n estimated 12 million renter and homeowner households now pay more than 50 percent of their annual incomes for housing, and a family with one full-time worker earning the minimum wage cannot afford the local fair-market rent for a two-bedroom apartment anywhere in the United States.”<sup>13</sup> These glaring facts point to the great need for federal programs that subsidize housing, such as the Section 8 housing voucher program. Section 8 is a federal program that “assist[s] very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market.”<sup>14</sup> Local public housing agencies (“PHAs”) use federal funds awarded by HUD to “provide 75 percent of its voucher to applicants whose incomes do not exceed 30 percent of the area median income.”<sup>15</sup>

Perhaps recognizing that lower-income housing structures are at the highest risk of failing to meet minimum standards of safety, the federal government has propagated a variety of environmental regulations for housing that receives federal funds.<sup>16</sup> This Note will address some of the failures inherent within both the regulations themselves and the policies that have been used to enforce them.<sup>17</sup>

The success of such subsidized housing programs obviously depends largely on the willingness of landlords to participate in these programs. Research suggests that the federal government’s efforts thus far to create and enforce regulations designed to ensure safe and sanitary housing for tenants in these programs have made lower-income housing programs such as Section 8 unpopular with landlords due to the additional hurdles and expenses incurred in complying with stricter regulations.<sup>18</sup> While landlord participation needs to be increased, the social and economic costs of ignoring environmental hazards are too high to simply abandon or even reduce environmental regulations.<sup>19</sup> Instead, policy changes need to be made that will incentivize both participation in affordable housing programs and compliance with environmental regulations.<sup>20</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T HOUS. & URB. DEV., [http://portal.hud.gov/hudportal/HUD?src=/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8) (last visited Jan. 15, 2015), archived at <http://perma.cc/9M2F-D6BA>.

<sup>15</sup> *Id.*

<sup>16</sup> See *infra* Parts II, III.

<sup>17</sup> See *infra* Parts II, III.

<sup>18</sup> See *infra* Part V.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* Part V.

Extending efforts to eradicate environmental hazards to lower-income tenants is of particular importance because these are the individuals who arguably need such protection the most, due to their inability to access adequate health care. Some may reason that this argument is rendered obsolete by the Patient Protection and Affordable Care Act (“ACA”), which is meant to expand health care access to the lowest straits of society. However, though the ACA will decrease the number of uninsured individuals in the United States, “[a]pproximately 24 million people are expected to remain without coverage.”<sup>21</sup> Furthermore, the Kaiser Commission on Medicaid and the Uninsured reports that while the ACA “provides for the expansion of Medicaid to eligible adults with incomes at or under 138% FPL,”<sup>22</sup> “[t]he impact of the Medicaid expansion on the uninsured will depend on state decisions about whether to expand their programs.”<sup>23</sup> The commission reported that “as of the end of September 2013, 26 states were not planning to implement the expansion and 54% of the currently uninsured population at or below 138% of poverty live in these states.”<sup>24</sup> Therefore, though recent changes in healthcare policy will certainly increase health care access, the extent to which the policy will alleviate the disparity in health care access between the rich and poor is still uncertain.

The federal government’s unsuccessful efforts to eradicate asbestos and lead-based paint hazards in lower-income housing provide a revealing example of the inherent difficulties of ensuring compliance with existing environmental regulations when dealing with landlords who house lower-income tenants. While lead-based paint was banned in the United States by the Consumer Product Safety Commission in 1978,<sup>25</sup> the Environmental Protection Agency (“EPA”)<sup>26</sup> still believes that “[o]ld

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<sup>21</sup> Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, 126 PUB. HEALTH REP. 130, 130 (2011).

<sup>22</sup> Kaiser Comm’n on Medicaid and the Uninsured, *The Uninsured: A Primer—Key Facts About Health Insurance on the Eve of Coverage Expansions*, HENRY J. KAISER FAMILY FOUND. (Oct. 23, 2013), <http://kff.org/report-section/the-uninsured-a-primer-2013-6-how-will-the-affordable-care-act-affect-the-uninsured-population/>, archived at <http://perma.cc/JST2-YKLV>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> CPSC Announces Final Ban On Lead-Containing Paint, U.S. CONSUMER PROD. SAFETY COMM’N (Sept. 2, 1977), <http://www.cpsc.gov/en/Recalls/1977/CPSC-Announces-Final-Ban-On-Lead-Containing-Paint/>, archived at <http://perma.cc/ABQ5-CXEK>.

<sup>26</sup> *Lead Laws and Regulations*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/lead/lead-laws-and-regulations> (last updated Aug. 26, 2014), archived at <http://perma.cc/U7LF-93QC>.

lead-based paint is the most significant source of lead exposure in the U.S. today,”<sup>27</sup> noting specifically that “[m]ost homes built before 1960 contain heavily leaded paint”<sup>28</sup> and that “[s]ome homes built as recently as 1978 may also contain lead paint.”<sup>29</sup> The Centers for Disease Control and Prevention (“CDC”) states that “[a]pproximately 24 million housing units have deteriorated leaded paint and elevated levels of lead-contaminated house dust.”<sup>30</sup> It further notes that “[m]ore than 4 million of these dwellings are homes to one or more young children.”<sup>31</sup> CDC also estimates that “310,000 U.S. children aged 1 to 5 years have blood lead levels greater than 10 micrograms per deciliter ( $\mu\text{g}/\text{dL}$ ), a level at which harmful health effects are known to occur.”<sup>32</sup> Tenants of these homes risk hazardous exposure not only from direct contact, but also from airborne particles “created when lead-based paint is improperly removed from surfaces by dry scraping, sanding, or open-flame burning,” as well as from “outdoor sources, including contaminated soil tracked inside.”<sup>33</sup> The National Center for Healthy Housing also estimates that “renovation, remodeling and painting work . . . expose[s] 1.1 million children to the risk of lead poisoning each year” as a result of the approximately “4 million renovations in older homes [which] go unchecked” every year.<sup>34</sup>

### B. Proposed Policy Changes

The statistics are not encouraging and suggest that the federal government’s attempts to balance the need for housing with the right to environmental justice thus far seem to have been haphazard at best.<sup>35</sup>

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<sup>27</sup> *Remodeling Your Home? Have You Considered Indoor Air Quality?: Lead-Based Paint*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/iaq/homes/hip-lead.html> (last updated Sept. 12, 2014), archived at <http://perma.cc/AHM7-GH39> [hereinafter *Remodeling Your Home?*].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Lead: Prevention Tips*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nceh/lead/tips.htm> (last updated June 19, 2014), archived at <http://perma.cc/FDK9-4RBJ>.

<sup>31</sup> *Id.*

<sup>32</sup> DIV. OF EMERGENCY & ENVTL. HEALTH SERVS., CTRS. FOR DISEASE CONTROL, CHILDHOOD LEAD POISONING PREVENTION PROGRAM 1 (2006), available at <http://www.cdc.gov/nceh/publications/factsheets/ChildhoodLeadPoisoningPreventionProgram.pdf>.

<sup>33</sup> *Remodeling Your Home?*, *supra* note 27.

<sup>34</sup> *Call on EPA to Ensure Safe Renovations*, NAT’L CTR FOR HEALTHY HOUSING, <http://webcache.googleusercontent.com/search?q=cache:x9P6BeZ2KsoJ:www.nchh.org/Media/Press-Releases/Call-on-EPA-to-Ensure-Safe-Renovations.aspx+&cd=2&hl=en&ct=clnk&gl=us> (last visited Jan. 15, 2015), archived at <http://perma.cc/2PVM-ZHER>.

<sup>35</sup> See *infra* Parts I & II.

The best hope for a long-term and cost-effective solution is to initiate a comprehensive plan that will incentivize compliance by incorporating positive consequences for environmentally safe practices, such as tax incentives and mitigation of future liability.<sup>36</sup> The enforcement policy should prioritize obtaining the greatest possible access to crucial forms of environmental justice for the lowest straits of society.

To understand the issue at hand, this Note will first discuss and evaluate the relevant federal laws, both general and specific, that currently regulate environmental hazards related to housing, particularly lead and asbestos.<sup>37</sup> The Note will then discuss the issue of providing environmental justice for lower-income housing tenants, first providing proof of a disparate impact of noncompliance on those of lower income, particularly minorities, and then detailing the health ramifications that result when existing policies are insufficient to handle the problem.<sup>38</sup> The Note will conclude by providing support for the assertion that policy changes incentivizing compliance are the best means of enforcing environmental regulations while preserving the vitality of lower-income housing programs.<sup>39</sup>

## I. FEDERAL ENVIRONMENTAL REGULATIONS ON HOUSING

Numerous federal statutes govern the regulation of environmental hazards such as lead paint and asbestos, the first of which discussed is the CERCLA/Superfund.

### A. *CERCLA/Superfund*

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA/Superfund”)<sup>40</sup> “created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.”<sup>41</sup> Money collected from the tax was used to set up a “trust fund for cleaning up abandoned

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<sup>36</sup> See *infra* Conclusion.

<sup>37</sup> See *infra* Parts I & II.

<sup>38</sup> See *infra* Part III.

<sup>39</sup> See *infra* Part IV.

<sup>40</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–75 (2012) [hereinafter CERCLA/Superfund].

<sup>41</sup> *CERCLA Overview*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/superfund/policy/cercla.htm> (last updated Dec. 12, 2011), archived at <http://perma.cc/Y2GL-DWUX>.

or uncontrolled hazardous waste sites.”<sup>42</sup> One of CERCLA’s functions is to set up best management practices (“BMPs”), and the EPA has noted that “large scale residential development projects that may raze old housing in favor of new will frequently recontaminate areas where lead-contaminated soil was left at depth, without appropriate BMPs in place.”<sup>43</sup>

While CERCLA addresses lead in relation to potential soil contamination, it does not provide any instructions on dealing with existing lead hazards. In fact, EPA and the Department of Defense have agreed that the Toxic Substances Control Act (“TSCA”) already “provide[s] an efficient, effective, and legally adequate framework for addressing lead-based paint in residential areas and that, as a matter of policy, CERCLA/ Resource Conservation and Recovery Act (RCRA) will not be applied except in limited circumstances.”<sup>44</sup> The Superfund Lead-Contaminated Residential Sites Handbook clarifies that:

Superfund dollars *may* . . . be used in limited circumstances to remediate exterior lead-based paint in order to protect the overall site remedy (*i.e.*, to avoid re-contamination of soils that have been remediated) but generally only after determining that other funding sources [such as potentially responsible parties (PRPs), local governments, individual homeowners and other government programs] are unavailable.<sup>45</sup>

CERCLA’s unwillingness to expend money on residential lead-paint hazards is disappointing since it bars proponents of lead abatement from a significant source of funding. This unwillingness indicates a refusal to recognize the detrimental effects of lead poisoning, which may be as harmful as other forms of environmental contamination.<sup>46</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> ENVTL. PROT. AGENCY LEAD SITES WORK GROUP, U.S. ENVTL. PROT. AGENCY, OSWER 9285.7-50, SUPERFUND LEAD-CONTAMINATED RESIDENTIAL SITES HANDBOOK 53–54 (2003) [hereinafter SUPERFUND HANDBOOK], available at <http://www.epa.gov/superfund/lead/products/handbook.pdf>.

<sup>44</sup> Memorandum from The Dep’t of Def. & The U.S. Env’tl. Prot. Agency, Management of Lead-Based Paint in Residential and Non-Residential Areas at Base Realignment and Closure (BRAC) Properties (May 17, 1999), available at [http://www2.epa.gov/sites/production/files/documents/lead\\_bsd\\_paint\\_brac.pdf](http://www2.epa.gov/sites/production/files/documents/lead_bsd_paint_brac.pdf) (last visited Jan. 15, 2015).

<sup>45</sup> SUPERFUND HANDBOOK, *supra* note 43, at B-5.

<sup>46</sup> Lawrie Mott et al., *Our Children At Risk: The Five Worst Environmental Threats to Their Health*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/health/kids/ocar/ocarexec.asp> (last revised Nov. 25, 1997), archived at <http://perma.cc/6YHQ-XSKU>.

## B. TSCA

The TSCA is another relevant federal statute that was created “to protect the public and the environment from exposure to numerous chemical substances and mixtures.”<sup>47</sup> The TSCA is administered by EPA and it imposes requirements on hazardous materials such as lead and asbestos.<sup>48</sup> Section 1018<sup>49</sup> of the Real Estate Notification and Disclosure Rule of 1992,<sup>50</sup> also known as Title X, was an amendment to the TSCA which provides the EPA with the authority and duty to “promulgate regulations . . . for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease.”<sup>51</sup> Section 1018 provides that these regulations shall require the seller to fulfill certain obligations “before the purchaser or lessee is obligated under any contract to purchase or lease the housing.”<sup>52</sup> Among these obligations are the requirements that the seller or landlord provide a lead hazard information pamphlet, as prescribed by the EPA under Section 406 of the TSCA,<sup>53</sup> disclose “the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide . . . any lead hazard evaluation report available,”<sup>54</sup> and “permit the purchaser a 10-day period (unless the parties mutually agree upon a different period of time) to conduct a risk assessment or inspection for the presence of lead-based paint hazards.”<sup>55</sup> Note that this Lead-Based Paint Disclosure Rule does not actually preserve the buyer or seller’s right to a safe home by requiring sellers or landlords to remove lead-based paint or lead-based paint hazards. Instead, the rule only requires disclosure, which is unlikely to make a difference to a tenant who is at risk of homelessness or one who is already struggling to find landlords who will accept housing vouchers. Also of concern is that many of these requirements seem to provide landlords and sellers with loopholes.

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<sup>47</sup> *TSCA Enforcement Program*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/region1/enforcement/tsca/> (last updated May 9, 2014), *archived at* <http://perma.cc/5UM2-77KJ>.

<sup>48</sup> *Id.*

<sup>49</sup> *Section 1018: The Real Estate Notification and Disclosure Rule*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/region1/enforcement/leadpaint/section1018.html> (last updated Apr. 11, 2014), *archived at* <http://perma.cc/Y6ZH-ELGW>.

<sup>50</sup> 42 U.S.C. § 4851 (2012).

<sup>51</sup> § 4852d(a)(1).

<sup>52</sup> *Id.*

<sup>53</sup> § 4852d(a)(1)(A).

<sup>54</sup> § 4852d(a)(1)(B).

<sup>55</sup> § 4852d(a)(1)(C).



For instance, the provision that a seller may permit the purchaser a 10-day period unless the parties mutually agree upon a different period of time may open the door for sellers to routinely waive the 10-day period within the contract unless the purchaser asserts this right. Another example is the provision that landlords need only disclose known lead-based paint hazards and reports. This provision could actually encourage landlords to actively avoid knowledge of lead-paint hazards.

The EPA-approved information pamphlet<sup>56</sup> is described more fully in Section 406(a) of the TSCA. Section 406(a) requires the EPA, in consultation with HUD and Health and Human Services (“HHS”), to “publish, and from time to time revise, a lead hazard information pamphlet to be used in connection with this subchapter and section 4852d of title 42.”<sup>57</sup> Section 406(a) provides that the pamphlet must include information to tenants regarding the health risks associated with exposure to lead;<sup>58</sup> the presence of lead-based paint hazards in federally assisted, federally owned, and target housing;<sup>59</sup> and the risks of lead exposure for children under six years of age, pregnant women, women of childbearing age, persons involved in home renovation, and others residing in a dwelling with lead-based paint hazards.<sup>60</sup> Tenants must also be made aware of the risks of renovating a dwelling with lead-based paint hazards, and the approved methods for evaluating and reducing such hazards, along with information on the effectiveness of those methods in identifying, reducing, eliminating, or preventing exposure to lead-based paint.<sup>61</sup> In order to assist tenants in taking the necessary steps to protect their families from lead paint, the pamphlet must also provide information to tenants on how they can find contractors in their own locality who are certified to conduct lead-based paint hazard evaluation and reduction.<sup>62</sup> Similarly, the pamphlet must provide a listing with contact information for Federal, State, and local agencies in each State so that tenants can obtain information about the applicable laws in their own locality and access any

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<sup>56</sup> U.S. ENVTL. PROT. AGENCY, EPA-747-K-12-001, PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME (2013), available at [http://www2.epa.gov/sites/production/files/2013-09/documents/lead\\_in\\_your\\_home\\_brochure\\_land\\_b\\_w\\_508.pdf](http://www2.epa.gov/sites/production/files/2013-09/documents/lead_in_your_home_brochure_land_b_w_508.pdf).

<sup>57</sup> 15 U.S.C.S. § 2686(a) (2012).

<sup>58</sup> § 2686(a)(1).

<sup>59</sup> § 2686(a)(2). The term “target housing” is defined as “any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling.” § 2681(17).

<sup>60</sup> § 2686(a)(3).

<sup>61</sup> § 2686(a)(4)&(5).

<sup>62</sup> § 2686(a)(6).

available governmental and private assistance that they can utilize to ensure the safety of their families from lead-based paint.<sup>63</sup> The pamphlet must also advise tenants to conduct a risk assessment or inspection for lead-based paint prior to purchasing, leasing, or renovating any of the target housing.<sup>64</sup>

While the above requirements for the lead hazard information pamphlet are certainly sufficient to ensure that tenants will be educated as to the risks of lead poisoning, the actual effectiveness of the pamphlet will depend on three factors: 1) whether this regulation is actually enforced; 2) whether tenants actually read the pamphlet; and 3) whether tenants feel they are in a position to act on the information the pamphlet contains.

#### 1. On Whether the Lead Paint Disclosure Rule Is Actually Enforced

As to the question of enforcement, Congress established HUD's Office of Healthy Homes and Lead Hazard Control ("OHHLHC")<sup>65</sup> in 1991 to work in conjunction with HUD and EPA to ensure compliance of federal statutes on lead abatement.<sup>66</sup> OHHLHC's Lead Programs Enforcement ("LPE") Division "ensures regulatory compliance with the Lead-Based Paint Disclosure Rule and the Lead Safe Housing Rule" while its Policy and Standards Division "develops healthy homes guidelines and standards, oversees research studies, and provides technical assistance on policy issues for OHHLHC and other HUD Program Offices."<sup>67</sup> The LPE Division notes on its website that "[v]iolations of the Lead Disclosure Rule may result in civil money penalties of up to \$11,000 per violation,"<sup>68</sup> a significant fine that is certain to deter landlords from ignoring their duties under this rule. However, such a high level of landlord liability is also likely to decrease interest in public housing programs that bring landlords into greater contact with the federal government.

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<sup>63</sup> § 2686(a)(8).

<sup>64</sup> § 2686(a)(7).

<sup>65</sup> *Office of Healthy Homes and Lead Hazard Control (OHHLHC)*, U.S. DEP'T HOUSING & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/healthy\\_homes](http://portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes) (last visited Jan. 15, 2015), *archived at* <http://perma.cc/GL9A-UNL8>.

<sup>66</sup> *About the Office of Healthy Homes and Lead Hazard Control*, U.S. DEP'T HOUSING & URBAN DEV., <http://www.hud.gov/offices/lead/about.cfm> (last visited Jan. 15, 2015), *archived at* <http://perma.cc/28J4-WLY9>.

<sup>67</sup> *Id.*

<sup>68</sup> *Lead Programs Enforcement Division*, U.S. DEP'T HOUSING & URBAN DEV., <http://www.hud.gov/offices/lead/enforcement/index.cfm> (last visited Jan. 15, 2015), *archived at* <http://perma.cc/V4HC-J7FF>.

The LPE Division also notes many of the processes it utilizes to ensure compliance, including on-site inspections of sale and lease records, document request letters and/or subpoenas to landlords and property managers, and targeted investigations based on tips and complaints from the public.<sup>69</sup> Note that none of these measures involve inspection of the actual residence, but only document review. From approximately 1998 to 2008, the LPE Division self-reports conducting over 300 on-site document reviews covering over 400,000 housing units.<sup>70</sup> However, the LPE Division also notes that there were only forty eight settlements as of May 2008.<sup>71</sup> While the LPR Division has been able to collect a significant amount of money from these enforcement policies (“over \$850,000 in penalties and commitments of approximately \$30 million to test and abate lead-based paint and lead-based paint hazards in over 185,000 high-risk units,” as well as an additional \$600,000 to fund Child Health Improvement Projects),<sup>72</sup> it is unclear whether these policies have actually been effective in making meaningful change. Of particular concern is whether these compliance measures are even targeting the appropriate parties. One news source notes that according to EPA policy, “landlords can still be fined even if they prove that their property is free of lead-based paint,” in which case EPA will merely “adjust the proposed penalty downward” by up to fifty percent.<sup>73</sup> If many of the landlords who have been sanctioned for violations of the disclosure rule own property that was actually free of lead-based hazards in the first place, then the significant amount of money that the LPE Division has collected might not reflect as much change as the numbers initially suggest. While the LPE Division’s policy may raise a considerable amount of money that might then be re-allocated towards worthy causes, it may well have accomplished nothing to meet the disclosure rule’s ultimate purpose of ensuring that buyers and tenants are aware of lead-based hazards. The full effectiveness of EPA’s enforcement of the Lead-Based Paint Disclosure Rule cannot truly be analyzed unless EPA provides an in-depth report detailing the circumstances under which these penalty fines are being collected.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Elizabeth Harrington, *EPA Levies \$40,000+ Fines on Landlords Who Fail to Provide ‘EPA-Approved’ Pamphlets to Tenants*, CNSNEWS.COM (Aug. 24, 2012), <http://cnsnews.com/news/article/epa-levies-40000-fines-landlords-who-fail-provide-epa-approved-pamphlets-tenants>, archived at <http://perma.cc/5CNH-9N5B>.

The fact that the federal government reaps the monetary benefits of these lead-based paint hazard violations is ironic, since often it is the state housing authorities that are sued and have to pay sizable judgments when actual public housing violations are found to have resulted in significant harm to tenants. In one recent situation, the Baltimore Housing Authority had to figure out how to pay a \$6.8 million judgment to satisfy judgments for child lead poisoning victims.<sup>74</sup> The judgment was paid by “dipping into funds [the local PHA] receive[d] to operate public housing and subsidize rents for low-income families in private housing,” funds which “would have been used to help pay rents for 700 households in a city with a severe shortage of affordable housing.”<sup>75</sup> More disturbing is the fact that these judgments would have been significantly lower had the local PHA paid them out immediately.<sup>76</sup> The housing authority admitted that “[t]he original judgments totaled \$7.5 million when they were rendered . . . [b]ut as judgments dating to 2007 went unpaid and interest accrued annually at the rate of 10 percent, the agency wound up paying nearly \$3.8 million more.”<sup>77</sup> The Housing Commissioner explained that he was waiting on HUD’s authorization to use federal funds intended to promote public housing efforts to pay out the judgments, a process which apparently took nearly a year.<sup>78</sup> The commissioner was also holding out in hopes of finding a “‘global resolution’ to the . . . 316 other pending cases claiming more than \$900 million in damages.”<sup>79</sup> This ridiculous situation highlights the need for a more comprehensive policy in handling violations of environmental regulations. HUD, not the individual local PHAs, should be the proper target of the lawsuit to ensure that such lawsuits are dealt with promptly and that any resulting judgments are disbursed immediately rather than delayed to the detriment of both the federal agency and the victims. The federal government is also in a better place to cap liability for violations in a fair manner that provides sufficient

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<sup>74</sup> Timothy B. Wheeler & Scott Calvert, *Housing Agency Pays \$6.8 Million to Lead Paint Victims: Federal Funds to Help Poor Pay Rent Tapped for Outstanding Judgments*, BALTIMORE SUN (Aug. 14, 2013), [http://articles.baltimoresun.com/2013-08-14/news/bs-md-ci-housing-authority-judgments-20130813\\_1\\_housing-authority-judgments-housing-agency](http://articles.baltimoresun.com/2013-08-14/news/bs-md-ci-housing-authority-judgments-20130813_1_housing-authority-judgments-housing-agency), archived at <http://perma.cc/WJ84-BNZM>.

<sup>75</sup> *Id.*

<sup>76</sup> Timothy B. Wheeler, *Lead Paint Judgments Against Baltimore Inflated by Delay: Housing Authority Paid Nearly \$3.8 Million in Interest*, BALTIMORE SUN (Aug. 20, 2013), [http://articles.baltimoresun.com/2013-08-20/news/bs-md-ci-lead-paint-payment-20130820\\_1\\_lead-paint-judgments-housing-authority-graziano](http://articles.baltimoresun.com/2013-08-20/news/bs-md-ci-lead-paint-payment-20130820_1_lead-paint-judgments-housing-authority-graziano), archived at <http://perma.cc/7LYC-64TW>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

compensation to victims while encouraging compliance and ensuring that judgments are both reasonable and cross-jurisdictionally consistent.

2. On Whether Tenants Actually Read the Lead-Based Paint Information Pamphlet

Providing the pamphlet does not necessarily ensure that tenants will read it. It should be noted that although simply written and straightforward, the pamphlet is nineteen pages long.<sup>80</sup> Landlords only have an obligation to provide the pamphlet, not ensure that tenants pay attention to it.<sup>81</sup> Despite the fact that the LPE Division seems to expend the majority of its effort on ensuring that tenants receive this pamphlet from their landlords, it does not seem to have any measures in place to evaluate whether the pamphlet makes any difference in the actual behavior of tenants.

3. On Whether Tenants Are in a Position to Act on the Information The Pamphlet Contains

Even if tenants do read the pamphlet, how likely are they to act on the information provided in order to ensure that their families are protected from exposure to lead hazards? Will the information pamphlet make a difference to a tenant who is at risk of homelessness or one who is already struggling to find landlords who will accept housing vouchers and may not want to risk upsetting a landlord who finally agrees? These are questions which HUD, EPA, and the LPE Division have not addressed, yet without answers to these questions, the effectiveness of the existing regulations cannot be evaluated adequately.

C. *The Lead Renovation, Repair, and Painting Rule*

Under Section 745.84(c) of the Lead Renovation, Repair, and Painting Rule, EPA also requires contractors and construction professionals that work in pre-1978 housing or child-occupied facilities to follow lead-safe work practice standards.<sup>82</sup> Section 745.84(c) of the Lead Renovation, Repair, and Painting Rule, which relates specifically to renovations in child-occupied facilities, requires that no more than sixty days before beginning renovation activities in any child-occupied facility, the firm

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<sup>80</sup> PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME, *supra* note 56.

<sup>81</sup> Harrington, *supra* note 73.

<sup>82</sup> Lead Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,692 (Apr. 22, 2008) (to be codified at 40 C.F.R. § 745).

performing the renovation must provide the owner of the building with their own version of the lead-based hazard information pamphlet.<sup>83</sup> These contractors and construction professionals must then either “[o]btain, from the owner, a written acknowledgment that the owner has received the pamphlet”<sup>84</sup> or “[o]btain a certificate of mailing at least 7 days prior to the renovation.”<sup>85</sup> While this rule may ensure that the owner of the building is apprised of the specific lead based hazards that might occur during renovation, it is only effective in protecting residents of the building if the owner is the resident. The rule does nothing to ensure that the owner passes the relevant information onto his tenants, the very people who are actually at risk from such renovation.

#### D. *Asbestos Ban*

Asbestos is another hazardous environmental material that poses a risk to tenants, particularly those of lower income.<sup>86</sup> Asbestos is a mineral fiber that has been used “in a variety of building construction materials for insulation and as a fire retardant,” including “roofing shingles, ceiling and floor tiles . . . and asbestos cement products,” due to its fiber strength and heat resistant properties.<sup>87</sup> Although EPA attempted to ban most asbestos-containing products in 1989,<sup>88</sup> the Fifth Circuit Court of Appeals vacated the ban,<sup>89</sup> holding that EPA “failed to demonstrate that the ruling was the ‘least burdensome alternative’ for eliminating the ‘unreasonable risk’ of exposure to asbestos.”<sup>90</sup>

Due to the 1989 asbestos ban being vacated, the EPA has only been able to ban specific asbestos-related products and uses.<sup>91</sup> For example,

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<sup>83</sup> 40 C.F.R. § 745.84(c)(1)(i) (2010).

<sup>84</sup> § 745.84(c)(1)(i)(A).

<sup>85</sup> § 745.84(c)(1)(i)(B).

<sup>86</sup> *Environmental Justice Equals Healthy, Sustainable, and Equitable Communities*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oecaerth/environmentaljustice/sustainability/index.html> (last updated Aug. 7, 2013), *archived at* <http://perma.cc/89YC-URJH>.

<sup>87</sup> *Learn About Asbestos*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/asbestos/learn-about-asbestos#asbestos> (last updated Mar. 16, 2014), *archived at* <http://perma.cc/79U3-UCDW>.

<sup>88</sup> Asbestos: Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions; 54 Fed. Reg. 29,460 (July 12, 1989) (to be codified at 40 C.F.R. § 763).

<sup>89</sup> *Corrosion Proof Fittings v. U.S. Env'tl. Prot. Agency*, 947 F.2d 1201 (5th Cir. 1991).

<sup>90</sup> *The Failed EPA Asbestos Ban*, ENVTL. WORKING GROUP (Mar. 4, 2004), <http://www.ewg.org/research/asbestos-think-again/asbestos-still-not-banned>, *archived at* <http://perma.cc/GW2F-RU8B>.

<sup>91</sup> *U.S. Federal Bans on Asbestos*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov>

the Clean Air Act (“CAA”)<sup>92</sup> bans “[a]sbestos pipe insulation and asbestos block insulation on facility components, such as boilers and hot water tanks, if the materials are either pre-formed (molded) and friable or wet-applied and friable after drying.”<sup>93</sup> It also bans “[s]pray-on application of materials containing more than 1% asbestos to buildings, structures, pipes, and conduits unless certain conditions . . . are met.”<sup>94</sup> Despite such rules, the Environmental Working Group estimates that more than thirty million pounds of asbestos are imported into the U.S. each year.<sup>95</sup> However, the United States Consumer Product Safety Commission (“CPSC”) claims that “[m]ost products made today do not contain asbestos,” and that the real risk of asbestos exposure arises from the fact that “until the 1970s, many types of building products and insulation materials used in homes contained asbestos,” including steam pipes, boilers, furnace ducts, resilient floor tiles, vinyl sheet flooring, adhesives used for installing floor tile, soundproofing or decorative material sprayed on walls and ceilings, patching and joint compounds for walls and ceilings, textured paints, and asbestos cement roofing, shingles, and siding.<sup>96</sup> The CPSC cautions that some of these materials “may release asbestos fibers if damaged, repaired, or removed improperly.”<sup>97</sup> To mitigate exposure to such hazards, the Asbestos National Emission Standards for Hazardous Air Pollutants (“NESHAP”)<sup>98</sup> requires the owner of the building to notify the appropriate state agency before any demolition, or before any renovations of buildings that could contain a certain threshold amount of asbestos or asbestos-containing material.<sup>99</sup>

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/asbestos/us-federal-bans-asbestos (last updated Mar. 16, 2014), *archived at* <http://perma.cc/XTE9-TYPR>.

<sup>92</sup> *Clean Air Act Requirements and History*, UNITED STATES ENVTL. PROTECTION AGENCY, <http://www.epa.gov/air/caa/requirements.html> (last updated Aug. 15, 2013), *archived at* <http://perma.cc/EUB6-QSF2>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Asbestos Bailout Fails*, ENVTL. WORKING GROUP (Apr. 22, 2004), <http://www.ewg.org/research/asbestos-think-again/asbestos-bailout-fails-april-2004>, *archived at* <http://perma.cc/T7UF-ZXDH>.

<sup>96</sup> *Asbestos in the Home*, CONSUMER PRODUCT SAFETY COMMISSION, <http://www.cpsc.gov/en/Safety-Education/Safety-Guides/Home/Asbestos-In-The-Home/> (last visited Jan. 15, 2015), *archived at* <http://perma.cc/AZ7T-X7N5>.

<sup>97</sup> *Id.*

<sup>98</sup> Approval of the Clean Air Act, Section 112(l), Authority for Hazardous Air Pollutants: Asbestos Management and Control; State of New Hampshire Department of Environmental Services, 71 Fed. Reg. 68,746 (Nov. 28, 2006) (to be codified at 40 C.F.R. §§ 61, 63).

<sup>99</sup> *Asbestos NESHAP*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/asbestos/asbestos-neshap> (last updated Jan. 24, 2014), *archived at* <http://perma.cc/Z6SZ-SU26>.

## II. FEDERALLY OWNED/ASSISTED HOUSING LAWS GOVERNING ENVIRONMENTAL HAZARDS:

In addition to the above general federal laws, more specific guidelines exist for federally owned or assisted housing programs, designed to ensure that these programs provide safe housing to participants.

### A. *The Residential Lead-Based Paint Hazard Reduction Act of 1992, Section 1012*

Section 1012 of the Residential Lead-Based Paint Hazard Reduction Act of 1992<sup>100</sup> sets requirements for housing receiving Federal assistance. The Requirements for the Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance implements sections 1012 and 1013 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 in order to “ensure . . . that housing receiving Federal assistance or being sold by the Federal Government does not have lead-based paint hazards that could cause lead poisoning in young children.”<sup>101</sup>

Section 1012 reiterates the previously described requirement of “the provision of lead hazard information pamphlets, developed pursuant to Section 406 of the Toxic Substances Control Act . . . to purchasers and tenants.”<sup>102</sup> For the most part, the remaining portions of Section 1012 extend additional requirements only in the case of renovation or rehabilitation projects, particularly those funded by Federal money. These portions require:

- (C) inspection for the presence of lead-based paint prior to federally-funded renovation or rehabilitation that is likely to disturb painted surfaces;
- (D) reduction of lead-based paint hazards in the course of rehabilitation projects receiving less than \$ 25,000 per unit in Federal funds;

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<sup>100</sup> 42 U.S.C.S. §§ 4851–56 (2012).

<sup>101</sup> Requirements for the Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 69 Fed. Reg. 34,262 (June 21, 2004) (to be codified at 24 C.F.R. §§ 35, 200, 291, 598, 891, 982, 983).

<sup>102</sup> 42 U.S.C. § 4822(a)(1)(A) (2006). *See supra* Part I.B for information regarding Section 406 of the TSCA.



- (E) abatement of lead-based paint hazards in the course of substantial rehabilitation projects receiving more than \$25,000 per unit in Federal funds;
- (F) . . . provision of notice to occupants describing the nature and scope of such activities.<sup>103</sup>

Exceptions to this trend are the requirements that “periodic risk assessments and interim controls [be conducted] in accordance with a schedule determined by the Secretary”<sup>104</sup> and that the “actual risk assessment or inspection reports (including available information on the location of any remaining lead-based paint on a surface-by-surface basis)” be provided to the occupants.<sup>105</sup> HUD provides ample guidelines for how such interim controls should be conducted.<sup>106</sup>

#### B. *Subpart H of the Lead-Safe Housing Rule*

Subpart H of the Lead-Safe Housing Rule is another relevant Federal housing statute, regulating in particular environmental safety hazards in Project Based Assistance.<sup>107</sup> The Section 8 Housing Voucher Program is one such federal assistance housing program to which the rule applies.<sup>108</sup> HUD self-reports that “[t]hrough Project-Based Section 8 Rental Assistance, HUD assists more than 1.2 million extremely low-, low- and very low-income families in obtaining decent, safe, and sanitary housing.”<sup>109</sup>

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<sup>103</sup> § 4822(a)(1)(C)–(F).

<sup>104</sup> § 4822(a)(1)(B).

<sup>105</sup> § 4822(a)(1)(F).

<sup>106</sup> See *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (2012 Edition)*, U.S. DEP’T HOUSING & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/healthy\\_homes/lbp/hudguidelines](http://portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/lbp/hudguidelines) (last visited Jan. 15, 2015), *archived at* <http://perma.cc/9D6Y-AM4B>.

<sup>107</sup> 24 C.F.R. § 35.725 (2004).

<sup>108</sup> 42 U.S.C. § 1437f(c)(2)(B) (2012) (“The Secretary may (at the discretion of the Secretary and subject to the availability of appropriations for contract amendments), on a project by project basis for projects receiving project-based assistance, provide adjustments to the maximum monthly rents to cover the costs of evaluating and reducing lead-based paint hazards, as defined in section 4851b of this title.”).

<sup>109</sup> *Renewal of Section 8 Project-Based Rental Assistance*, U.S. DEP’T HOUSING & URBAN DEV., <http://portal.hud.gov/hudportal/HUD?src=/hudprograms/rs8pbra> (last visited Jan. 15, 2015), *archived at* <http://perma.cc/2YDK-GP56>.

## III. CONSEQUENCES TO LOW-INCOME TENANTS

Lack of environmental justice for lower-income housing tenants is a large and widespread issue.

A. *High Lead Levels in Children in Public Housing*<sup>110</sup>

Congressional findings from 1992 indicated that “low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under age 6, with minority and low-income communities disproportionately affected.”<sup>111</sup> Furthermore, “pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint.”<sup>112</sup> The findings indicated that “the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children.”<sup>113</sup>

These congressional findings, though outdated, are especially relevant because of the finding that “despite the enactment of laws in the early 1970s requiring the Federal Government to eliminate as far as practicable lead-based paint hazards in federally owned, assisted, and insured housing, the Federal response to this national crisis remains severely limited.”<sup>114</sup> The continuing relevance of these findings is supported by the *National Health and Nutrition Examination Survey*, which was conducted by the Center for Disease Control in 2011.<sup>115</sup> The findings indicated that environmental risk is racially disproportionate.<sup>116</sup> Specifically, the survey results found that “[t]he risk for lead exposure is disproportionately higher for children who are poor, non-Hispanic black, living in large metropolitan areas, or living in older housing.”<sup>117</sup>

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<sup>110</sup> Felicia A. Rabito et al., *Lead Levels among Children Who Live in Public Housing*, 14 EPIDEMIOLOGY 3 (2003).

<sup>111</sup> 42 U.S.C. § 4851.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *National Health and Nutrition Examination Survey*, CENTERS FOR DISEASE CONTROL (Sept. 2013), [http://www.cdc.gov/nchs/nhanes/nhanes2011-2012/PbCd\\_G.htm](http://www.cdc.gov/nchs/nhanes/nhanes2011-2012/PbCd_G.htm), archived at <http://perma.cc/2VCU-SDLT>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

The Center for Disease Control and Prevention (“CDC”) also estimates that “310,000 U.S. children aged 1 to 5 years have blood lead levels greater than 10 micrograms per deciliter ( $\mu\text{g}/\text{dL}$ ), a level at which harmful health effects are known to occur.”<sup>118</sup> The American Healthy Homes Survey’s Lead and Arsenic Findings of 2011,<sup>119</sup> which was conducted by HUD’s Office of Healthy Homes and Lead Hazard Control, provides further proof of the prevalence of the problem. The survey estimates that “37.1 million homes (34.9%) have lead-based paint (LBP) somewhere in the building, of which 23.2 million (21.9% of all homes) have one or more lead-based paint hazards.”<sup>120</sup> The survey also estimated that “3.6 million homes with children less than 6 years of age have one or more LBP hazards,” including “1.1 million low income households (< \$30,000/yr).”<sup>121</sup> The survey noted that “[l]ow income households had a higher prevalence of LBP hazards (29%) than higher income households (18%),” though it also noted that “[h]ouseholds receiving Government housing assistance had a lower prevalence of LBP hazards (12%) compared to those not receiving support (22%),”<sup>122</sup> which may be an indication that increased federal environmental regulations geared specifically towards public housing have had partial success in addressing the situation.

### *B. Harmful Health Effects of Environmental Hazards*

#### 1. Health Effects as a Result of Exposure to Lead Paint

Exposure to lead paint poses various environmental health hazards to occupants. The most significant health hazards are posed to children, with “low-level lead poisoning affect[ing] the developing brain and nervous system, causing reductions in IQ and attention span; reading and other learning disabilities; hyperactivity; aggressive behavior; hearing loss; and coordination problems.”<sup>123</sup> Research suggests that “the chronic stressors of

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<sup>118</sup> CHILDHOOD LEAD POISONING PREVENTION PROGRAM, *supra* note 32; *see also* discussion *infra* Part III.B.1.

<sup>119</sup> OFFICE OF HEALTHY HOMES, U.S. DEPT OF HOUSING & URBAN DEV., AMERICAN HEALTHY HOMES SURVEY: LEAD AND ARSENIC FINDINGS 4 (2011), *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=AHHS\\_REPORT.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=AHHS_REPORT.pdf).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Cushing N. Dolbeare & Don Ryan, *Getting the Lead Out: Controlling Lead Paint Hazards in Housing*, NAT’L HOUSING INST. (Sept./Oct. 1997), <http://www.nhi.org/online/issues/95/lead.html>, *archived at* <http://perma.cc/M9BT-GZWW>.

poverty may fundamentally alter the way the body reacts to pollutants, especially in young children. Several studies have found that such stress may exacerbate the effects of lead on children's developing brains.<sup>124</sup> One study claims that "per capita use of lead in gasoline from 1941–1975 explained 90% of the variation in the USA violent crime rate from 1964 to 1998."<sup>125</sup>

## 2. Health Effects as a Result of Exposure to Asbestos

Research indicates that the "[i]nhalation of asbestos fibers is the primary cause of asbestos-related disease[s]," including asbestosis, lung cancer, and mesothelioma.<sup>126</sup> Ovarian cancer and laryngeal cancer have also been confirmed to be caused by asbestos, while gastrointestinal cancer and colorectal cancer are thought to have an association.<sup>127</sup> Some studies also report that exposure to asbestos leads to an increased risk for cancer of the esophagus and kidney.<sup>128</sup>

### C. Potential Benefits of Reform

According to proponents of reform, "strict enforcement of housing policies to prevent childhood blood lead elevation results in decreased societal costs due to the avoidance of future medical and special education and to increased productivity of resident children."<sup>129</sup>

While some proponents have suggested that the problems of environmental justice and affordable housing can both be solved through the

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<sup>124</sup> Lindsey Konkel, *Stress + Pollution = Health Risks for Low-Income Kids*, ENVTL. HEALTH NEWS (June 6, 2012), <http://www.environmentalhealthnews.org/ehs/news/2012/pollution-poverty-and-people-of-color-stress-day-3>, archived at <http://perma.cc/GR4G-N76H>.

<sup>125</sup> RICK NEVIN, *THE ANSWER IS LEAD POISONING* 15 (2012), available at [http://www.ricknevin.com/uploads/The\\_Answer\\_is\\_Lead\\_Poisoning.pdf](http://www.ricknevin.com/uploads/The_Answer_is_Lead_Poisoning.pdf). See also JESSICA WOLPAW REYES, NAT'L BUREAU OF ECON. RES., *ENVIRONMENTAL POLICY AS SOCIAL POLICY? THE IMPACT OF CHILDHOOD LEAD EXPOSURE ON CRIME* (2007), available at [http://www.nber.org/papers/w13097.pdf?new\\_window=1](http://www.nber.org/papers/w13097.pdf?new_window=1).

<sup>126</sup> *Asbestos Health Risks*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/region8/asbestos-health-risks> (last visited Jan. 15, 2015), archived at <http://perma.cc/QJ7L-3VRU>.

<sup>127</sup> *Asbestos Cancer Facts and Statistics*, ASBESTOS.COM, <http://www.asbestos.com/cancer/facts.php> (last visited Jan. 15, 2015), archived at <http://perma.cc/B7JH-ATFE>.

<sup>128</sup> *Id.*

<sup>129</sup> Mary Jean Brown, *Costs and Benefits of Enforcing Housing Policies to Prevent Childhood Lead Poisoning*, 22 *MED. DECISION MAKING* 482, 482 (2002).

implementation of green housing,<sup>130</sup> reforms revising existing laws and enforcement policies are a more likely means of solving both of these problems. Although proponents claim that instead of decreasing property values, green, affordable housing can be a force for economic vitality,<sup>131</sup> green building would be difficult to implement in a cost-effective manner that would reach the lowest straits of society.<sup>132</sup> While green housing can be affordable, it cannot work as a comprehensive plan that will feasibly solve the dilemma of low-income housing for the economically disadvantaged. Even if low-income tenants, or the federal government on their behalf, were able to bear the upfront costs of green building, the anticipated energy savings could very well fail to cover the extra costs. Furthermore, in green building “the price of maintaining, repairing and even getting insurance for green products can often be higher” as well.<sup>133</sup>

#### IV. INCENTIVIZING COMPLIANCE

While certain areas, particularly those suffering from a major housing problem, have begun to pass laws forbidding landlords from discriminating against tenants solely on the basis that they will pay with a Section 8 housing voucher,<sup>134</sup> the trend is still limited to a few cities, counties, and states.<sup>135</sup> A recent attempt to pass such a law in Maryland resulted in defeat due to claims by the opposition that the bill would force landlords to work with HUD against their will.<sup>136</sup> Thus, the unwillingness of landlords to participate in Section 8 housing programs must be considered when determining how to regulate and enforce measures against environmental hazards.

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<sup>130</sup> Kevin C. Foy, *Home Is Where The Health Is: The Convergence Of Environmental Justice, Affordable Housing, And Green Building*, 30 PACE ENVTL. L. REV. 1 (2012).

<sup>131</sup> *Id.* at 24.

<sup>132</sup> *Id.*

<sup>133</sup> Anna Prior, *The Hidden Cost of Going ‘Green,’* MARKETWATCH (Dec. 13, 2010), <http://www.marketwatch.com/story/the-hidden-cost-of-gong-green-1292011716331>, archived at <http://perma.cc/UDN9-6WAF>.

<sup>134</sup> *Section 8 Assistance: Frequently Asked Questions—Section 8 Tenant Questions*, N.Y.C. HOUSING AUTHORITY, [http://www.nyc.gov/html/nycha/html/section8/lh\\_ten\\_faqs.shtml#q52](http://www.nyc.gov/html/nycha/html/section8/lh_ten_faqs.shtml#q52) (last visited Jan. 15, 2015), archived at <http://perma.cc/68BP-9MR6>.

<sup>135</sup> See, e.g., Kevin Herrera, *Ruling: Landlords Don’t Have to Accept Section 8 Tenants*, TENANTS TOGETHER (Apr. 12, 2010), <http://www.tenants-together.org/article.php?id=1336>, archived at <http://perma.cc/4CJV-PFBL>.

<sup>136</sup> Matt Bush, *Maryland Housing Discrimination Debate Centers On Section 8*, WAMU 88.5 (Mar. 27, 2013), [http://wamu.org/news/13/03/27/maryland\\_housing\\_debate\\_centers\\_on\\_section\\_8](http://wamu.org/news/13/03/27/maryland_housing_debate_centers_on_section_8), archived at <http://perma.cc/P7KR-4QKD>.

The best means of enforcing environmental regulations on lower-income housing programs without decreasing landlord participation in such programs is to incentivize compliance. Currently in the Section 8 Housing Voucher Program, the landlord's main incentive seems to be the ability to obtain consistent rent payment from the federal government, presumably a more reliable source of rental income than tenants.<sup>137</sup> Other incentives include a broadened and more consistent tenant base (since Section 8 housing is so high in demand), the opportunity to conduct more targeted marketing to find tenants through local PHA offices and web sites, and some basic prescreening of tenants which the federal government already conducts for the landlord.<sup>138</sup>

Upon a closer look, some of these incentives are not as encouraging as they might first appear. Though the PHAs will conduct basic screening, they are only required to provide the landlord with information on the type of screening they have conducted on the tenant, the tenant's current and previous addresses, and the name and addresses of the tenant's current and previous landlords.<sup>139</sup> The only other assurance that the landlord has is that "Public Housing Authorities will not provide Housing Choice Vouchers to those who have been evicted due to drug related activities within the last three years."<sup>140</sup> Thus, landlords will most definitely have to conduct their own thorough background check on tenants, notwithstanding the PHA offices' basic screening.<sup>141</sup> Furthermore, while the government might be a reliable source of rental income, Section 8 tenants might still be responsible for a portion of their rent.<sup>142</sup> Though it is argued that the risk of losing their voucher presents an incentive for Section 8 tenants to pay their portion of the rent,<sup>143</sup> the tenant's ability to fulfill their own responsibilities in the program in a timely and orderly fashion will vary by person and situational context.

Of further concern to landlords are administrative backups that may delay the first few rental payments for as many as three to four months.<sup>144</sup> Such bureaucratic delays are of particular concern to landlords

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<sup>137</sup> Erin Eberlin, *Advantages of Renting to Section 8 Tenants: Pros of the Housing Choice Voucher Program*, ABOUT.COM (Mar. 3, 2014), <http://landlords.about.com/od/Landlord101/a/Advantages-Of-Renting-To-Section-8-Tenants.htm>, archived at <http://perma.cc/93XY-LBPS>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Eberlin, *supra* note 137.

<sup>144</sup> *Id.*

who own fewer rental units and are reliant on rental income to meet their own expenses. Other causes of concern are frequent inspections (which might expose landlords to liability) and the fact that the Section 8 program does not pay the tenant's security deposit, which means that landlords will have to collect the deposits from tenants, potentially resulting in more complications.<sup>145</sup> Perceptions that Section 8 tenants are destructive and that offering Section 8 housing will drive away other tenants who assume that the property is subpar also hurt landlord participation rates.<sup>146</sup>

Landlords who are opposed to participation in the Section 8 housing program argue that the additional hurdles and expenses incurred in complying with stricter regulations make the program financially valueless, if not outright risky. One article notes that "[m]any property owners and real estate agents say the program is overly cumbersome, and in a hot rental market. . . there is no need to take on a Section 8 tenant."<sup>147</sup> The article also notes that the program is "riddled with bureaucratic problems."<sup>148</sup> Another article notes that "there is a growing trend amongst landlords to flatly refuse to rent to anyone on Section 8, and some have blatantly tried to evict those tenants who are because the owner no longer wants to participate in the program."<sup>149</sup> These landlords are particularly frustrated by the fact that participation in the program involves preparing more paperwork and inviting more governmental oversight through inspections.<sup>150</sup> In yet another article, a landlord claimed that, "[A] landlord new to Section 8 is going to lose two months' rent just getting the necessary approvals."<sup>151</sup> This landlord also expressed hostility to Section 8 inspectors whom he claims sanctions landlords and dock rental payments for minor infractions.<sup>152</sup>

If existing incentives are not strong enough to override landlord concerns about government interference, then what other incentives could encourage participation? Landlords may find lower-income housing more attractive if participation in environmentally friendly programs would

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES (Oct. 30, 2007), <http://www.nytimes.com/2007/10/30/nyregion/30section.html?pagewanted=all>, *archived at* <http://perma.cc/44FD-ZAMJ>.

<sup>148</sup> *Id.*

<sup>149</sup> Herrera, *supra* note 135.

<sup>150</sup> *Id.*

<sup>151</sup> James W. Gatton, *Section 8 Housing Is a Nightmare for Landlords*, BALT. SUN (May 13, 2013), [http://articles.baltimoresun.com/2013-05-12/news/bs-ed-housing-vouchers-20130512\\_1\\_section-8-inspector-landlords-vouchers](http://articles.baltimoresun.com/2013-05-12/news/bs-ed-housing-vouchers-20130512_1_section-8-inspector-landlords-vouchers), *archived at* <http://perma.cc/2LFP-VXLQ>.

<sup>152</sup> *Id.*

mitigate future liability. While there may be instances where such mitigation could actually be to the detriment of lower income tenants, in the majority of cases it may provide greater access to crucial forms of environmental justice. Lower-income housing programs become less popular among landlords when the federal government establishes more stringent enforcement policies because it exposes landlords to increased liability.<sup>153</sup> Even if the government makes compliance easier, landlords would still hesitate to participate due to the fear of increased liability.<sup>154</sup> A strong example is provided by the penalties for failure to disclose information concerning lead upon transfer of residential property.<sup>155</sup> Under the TSCA, “[a]ny person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such individual.”<sup>156</sup>

While taking away all liability would leave landlords with no incentive to comply with regulations and thus prevent lower income tenants from obtaining environmental justice, mitigating liability when landlords take environmentally beneficial actions, without extinguishing it entirely, would reassure landlords and serve as positive reinforcement that incentivizes environmentally safe practices.

The Federal government could also offer higher rent supplements or tax deductions to landlords who respond to the environmental needs of their tenants proactively. Currently, the IRS views expensive cleanups of environmental hazards such as lead paint as “improvements that must be depreciated over 27.5 years” rather than a repair that can be deducted in a single year.<sup>157</sup> The IRC Section 263 on capital expenditures states that, “No deduction shall be allowed for . . . Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.”<sup>158</sup>

Holding payments, which “compensate landlords for the time units are vacant while inspections and lease approvals are being conducted,” are another possible means of incentivizing compliance.<sup>159</sup> As noted previously,

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<sup>153</sup> See *supra* Part I.B.1.

<sup>154</sup> See *supra* Part I.B.1.

<sup>155</sup> 42 U.S.C. § 4852d(b)(3) (2012).

<sup>156</sup> *Id.*

<sup>157</sup> Stephen Fishman, *Landlord Tax Deductions for Environmental Cleanup Costs*, NOLO, <http://www.nolo.com/legal-encyclopedia/landlord-tax-deductions-environmental-cleanup-costs.html> (last visited Jan. 15, 2015), archived at <http://perma.cc/S8SC-TZHX>.

<sup>158</sup> 26 U.S.C. § 263(a) (2012).

<sup>159</sup> MARGERY AUSTIN TURNER ET AL., THE URBAN INST., SECTION 8 MOBILITY AND NEIGHBORHOOD HEALTH: EMERGING ISSUES AND POLICY CHALLENGES 35 (2000), available at [http://www.urban.org/UploadedPDF/sec8\\_mobility.pdf](http://www.urban.org/UploadedPDF/sec8_mobility.pdf).



a landlord may lose two months simply obtaining the necessary approvals to accept a Section 8 tenant.<sup>160</sup> If the landlord were provided with compensation for this wait time, it could greatly incentive landlord interest and degree of cooperation, while decreasing the hostility between landlords and PHAs.

While efforts to incentivize landlord participation could be costly, they may prove to be less costly than the alternative option of waiting for courts to order millions of dollars in damages that will provide justice for the few with the very money that was meant to keep the destitute off the streets.<sup>161</sup> Costs may further be reduced if the federal government provides environmental cleanup companies incentives to offer low-cost services to landlords who participate in lower-income housing programs.

#### CONCLUSION

Providing affordable housing that is environmentally sound requires balancing a number of interests: landlord property rights, tenant civil rights, and the federal government's duty to enforce its own environmental regulations. The continuing risks posed by lead-based paint and asbestos exposure provide a poignant example. Although there has been progress in limiting these environmental risks, existing Federal measures do not fully address the problem of providing environmental justice to lower income tenants who are disparately impacted by failures in the existing system. As illustrated in this Note, current regulations are not sufficient and must be revised to more directly address the problem. Enforcement measures also need to be evaluated in more depth. In particular, the purported success of existing measures needs to be more narrowly evaluated. Since landlord participation is so vital to the strength of housing programs such as Section 8, which is designed to prevent lower income individuals from falling into homelessness, it is also imperative that the federal government undertake a comprehensive plan that incentivizes compliance with environmental regulations without making participation in vital lower incoming housing programs unpopular among landlords. The costliness of such a plan is likely to be minimal in comparison to the large social risks and financial liabilities which would be incurred if the issues pointed out in this Note are ignored.

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<sup>160</sup> Gatton, *supra* note 151.

<sup>161</sup> Wheeler, *supra* note 76.

