Chapter XVI

OTHER REGULATED MATERIALS

A number of other programs regulated "hazardous" or other materials. This discussion will address a few.

A. Radioactive Materials

The Atomic Energy Act, 42 U.S.C. §§2011, *et seq.*, was enacted in 1954 to provide for the development, utilization and control of atomic energy for military and commercial purposes. The Nuclear Regulatory Commission ("NRC") has jurisdiction over regulation of radioactive materials, including nuclear power plants. Generally, state and local regulation of nuclear power facilities is preempted by the Atomic Energy Act. All nuclear power plants are required to obtain permits from NRC for both construction and operation. *See* 10 C.F.R. Part 50.

Following the accident at Three Mile Island in 1979, NRC, acting in cooperation with the FEMA, strengthened emergency planning and response requirements for nuclear power plants. The agencies developed NUREG-0654, *Criteria for Preparation and Evacuation of Nuclear Power Plants*, extensively revised applicable regulations, and entered into a Memorandum of Understanding to coordinate their efforts.

Under these requirements, a "preliminary safety analysis report," including a preliminary emergency plan, must be included in each application to construct a nuclear power plant. 10 C.F.R. §50.34(a). The preliminary safety analysis report must include a preliminary plan for coping with emergencies, which contains all items set forth in Appendix E to 10 C.F.R. Part 50.

Each initial application to operate a nuclear power plant is required to include a "final safety analysis report." 10 C.F.R. §50.34(b). This must include an emergency plan, as prescribed by Appendix E to Part 50. Other requirements for an application for a permit to

operate include a physical security plan, 10 C.F.R. §50.34(c), a safeguards contingency plan to deal with threats, thefts, and sabotage 10 C.F.R. §50.34(d), and a fire protection plan. 10 C.F.R. §50.48(a).

The emergency plans make provisions for emergency response within specific emergency planning zones ("EPZs"). Generally, the plume exposure pathway EPZ for nuclear power plants is an area 10 miles in radius, and the ingestion pathway EPZ is 50 miles in radius, subject to local variations. 10 C.F.R. §50.47(c)(2), 44 C.F.R. §350.7(b). No operating permit can be granted unless there is a finding by NRC that the emergency plan for a reactor provides "reasonable assurance that adequate protection can and will be taken in the event of a radiological emergency." §50.47(a)(1). The failure to meet the applicable standards may result in rejection of an application, or else the applicant can obtain a permit by showing the deficiencies are "not significant," adequate interim compensating measures have or will be taken, or "there are other compelling reasons to permit plant operations." §50.47(c)(1).

However, if the deficiencies are wholly or substantially caused by "the decision of state and/or local governments, not to participate further in emergency planning," a permit may be issued if the applicant "has made a sustained good faith effort to secure and retain the participation of the pertinent state and/or local government authorities," and the applicant's own plan "provides reasonable assurance that public health and safety is not endangered by operation of the facility." §50.47(c)(1). That way, local officials cannot block a nuclear plant merely by refusing to participate in emergency planning activities. Further, provision is made for testing and loading operations at up to 5% of full power without full approval of an emergency plan. §50.47(d).

FEMA regulations set forth at 44 C.F.R. Part 350 provide procedures for FEMA "Review and Approval of State and Local Radiological Emergency Plans and Preparedness." Part 351 describes the roles for federal agencies in assisting state and local agencies in the preparation of radiological emergency plans, including not only FEMA and NRC, but also EPA and the Departments of Health and Human Services, Energy, Transportation, Agriculture, Defense and Commerce. 44 C.F.R. Part 352 defines the procedures for FEMA to assist in the preparation of emergency plans. In New York State, the DPC and local governments coordinate the radiological emergency planning procedures through New York Executive Law Article 2-B.

Pursuant to 44 C.F.R. §350.7(a), a state can submit a radiological emergency plan for FEMA review and approval, including plans of local governments, and a specification of all power plant sites for which approval is sought to be applicable. Applications must include a statement that the plans are, "in the opinion of the State, adequate to protect the public health and safety of its citizens living within the emergency planning zones for the nuclear power facilities included in the submission by providing reasonable assurance that State and local governments can and intend to effect appropriate protective measures off-site in the event of a radiological emergency." §350.7(d). FEMA and the states must make appropriate arrangements in the case of overlapping or adjacent jurisdictions. §350.7(e).

After acknowledgment of an application by the FEMA Regional Director, §350.8(a), the agency must publish a public notice in the Federal Register within 30 days stating that it has received the application and that copies are available for review and copying at the Regional Office. §350.8(b). The Regional Director must then make a detailed review of the Plan, §350.8(d), using criteria set forth at 44 C.F.R. §350.5 (which criteria incorporate guidelines

established by NUREG-0654), and make suggestions to the states concerning perceived gaps or deficiencies which may be remedied by amendment. §350.8(e).

In December, 2004, the National Response Plan was adopted by the Department of Homeland Security and numerous other federal agencies, including EPA and FEMA. It establishes a comprehensive all-hazards approach to enhance the ability of the federal government to manage domestic incidents. As of April, 2005, the NRP supercedes various plans dealing with terrorism and emergencies (including the Federal Radiological Emergency Response Plan). It also calls for changes in other plans and regulations.

The federal Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§2021b, *et seq.*, requires every state to be responsible for providing either by itself, or in cooperation with other states, for the disposal of low-level radioactive waste ("LLRW") generated within the state. While the Act provided that if a facility was not on-line for a state by 1993, the state would "take title" to LLRW within the state, this scheme was declared unconstitutional. *New York v. U.S.*, 505 U.S. 144, 112 S.Ct. 2408 (1992).

In New York State, ECL Article 29 specifically implements the state's plan to comply with the Low-Level Radioactive Waste Policy Act. Pursuant to Article 29, a Commission for Siting LLRW Facilities was created, and a siting procedure was specified. The siting process has now been abandoned, and New York is seeking to arrange for a compact with other states to take care of its LLRW disposal needs, or else begin a new siting process.

Some states have their own rules regulating radioactive wastes. In New York, DEC regulates radioactive waste, pursuant to state regulations set forth at 6 N.Y.C.R.R. Parts 380-383. Part 380 addresses "Prevention and Control of Environmental Pollution by Radioactive Materials." Subpart 380-3 requires a permit for discharge into the air or water, 380-4 regulates

discharges into public sewers, and subpart 380-5 regulates exposures to the public. Transporters of LLRW are regulated by Part 381 (who must be permitted and use manifests), and LLRW disposal facilities are regulated by Parts 382 and 383.

B. Hazardous Materials Transportation

The transportation of hazardous materials is governed by the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§5101, *et seq.* "Hazardous materials" include products in commerce as well as wastes, and are defined by regulation at 49 C.F.R. §172.101. Comprehensive federal regulations are set forth at 49 C.F.R. Parts 171-180, and administrated by the United States Department of Transportation ("USDOT"). The USDOT regulations provide extensive requirements for transportation of hazardous materials. They identify a hazard class for each listed material, specify the acceptable means of storage and transportation, and set requirements for marking, packaging, labeling, placarding, handling and loading.

New York State has its own regulations governing transportation of hazardous materials, set forth at 17 N.Y.C.R.R. Part 507, which incorporate by reference the federal definitions and standards. They are designed to create a scheme at least as strict as the federal program.

C. Pesticide Regulation

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§136, *et seq.*, regulates pesticides on the federal level. FIFRA specifically provides that while states may prohibit the sale or use of federally regulated pesticides, FIFRA §24(a), 7 U.S.C. §136v(a), a state "shall not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under" FIFRA. FIFRA §24(b), 7 U.S.C. §136v(b). This provision does not bar claims that do not relate to labeling or packaging governed by FIFRA, such as defective design, defective manufacture, negligent testing, and breach of express

warranty. *Bates v. Dow Agrosciences*, 125 U.S. 1788, 125 S.Ct. 1788 (2005); *State v. Fermenta Asc Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *mot. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997).

"Pesticide" is defined to include "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer." FIFRA §2(u), 7 U.S.C. §136(u). Unless specifically excepted, no person "may distribute or sell to any person any pesticide that is not registered under" FIFRA. FIFRA §3(a), 7 U.S.C. §136a(a). EPA regulations set procedures for registration of pesticides, 40 C.F.R. Part 162, including the submission of an application by the manufacturer which includes all claims made by the manufacturer, test data to support the claims, directions for use, a copy of the label, and a statement proposing a classification of "general" or "restricted" use for the pesticide.

EPA may register a pesticide if it determines that:

> (A) its composition is such as to warrant the proposed claim for it;
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> (B) its labeling and other material required to be submitted comply with the requirements of [FIFRA];
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> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
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> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

FIFRA §3(c)(5), 7 U.S.C. §136a(c)(5). EPA must classify each pesticide as either "general use," or "restricted use," depending upon whether or not it requires "additional regulatory restrictions" to avoid "unreasonable adverse effects on the environment." FIFRA §3(d)(1), 7 U.S.C.

§136a(d)(1). Registration can be refused, suspended or canceled. FIFRA §§3(c)(6), 6, 7 U.S.C. §§136a(c)(6), 136d.

Only a "certified applicator" is authorized to use or supervise the use of restricted use pesticides. Various states, including New York, are authorized to give this certification, pursuant to FIFRA §11(b), 7 U.S.C. §136i(b). FIFRA also provides for experimental use permits, FIFRA §5, 7 U.S.C. §136c, registration of establishments which produce pesticides, FIFRA §7, 7 U.S.C. §136e, maintenance of books and records, FIFRA §8, 7 U.S.C. §136f, inspection of establishments, FIFRA §9, 7 U.S.C. §136g, protection of trade secrets, FIFRA §10, 7 U.S.C. §136h, enforcement, FIFRA §§13, 14, 7 U.S.C. §§136k, 136l, administrative procedures and judicial review, FIFRA §16, 7 U.S.C. §136n, and restrictions on imports and exports, FIFRA §17, 7 U.S.C. §136o. Furthermore, under 1988 amendments to FIFRA, pesticides registered prior to 1984 must be re-registered in accordance with new standards, FIFRA §4, 7 U.S.C. §136a-1.

New York State also regulates distribution, sale and transportation of pesticide, pursuant to New York ECL Article 33, and DEC regulations set forth at 6 N.Y.C.R.R. Parts 320-329. Since the state regulations do not deal with labeling, they are not preempted by FIFRA. *NYS Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2d Cir. 1989). Every pesticide "used, distributed, sold, or offered for sale" within New York, or involved in intrastate commerce, must be registered with DEC, although federally-regulated pesticides imported into New York in sealed containers may be exempted. ECL §33-0701.

In New York, regulations set forth at 6 N.Y.C.R.R. Part 326 govern certain "restricted" pesticides, including those designated as "restricted" under FIFRA, and required a commercial permit to "distribute, sell, offer for sale, purchase for the purpose of resale, or possess for the

purpose of resale, any restricted pesticide." 6 N.Y.C.R.R. §326.3(a). Further, commercial applicators, private applications of restricted use pesticides, and persons who sell restricted use pesticides must be state certified. 6 N.Y.C.R.R. §325.7. Special requirements apply to commercial lawn applicators, including advance notification and warning signs. ECL Article 33, Title 10.

D. Toxic Substances

The Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§2601, *et seq.*, was enacted in 1976 to give EPA authority to regulate the commercial manufacture, use, and disposal of chemicals from "cradle to grave." TSCA governs "chemical substances," defined as "any organic or inorganic substance of a particular molecular identity," but not certain substances regulated under other federal laws, including pesticides, tobacco, food and drugs. TSCA §3(2), 15 U.S.C. §2602(2).

After TSCA went into effect, EPA created an Inventory of Chemicals, as required by TSCA §8(b), 15 U.S.C. §2607(b), which listed chemicals already being used in commerce. Since that time, before a manufacturer can begin production of a new chemical not on the Inventory, or a "significant new use" of a chemical already listed, it was required, at least ninety (90) days before beginning manufacture, to give EPA a pre-manufacture notice ("PMN"), pursuant to TSCA §5, 15 U.S.C. §2604. However, this requirement does not apply to mixtures, 40 C.F.R. §720.30, so as long as a new formulation does not result in chemical reactions that form new chemical compounds, the PMN requirements are not applicable.

The PMN must include information such as the identity of the submitter and the chemical, product and use information, and potential exposure and releases from the sites of the manufacturer, processors and users. Further, test data within the submitter's "possession or

control," and other health or environmental effects "known to" or "reasonably ascertainable" by the submitter, must be provided.

Upon review of the application, EPA can "clear" the chemical without any restriction. However, if it finds "a reasonable basis to conclude" that the chemical "presents or will present an unreasonable risk of injury to health or environment," it can put restrictions on the manufacture, processing, distribution, use or disposal of the chemical, or prohibit it altogether. TSCA §5(f), 15 U.S.C. §2604(f).

If EPA determines that a chemical "may present an unreasonable risk or injury to health or the environment," or the chemical is or will be produced in "substantial quantities," and may result in substantial environmental or human exposure, and also that there is "insufficient data and experience" with respect to the effects of the chemical, it can require testing of a chemical by manufacturers and processors. TSCA §4, 15 U.S.C. §2603.

Further, pursuant to TSCA §8, 15 U.S.C. §2607, EPA can require manufacturers or processors to provide it with information, including health and safety studies, related to chemicals. If any manufacturer "obtains information which reasonably supports the conclusion" that a chemical substance or mixture "presents a substantial risk of injury to health or the environment," it must immediately notify EPA. TSCA §8(e), 15 U.S.C. §2607(e).

If EPA determines that "there is a reasonable basis to conclude that" a chemical substance or mixture "presents or will present an unreasonable risk of injury to health or the environment," EPA can prohibit, or severely regulate, the manufacturing, processing, distribution, use, or disposal of a chemical. TSCA §6, 15 U.S.C. §2605. In accordance with this authority, EPA has acted to regulate various chemicals, including PCBs, chlorofluorocarbons,

and dioxins. Further, special authority is given to EPA, in cases of "imminent hazards," to seize chemical substances or obtain other drastic relief. TSCA §7, 15 U.S.C. §2606.

TSCA provides for civil and criminal penalties, §16, 15 U.S.C. §2615, enforcement and seizure, §17, 15 U.S.C. §2616, judicial review, §19, 15 U.S.C. §2618, and citizen's suits, §20, 15 U.S.C. §2619. It also preempts conflicting state regulations. TSCA §18, 15 U.S.C. §2617.

E. Lead Paint

1. Federal Regulation

Lead-based paint was widely used in residential structures until 1978. Pursuant to the amended the Lead-Based Poisoning Prevention Act ("LBPPA"), 42 U.S.C. §§4801, *et seq*., lead-based paint was required to be banned in utensils and federally-assisted housing by 1971. The statute also required the Consumer Product Safety Commission to take steps to prohibit the use of lead paint in toys and furniture. In 1978, the Consumer Product Safety Commission banned all use of lead paint in residential structures.

The Lead-Based Poisoning Prevention Act addresses "target housing," 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." 42 U.S.C. §4851(27). The law sets requirements for purchasers and tenants of target housing who receive certain federal assistance (including FHA mortgages), including a brochure advising them of the hazards of lead-based paint, the symptoms and treatment of lead poisoning, and maintenance and removal techniques, 42 U.S.C. §4822(a)(1)(A); *see also* 24 C.F.R. §35.130, and risk assessments, inspections, and abatement action. 42 U.S.C. §4822(a)(1). "Lead-based paint" is

currently defined as paint having a base of .5% lead, although the threshold for manufacturing bans is generally 0.06%. 42 U.S.C. §4841(3).

Many environmental regulatory programs also apply to lead. Waste lead paint may be a hazardous waste regulated by RCRA. Lead exposure is also governed by OSHA requirements. 29 C.F.R. §§1910.1025, 1926.62. The Safe Drinking Water Act also regulates lead in drinking water.

2. Residential Lead-Based Paint Hazard Reduction Act of 1992

The Residential Lead-Based Paint Hazard Reduction Act of 1992 strengthened the federal regulatory program. The law amended LBPPA by setting more definitive schedules and requirements for inspection and abatement of lead hazards at target housing. 42 U.S.C. §4822. The 1992 law also added a new Subchapter IV to TSCA, known as the Lead-Based Paint Exposure Reduction Act.

Under TSCA §402, 15 U.S.C. §2682, EPA was required to set guidelines for lead-based paint abatement, and procedures for accreditation of training programs and certification of contractors engaged in such activities. States are given an opportunity to take over these programs with the approval of EPA. TSCA §404, 15 U.S.C. §2684. EPA was required to promulgate regulations to identify dangerous levels of lead in lead-based paint, as well as lead-contaminated dust, and lead-contaminated soil. TSCA §403, 15 U.S.C. §2683. It was also directed to conduct a comprehensive program to promote "safe, effective and affordable monitoring, detection and abatement of lead-based paint and other lead exposure hazards." TSCA §405, 15 U.S.C. §2685. The 1992 act also added new Chapter 63A to Title 42 (42 U.S.C. §§4851, *et seq*.), which included provisions for grants for lead paint abatement, 42 U.S.C. §4852, and measures for worker protection. 42 U.S.C. §4853.

3. Federal Real Estate Disclosure Rule

The Residential Lead-Based Paint Hazard Reduction Act of 1992 included a requirement that the Department of Housing and Urban Development ("HUD") and EPA promulgate regulations to require disclosure of information concerning lead paint, including the federal pamphlet, by sellers, landlords and real estate agents to all prospective purchasers and tenants of "target housing." 42 U.S.C. §4852d(a). However, the provisions do not affect the validity of contracts or leases, or create title defects. 42 U.S.C. §4852d(c).

On March 6, 1996, EPA and HUD published a final rule entitled *Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing* at 61 Fed. Reg. 9063, which promulgated essentially identical HUD and EPA regulations, codified at 24 C.F.R. Part 35 and 40 C.F.R. Part 745, respectively, applicable to sale or lease of "target housing." *See* 34 C.F.R. §35.82, 40 C.F.R. §745.101. "Lead-based paint" is defined as:

> paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.

34 C.F.R. §35.86, 40 C.F.R. §745.103. The rule is limited to disclosure requirements, and does not create "a positive obligation on the seller or lessor to conduct any evaluation or reduction activities." 34 C.F.R. §35.88(a), 40 C.F.R. §745.107(a).

The rule created the following 10-day inspection contingency requirement for buyers of target housing:

> (a) Before a purchaser is obligated under any contract to purchase target housing, the seller shall permit the purchaser a 10-day period (unless the parties mutually agree, in writing, upon a different period of time) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

> (b) Notwithstanding paragraph (a) of this section, a purchaser may waive the opportunity to conduct the risk assessment or inspection by so indicating in writing.

34 C.F.R. §35.90, 40 C.F.R. §745.110. "Inspection" is defined as follows:

> (1) A surface-by-surface investigation to determine the presence of lead-based paint as provided in section 302(c) of the Lead-Based Paint Poisoning and Prevention Act [42 U.S.C. 4822], and
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> (2) The provision of a report explaining the results of the investigation.

34 C.F.R. §35.86, 40 C.F.R. §745.103. "Risk assessment" is defined as:

> an on-site investigation to determine and report the existence, nature, severity, and location of lead-based paint hazards in residential dwellings, including:
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> (1) Information gathering regarding the age and history of the housing and occupancy by children under age 6;
>
> (2) Visual inspection;
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> (3) Limited wipe sampling or other environmental sampling techniques;
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> (4) Other activity as may be appropriate; and
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> (5) Provision of a report explaining the results of the investigation.

34 C.F.R. §35.86, 40 C.F.R. §745.103.

Furthermore, before a purchaser or tenant is obligated to buy or lease target housing, he or she must be furnished an EPA-approved lead paint information pamphlet. 34 C.F.R. §35.88(a)(1), 40 C.F.R. §745.107(a)(1). Sellers and landlords must also disclose the "known" presence of lead paint or "lead-based paint hazard," and the basis for this information, including "the existence of any available records or reports." 34 C.F.R. §35.88(a)(2,4), 40 C.F.R. §745.107(a)(2,4). This disclosure must also be made to real estate agents, 34 C.F.R.

§35.88(a)(3), 40 C.F.R. §745.107(a)(3). Reports must be furnished for common areas. 34 C.F.R. §35.88(a)(4), 40 C.F.R. §745.107(a)(4).

Real estate agents are specifically required to inform sellers and landlords of their obligations under the rule, and ensure compliance with the disclosure requirements. 34 C.F.R. §35.94(a), 40 C.F.R. §745.115(a). If the agent complies with these requirements, he or she "shall not be liable for the failure to disclose to a purchaser or lessee the presence of lead-based paint and/or lead-based paint hazards known by a seller or lessor but not disclosed to the agent." 34 C.F.R. §35.94(b), 40 C.F.R. §745.115(b). "Agents" covered by the rule include not only seller's agents, but also dual and buyer's agents, except buyer's agents who receive all of their compensation from the buyer. 34 C.F.R. §35.86, 40 C.F.R. §745.103. Furthermore, if they comply with the rule, neither the seller, a landlord, or their agent is liable for "failure of a purchaser's or lessee's legal representative (where such representative receives all compensation from the purchaser or lessee) to transmit disclosure materials to the purchaser or lessee." 34 C.F.R. §35.92(d), 40 C.F.R. §745.113(d).

All purchase contracts and leases for target housing must contain an attachment setting forth certain elements in the language of the contract (*e.g.* English or Spanish). 34 C.F.R. §35.92(a,b), 40 C.F.R. §745.113(a,b). A Lead Warning Statement is required to be included in the attachment to all such real estate purchase contracts and leases. 34 C.F.R. §35.92(a,b)(1), 40 C.F.R. §745.113(a,b)(1). An abbreviated form of the warning applies to leases. 34 C.F.R. §35.92(b)(1), 40 C.F.R. §745.113(b)(1).

Furthermore, the attachment should include statements by the seller/landlord that he or she has disclosed all known lead-based paint hazards (including the basis for such information), and a list of all records or reports. 34 C.F.R. §35.92(a,b)(2,3), 40 C.F.R. §745.113(a,b)(2,3).

The document must also include a statement by the purchaser/tenant that he or she has received this information, 34 C.F.R. §35.92(a,b)(2,4), 40 C.F.R. §745.113(a,b)(4), and in the case of a purchaser has received the opportunity to conduct a risk assessment or inspection or waived that opportunity. 34 C.F.R. §35.92(b)(5), 40 C.F.R. §745.113(b)(5). If an agent is involved in the transaction, he or she must also state that he or she has informed the seller/landlord of their obligations under the rule, and that the agent is aware of his/her duty under the law. 34 C.F.R. §35.92(a)(6), 40 C.F.R. §745.113(a)(6), 34 C.F.R. §35.92(b)(5), 40 C.F.R. §745.113(b)(5). The signatures of all parties, including any agents, are required, and constitutes a certification to the accuracy of the statements. 34 C.F.R. §35.92(a)(7), 40 C.F.R. §745.113(a)(7), 34 C.F.R. §35.92(b)(6), 40 C.F.R. §745.113(b)(6). All parties are required to retain a copy of the attachment for three years. 34 C.F.R. §35.92(c), 40 C.F.R. §745.113(c).

Compliance with the federal requirements does not excuse compliance with state or local law requirements. 34 C.F.R. §35.98, 40 C.F.R. §745.119. Thus, an owner or landlord may still be subject to common law "toxic tort" liability, and in fact noncompliance with the regulations may constitute negligence. As provided by statute, 42 U.S.C. §4852d(b), anyone injured by noncompliance with the regulations can recover triple damages, as well as court costs, attorneys' fees and expert witness fees. 34 C.F.R. §35.96(c,d), 40 C.F.R. §745.118(c,d). However, compliance with the regulations may be strong evidence that a landowner met his common law duties. Violations of the rule are punishable by fines of up to $10,000, and injunction in federal district court. 34 C.F.R. §35.96(f), 40 C.F.R. §745.118(f). Specific exceptions to the rule include foreclosure sales, short-term leases, certain target housing that has previously been certified as lead-free, and certain lease renewals. 40 C.F.R. §745.101; 34 C.F.R. §35.82.

4. New York State Regulations

New York State amended the Public Health Law in 1970 to address lead hazards, and banned lead-based paint on interior surfaces, Public Health Law §1372, and on toys and furniture, Public Health Law §1371. The threshold was reduced from one percent to one-half percent lead in 1976, and to .06% in 1993, although mandatory abatement measures described below are still governed by the .5% threshold. While federal law preempts inconsistent lead paint standards, 42 U.S.C. §4846, these standards appear consistent.

The State Health Commissioner "or his representative" (which may include local health officials) is empowered to direct an owner to abate a lead paint hazard in a dwelling. Public Health Law §1373. The removal of the tenant from such a dwelling does not relieve a landlord of the responsibility to take abatement action. Public Health Law §1373(5).

At the request of the Health Department, a court can appoint a receiver to take over a property and ensure lead abatement. Public Health Law §1374. Furthermore, failure to comply with an abatement order can result in penalties of up to $2,500 per violation. Public Health Law §1373(3).

Standards for lead sampling and abatement are set forth at 10 N.Y.C.R.R. Subpart 67-2. Acceptable abatement measures include encapsulation or enclosure of lead-containing surfaces, replacement of building components, and specified removal actions. 10 N.Y.C.R.R. §67-2.7. Other requirements include pre-abatement measures, clean-up, temporary housing if necessary, warning signs, and evacuation of children and pregnant women. 10 N.Y.C.R.R. §67-2.7. Clearly, purchasers of pre-1978 rental property should conduct lead paint inspections to avoid this potential liability.

The New York Lead Poisoning Act of 1992 requires establishment of a lead screening program for children. Public Health Law §1370-a, 1370-c. Children under six years old attending child care and pre-school programs must be tested. Public Health Law §1370-d. Implementing regulations are contained at 10 N.Y.C.R.R. Subpart 67-1, which provide for testing children between six months and six years old. If an "elevated blood level," defined as 10 micrograms or more per deciliter, 10 N.Y.C.R.R. §67-1.1(d), the result must be reported by health care professionals to local health officials. Public Health Law §1370-e. Under the regulations, a rebuttable presumption that the child's dwelling is the source of the lead poisoning is created, and an inspector must visit the dwelling and order abatement of any lead condition conducive to lead poisoning.

F. Bulk Storage of Hazardous Substances

Pursuant to ECL Articles 37 and 40, New York has promulgated regulations at 6 N.Y.C.R.R. Parts 596, 598 and 599 to govern bulk storage of "hazardous substances" listed at 6 N.Y.C.R.R. Part 597. The regulations apply to aboveground tanks of 185 gallons or more, underground tanks of any quantity, and non-stationary tanks holding 1,000 kilograms (2,200 pounds) for 90 days. 6 N.Y.C.R.R. §596.1(b)(1). Exceptions include septic tanks, aboveground tanks used for agricultural purposes, and various tanks regulated by other environmental programs. 6 N.Y.C.R.R. §596.1(b)(2).

Requirements include registration of stationary tanks, 6 N.Y.C.R.R. §596.2, registration fees for those tanks, 6 N.Y.C.R.R. §596.4, requirements that manufacturers and distributors of hazardous substances give technical guidance to tank owners, 6 N.Y.C.R.R. §596.5, and requirements for spill response, investigation and corrective action. 6 N.Y.C.R.R. §596.6.

Standards are specified for new or modified hazardous substance storage tanks. 6 N.Y.C.R.R. Part 599. Existing underground tanks were generally required to upgrade to these standards by December 22, 1998, while aboveground tanks were required to upgrade and add secondary containment one year later. 6 N.Y.C.R.R. §598.5. Restrictions are placed upon bulk storage in flood plains, 6 N.Y.C.R.R. §598.3, and transfers of hazardous substances. 6 N.Y.C.R.R. §598.4. Requirements are set for testing and inspection, 6 N.Y.C.R.R. §§598.6, 598.7, recordkeeping, 6 N.Y.C.R.R. §598.8, maintenance and repair, 6 N.Y.C.R.R. §598.9, closure and change-in service, 6 N.Y.C.R.R. §598.10, and financial responsibility. 6 N.Y.C.R.R. §598.11.

G. Medical Wastes

In 1988, in response to reports of medical wastes washing up on the beaches of the Northeast, Congress enacted the Medical Waste Tracking Act ("MWTA") by adding a new Subtitle J to RCRA, 42 U.S.C. §§6992, *et seq*. MWTA was only automatically applicable to New York, New Jersey, Connecticut, and states contiguous to the Great Lakes, although states have the opportunity to petition in, or opt out of, the program. RCRA §11001, 42 U.S.C. §6992. EPA regulations promulgated to implement the program, 40 C.F.R. Part 259, applied to cultures and stocks of infectious agents and associated biologicals, pathological waste, waste human blood and blood products, used "sharps," contaminated animal wastes, isolation wastes, and unused "sharps." 40 C.F.R. §259.30(a). As contemplated by MWTA, the regulations required tracking of medical wastes by a tracking form similar to hazardous waste manifests, segregation of medical wastes where practicable, proper handling and storage of the waste, packaging and labeling of medical wastes, recordkeeping, and use of EPA-authorized transporters. 40 C.F.R. Part 259. However, this program expired in 1991 by a "sunset" provision.

In 1991, OSHA promulgated regulations to govern bloodborne pathogens in the workplace. 29 C.F.R. §1910.1030. This rule imposes requirements governing the handling, storage, packaging and labeling of medical wastes. Besides requirements similar to those formerly mandated by MWTA, the rule requires employers to provide and ensure the use of protective equipment, and to utilize housekeeping practices relating to cleaning and disinfection, and disposal of infectious wastes. In particular, used sharps must be disposed of in leakproof, puncture-resistant bags that comply with color-coding or labeling requirements. In 1995, USDOT promulgated regulations to address the interstate shipment of medical waste, which are contained in 49 C.F.R. Parts 171, 172, 173 and 178. *See* 60 FR 48780 (Sept. 20, 1995).

In 1987, New York State acted by adding Title 13 to Article 13 of the Public Health Law, to regulate generation of medical wastes, and by adding Title 15 to the ECL Article 27 to regulate transportation, storage, treatment and disposal of medical wastes. In 1989, these laws were amended to conform to the federal program under MWTA, but they were amended again in 1993 to reflect the sunset of MWTA, and transfer authority to regulate medical waste to the Commissioner of Health.

The definition of "regulated medical waste" under New York law includes the following categories of waste "generated in the diagnosis, treatment or immunization of human beings or animals, in research pertaining thereto, or in production and testing of biologicals," except for hazardous wastes or household wastes: "cultures and stocks," "human pathological wastes," "human blood and blood products," "sharps," "animal waste," and other waste "containing infectious agents" designated by the Commissioner of Health. Public Health Law §1389-aa(1); ECL §27-1502; *see also* 6 N.Y.C.R.R. §364.9(c).

Under Department of Health regulations, 10 N.Y.C.R.R. Part 70, generators must store their waste in separate, clearly identified containers, in order to ensure that storage areas are environmentally safe, with limited exposure to the public. If medical waste is transported off-site, it must be accompanied by a tracking form and transported by a permitted hauler, and it is also subject to the other standards for tracking and management of medical wastes set forth at 6 N.Y.C.R.R. §364.9. However, "small quantity transporters" of less than 50 pounds per month of medical wastes who register with DEC do not need a permit, and may use an abbreviated manifest form. 6 N.Y.C.R.R. §364.9(e)(2).

Medical waste storage, containment and disposal facilities, 6 N.Y.C.R.R. Subpart 360-10, and medical waste treatment facilities, 6 N.Y.C.R.R. Subpart 360-17, are governed by the Part 360 solid waste regulations, except for on-site storage and containment facilities at a health care facility or clinical laboratory licensed pursuant to the Public Health Law, which may be able to accept waste from similar facilities. 6 N.Y.C.R.R. §360-10.1(b). Further, medical waste incinerators are governed by solid waste and air emission standards for incinerators, 6 N.Y.C.R.R. Subparts 360-3 and 219-3, respectively.