

Comments of the Attorneys General of New York, California,  
Connecticut, Illinois, Maryland, Massachusetts, Michigan, Minnesota,  
New Jersey, Oregon, Pennsylvania, Rhode Island, Wisconsin, and the  
District of Columbia,

on

the Environmental Protection Agency's Proposed National Primary  
Drinking Water Regulations for Lead and Copper: Improvements  
(LCRI)

88 Fed. Reg. 84,878 (Dec. 6, 2023)

EPA-HQ-OW-2022-0801

February 5, 2024

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## EXECUTIVE SUMMARY

The Attorneys General of New York, California, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Wisconsin, and the District of Columbia (together, “Attorneys General”) submit these comments on the Environmental Protection Agency’s proposed National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI), 88 Fed. Reg. 84,878 (Dec. 6, 2023) (Proposed Rule).

We commend EPA for the Proposed Rule, which represents a significant improvement over the previous rule the agency finalized in 2021. We particularly applaud the agency’s decision to generally require the replacement of all lead service lines within ten years. We also support revisions EPA has made to strengthen its 2021 rule in several areas, including lowering the lead action level, increasing protections for customers of small water systems, and improving public education on the dangers of lead.

Despite these significant improvements, the Attorneys General remain concerned that the Proposed Rule does too little to protect public health generally and specifically to address the disparate impacts of lead-contaminated drinking water on underserved communities. Therefore, as discussed in the comments below, we advocate for EPA to strengthen several aspects of the proposal.

Below we highlight some of the main points in our comments:

- ***Lead service line replacement.*** Mandatory replacement of all lead service lines within ten years is the heart of the Proposed Rule’s public health protections. Based on the experience of several of our states and cities, such a deadline is achievable provided adequate funding is available. We generally support EPA’s proposal to allow water systems with a large number or percentage of lead service lines additional time to complete replacements, subject to state oversight and ability to compel more expedited compliance. However, to increase the likelihood that lead service line replacements will in fact occur in all communities—regardless of income levels—we urge EPA to consider reviving its previous presumption that water systems control the entirety of the lead service line and/or narrowing the circumstances under which lack of access can be used to excuse mandatory replacements. EPA should also provide incentives to water systems to ensure that full replacements of service lines happen in all communities. As to other aspects

of lead service line replacement, we generally support the Proposed Rule's requirements on reasonable attempts by water systems to secure access to private property to do replacements, to mitigate lead concentrations after a lead service line has been disturbed, and to prepare and publish online lead service line replacement plans that (i) set forth strategies for replacement and (ii) identify barriers to full replacements. EPA should take the following additional steps to ensure that the final rule remedies longstanding inequities from lead exposure in drinking water by: (i) providing more specific language directing water systems on how to identify underserved communities and to prioritize replacing lead service lines in these communities; (ii) finalizing its proposed prohibition on water systems counting disconnections at vacant buildings toward their annual replacement requirements; (iii) adopting its proposed ban on partial service line replacements unless conducted in response to emergency repairs or planned infrastructure work; and (iv) finalizing its proposed provisions requiring that water systems develop funding strategies for (a) achieving full service line replacement that accommodates customers who are unable to pay for the replacement of private services lines, and (b) replacing lead service lines in rental properties and informing renters about the quality of their water.

- ***Revised lead action level and corrosion control treatment.*** We strongly support EPA's proposal to reduce the lead action level to 0.010 milligrams per liter (mg/L) to better protect public health, and encourage EPA to consider a more protective level of 0.005 mg/L in the near future. We also support eliminating the current regulations' trigger level in conjunction with reducing the action level to 0.010 mg/L. Focusing on a single, health-protective number for systems to reach will be simpler to implement and reduce confusion. With respect to whether water systems should be allowed to defer optimal corrosion control treatment requirements based on plans to replace lead service lines, we suggest that EPA tighten up the final regulations to ensure that water systems first have concrete plans to promptly replace lead service lines.
- ***Small water system compliance flexibility.*** We support EPA's proposed changes to compliance flexibility for small systems that exceed the lead action level, including (i) narrowing the eligibility for compliance flexibility from water systems serving 10,000 people to systems serving 3,300 or fewer people, and (ii) eliminating lead service line replacement as an option (instead of a requirement). Both of these changes will better protect public

health. Regarding the compliance alternatives to optimizing corrosion control treatment—installing point-of-use filters and replacing lead plumbing—we provide some suggestions for ensuring that these alternatives result in equivalent reductions in lead concentration as corrosion control treatment.

- ***Public education.*** We support EPA’s improvement of several public education requirements, including shortening the period for mandatory notice of lead tap sampling testing results, modifying lead hazard warning language to better inform the public about the health effects from lead in drinking water, and adding language translation requirements to increase the likelihood non-English speakers understand the risks of lead exposure.
- ***Lead sampling at schools and childcare facilities.*** The Proposed Rule’s provisions concerning lead sampling at schools and childcare facilities are inadequate and should be significantly strengthened. First, EPA should adopt a lead action level of 0.005 mg/L for schools and childcare facilities. This would obligate for community water systems serving these buildings and schools and childcare facilities that operate their own water systems to take corrective action if the level is exceeded. Second, EPA should require a more robust sampling program for these facilities, such as mandatory sampling in secondary schools, improved outreach, increased sampling frequency and quantity, and improved reporting of test results. Third, in lieu of requiring increased sampling frequency and quantity, EPA should consider giving water systems the alternative of installing and maintaining point-of-use water filters, similar to the “filter first” approach that Michigan adopted last year. EPA has the authority to require water systems to adopt this method, which could be a more cost effective approach to removing lead until a more permanent solution (e.g., removal of lead service lines and lead plumbing fixtures) is implemented.

Our comments are organized as follows: Section I is an introduction, which discusses our interest in protective drinking water standards and related advocacy in EPA’s rulemaking and in litigation. In Section II, we present our comments on the following aspects of the Proposed Rule: (A) lead service line replacement; (B) revised lead action level and corrosion control treatment; (C) compliance flexibilities for small water systems; (D) public education; and (E) lead sampling at schools and childcare facilities. Finally, we offer some concluding thoughts in Section III.

## I. INTRODUCTION

### A. States' Interest in Addressing Lead in Drinking Water

Lead is a highly toxic heavy metal that can adversely affect almost every organ and bodily system.<sup>1</sup> In adults, lead exposure can cause brain damage resulting in problems with thinking (cognition), difficulties with organizing actions, decisions, and behaviors, abnormal social behavior (including aggression), and difficulties in coordinating fine movements, such as picking up small objects.<sup>2</sup> Adults have increased risks of heart disease, high blood pressure, muscle and joint pain, reproductive problems, kidney damage, and nervous system problems including those related to memory and concentration.<sup>3</sup> According to one multi-year study on the impacts of low-level lead exposure, “of 2.3 million [cardiovascular] deaths every year in the U.S., about 400,000 are attributable to lead exposure.”<sup>4</sup> This study concludes that lead, even at low levels, is a key risk factor for deaths from cardiovascular disease.<sup>5</sup> In women exposed to lead before or during pregnancy, lead can transfer to the fetus through the placenta, increasing the child’s risk of harmful health effects.<sup>6</sup>

The health risks associated with lead exposure are even more dire for children. In particular, there is abundant evidence that links high lead levels in children’s blood with “increased diagnosis of attention-related behavioral problems, greater incidence of problem behaviors, and decreased cognitive performance as indicated by (1) lower academic achievement, (2) decreased intelligence quotient

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<sup>1</sup> Agency for Toxic Substances and Disease Registry (ATSDR), “Toxicological Profile for Lead,” (Aug. 2020) at 14, <https://www.atsdr.cdc.gov/toxprofiles/tp13.pdf>. The most studied effects of lead exposure are: neurological, renal, cardiovascular, hematological, immunological, reproductive, and developmental. Other health effects associated with lead exposure are: respiratory, hepatic, endocrine, gastrointestinal, musculoskeletal, ocular, and cancer. *Id.* at 14-16.

<sup>2</sup> U.S. Environmental Protection Agency (EPA), “What are the Health Effects of Lead?” <https://www.epa.gov/lead/learn-about-lead#effects>; Centers for Disease Control, “What are Possible Health Effects from Lead Exposure?” [https://www.atsdr.cdc.gov/csem/leadtoxicity/physiological\\_effects.html](https://www.atsdr.cdc.gov/csem/leadtoxicity/physiological_effects.html).

<sup>3</sup> ATSDR, Toxicological Profile for Lead, *supra* note 1, at 14.

<sup>4</sup> Lanphear, et al., “Low-Level Lead Exposure and Mortality in US Adults: a Population-Based Cohort Study,” 3 *Lancet Public Health* e177, e182 (Mar. 12, 2018), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(18\)30025-2/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(18)30025-2/fulltext).

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

<sup>6</sup> EPA, What are the Health Effects of Lead?, *supra* note 2.

(IQ), and (3) reductions in specific cognitive measures.”<sup>7</sup> Childhood lead poisoning can cause health effects for individuals later in life including hypertension, renal effects, reproductive problems, and developmental problems with their offspring.<sup>8</sup>

The American Academy of Pediatrics states that no amount of lead exposure is safe for children, and recommends that state and local governments take steps to reduce lead levels in school drinking water to less than or equal to 1 part per billion (ppb).<sup>9</sup> Similarly, a 2017 paper concluded that three decades of studies have shown that certain toxins, including lead, do not exhibit a threshold and are proportionately more toxic at the lowest levels of exposure.<sup>10</sup> The paper noted that “an increase in blood lead from <1 µg/dL to 30 µg/dL (<10 ppb to 300 ppb) was associated with a 9.2 IQ deficit, but the largest fraction of the deficit (6.2 IQ points) occurred below 10 µg/dL (100 ppb).”<sup>11</sup> Based on these findings, the author recommends that “regulatory agencies should strive to achieve near-zero exposures” for several toxins, including lead, to better protect public health.<sup>12</sup>

Drinking water can be a significant source of lead exposure. EPA estimates that drinking water can make up at least 20 percent of a person’s total exposure to lead.<sup>13</sup> However, infants who consume mostly formula mixed with tap water can receive 40 to 60 percent of their exposure to lead from the water used in the formula.<sup>14</sup> An analysis of EPA data by the Natural Resources Defense Council found that between 2018 and 2020, 186 million people in the United States were served by water systems detecting 90th percentile lead levels exceeding the level of 1 ppb recommended by the American Academy of Pediatrics to protect children from lead

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<sup>7</sup> National Toxicology Program, “Health Effects of Low-Level Lead, xviii (June 2012), [https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffects/lowlevellead\\_newissn\\_508.pdf](https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffects/lowlevellead_newissn_508.pdf).

<sup>8</sup> Centers for Disease Control, What are Possible Health Effects from Lead Exposure?, *supra* note 2.

<sup>9</sup> American Academy of Pediatrics, “Prevention of Childhood Lead Toxicity,” 138(1) *Pediatrics* 1 (July 2016), <https://pediatrics.aappublications.org/content/138/1/e20161493>.

<sup>10</sup> Lanphear, “Low-Level Toxicity of Chemicals: No Acceptable Levels,” 15(12) *PLoS Biology* 1, 5 (Dec. 19, 2017), <https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.2003066>.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> 88 Fed. Reg. at 84,897.

<sup>14</sup> *Id.*

in water.<sup>15</sup> More than 61 million people were served by water systems that detected 90th percentile lead levels that exceeded 5 ppb and 7 million people were served by systems that detected 90th percentile lead levels that exceeded 15 ppb.<sup>16</sup>

While the data show that large areas of the country have a higher potential for lead exposure due to drinking water contamination, underserved communities<sup>17</sup> are affected at even greater rates due to lack of infrastructure and investment in their communities and cumulative impacts of environmental problems. Studies show that “income is associated with exposure to a wide variety of environmental quality indicators in the ambient environment, at home, in school, on the job, and in one’s neighborhood.”<sup>18</sup> Relatedly, aging housing stock—often found in communities lacking sufficient investment—likewise correlates to increased lead exposure from a variety of sources.<sup>19</sup> The Environmental Justice Coalition for Water found, in California, “the lack of access to quality water resources and exclusion from water decision making has resulted in the disproportionate exposure of people of color and

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<sup>15</sup> Natural Resources Defense Council, “Millions Served by Water Systems Detecting Lead,” (May 13, 2021), <https://www.nrdc.org/resources/millions-served-water-systems-detecting-lead>. Note, these results are the 90th percentile value of tap water samples, meaning that 90 percent of tap water samples for each water system did not exceed the 1 ppb level and 10 percent of samples exceeded 1 ppb.

<sup>16</sup> *Id.*

<sup>17</sup> “Underserved communities” refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. See Executive Order 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7,009 (Jan. 25, 2021). In this comment letter, we use the terms “underserved communities” and “environmental justice communities” synonymously.

<sup>18</sup> Evans & Kantrowitz, “Socioeconomic Status and Health: The Potential Role of Environmental Risk Exposure,” *23 Annual Review of Public Health* 303, 323 (May 2002), <https://www.annualreviews.org/doi/10.1146/annurev.publhealth.23.112001.112349>.

<sup>19</sup> EPA, Executive Summary of EPA 747-R-96-002, (May 1996), <https://www.epa.gov/lead/executive-summary-epa-747-r-96-002> (lead in soil); Massachusetts Department of Public Health, 2021 Annual Childhood Lead Poisoning Surveillance Report, 5-6 (Nov. 17, 2022), <https://www.mass.gov/doc/2021-annual-childhood-lead-poisoning-surveillance-report-0/download> (lead in paint).



low-income communities to contaminated drinking water.”<sup>20</sup> A lack of resources in these communities leads to an inability to “construct, operate, and maintain water infrastructure.”<sup>21</sup> Similar disproportionate burdens have been found among migrant farmworkers in North Carolina and low-income Chicano populations living along the United States and Mexico border.<sup>22</sup> In fact, EPA’s environmental justice analysis for the Proposed Rule found that Black, Indigenous, People of Color (BIPOC) and low-income populations are at higher risk of lead exposure and associated health risks.<sup>23</sup>

Given the harm caused by ingesting lead-contaminated water and the disproportionate impacts of lead exposure on underserved communities, our states have a strong interest in replacing lead service lines with safer alternatives. To this end, several states have already enacted laws and regulations mandating lead service line replacement. For example, in 2018, Michigan revised its Safe Drinking Water Act regulations to require the replacement within 20 years of all lead service lines and galvanized service lines if the service line is or was connected to lead piping.<sup>24</sup> In 2021, New Jersey enacted legislation declaring that the presence of lead in drinking water represents a threat to public health and requiring that all lead service lines and galvanized service lines be replaced within 10 years.<sup>25</sup> In 2021, Illinois enacted the Lead Service Line Replacement and Notification Act, which declares that, for the general health, safety and welfare of its residents, all lead service lines in Illinois should be disconnected from the drinking water supply, and requires the replacement (in a timeframe ranging from 15 to 50 years) of all lead service lines and galvanized service lines that are or were connected to downstream

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<sup>20</sup> Environmental Justice Coalition for Water, *Thirsty for Justice: A People’s Blueprint for California Water*, 72 (Aug. 5, 2005), <https://www.issuelab.org/resources/2885/2885.pdf>.

<sup>21</sup> *Id.* at 78, 80.

<sup>22</sup> Cieselski, et al., “The Microbiologic Quality of Drinking Water in North Carolina Migrant Labor Camps,” 81 *American Journal of Public Health* 762 (June 1991), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1405149/>; Calderon, et al., “Health Risks from Contaminated Water: Do Class and Race Matter?,” 9 *Toxicology and Industrial Health* 879 (Sept. 1, 1993).

<sup>23</sup> 88 Fed. Reg. at 84,927.

<sup>24</sup> Mich. Admin. Code R 325.10604f.

<sup>25</sup> N.J. Stat. Ann. §§ 58:12A-40 to 12A-47.

lead piping.<sup>26</sup> In 2023, Rhode Island and Minnesota also enacted laws requiring the replacement of all lead service lines and galvanized service lines within 10 years.<sup>27</sup>

## B. Procedural History

As further context for our comments on the Proposed Rule, this section highlights relevant points from our comments on the 2019 proposal and our opening brief in litigation over the 2021 rule.

### 1. Comments on 2019 Proposal

In November 2019, EPA issued proposed revisions to its lead and copper drinking water regulations.<sup>28</sup> Our state coalition submitted comments,<sup>29</sup> expressing concerns about the proposal in several areas:

- ***Lead service line replacement rate.*** For water systems that exceed the lead action level, the 2019 proposal called for reducing the mandatory replacement rate of lead service lines from 7 percent annually to 3 percent. Although the agency contended that by not counting partial replacements or “test outs,” the actual number of replacements would not decrease, we argued that EPA could make those changes while keeping the same replacement rate in place.<sup>30</sup>
- ***Stronger measures to address noncompliance with lead service line replacement rate.*** Under the proposal, a water system that failed to replace

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<sup>26</sup> 415 Ill. Comp. Stat. Ann. 5/17.12. The Office of the Illinois Attorney General has also taken major steps to address the serious health hazards presented by lead in drinking water. For instance, it has brought legal action against a water utility in University Park in Will County, Illinois that failed to provide residents with safe drinking water uncontaminated by lead. Illinois Attorney General, Attorney General Raoul and Will County State’s Attorney Glasgow Announce Consent Order with Aqua Illinois Over Water Contamination, (Oct. 5, 2023), <https://www.illinoisattorneygeneral.gov/news/story/attorney-general-raoul-and-will-county-states-attorney-glasgow-announce-consent-order-with-aqua-illinois-over-water-contamination>.

<sup>27</sup> 23 R.I. Gen. Laws Ann. § 23-24.6-28; Minn. Stat. Ann. §§ 446A.077-446A.078.

<sup>28</sup> National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions, 84 Fed. Reg. 61,684 (Nov. 13, 2019).

<sup>29</sup> Comments of the Attorneys General of California, Oregon, Minnesota, Connecticut, Pennsylvania, Wisconsin, Illinois, Maryland, New York, and New Jersey (Feb. 12, 2020) (“2020 Multistate Comments”), <https://www.regulations.gov/comment/EPA-HQ-OW-2017-0300-1468>. These comments are attached as ***Attachment A***.

<sup>30</sup> 2020 Multistate Comments at 10-11.

lead service lines at the mandatory rate was not required to notify its customers and could instead choose other, less targeted communication methods such as to conduct a social media campaign. We recommended mandatory notification by certified mail to each customer in addition to holding public meetings and distributing education materials about the required replacement.<sup>31</sup>

- ***Disparate impacts.*** Although EPA proposed not to allow partial lead service line replacements to count toward a system’s compliance obligation, the agency otherwise failed to address disparate impacts associated with replacements. To the contrary, the proposal incentivized water systems to prioritize replacement in communities where private homeowners had the resources to cover the out-of-pocket cost of replacing the private portion of the lead service line. We urged EPA to evaluate and adopt methods to help ensure full lead service line replacements in low-income communities to reduce disparate impacts.<sup>32</sup>
- ***Small system compliance flexibility.*** Under the proposal, smaller water systems (which represent 91 percent of community water systems) that exceeded lead action levels could opt out of lead service line replacement and choose other compliance options, such as optimized corrosion control treatment. We advocated for EPA to eliminate this opt-out provision because these other compliance options are not as effective as lead service line replacement.<sup>33</sup>
- ***Mandatory replacement after exceedance of lead action level.*** Under the proposal, water systems that experienced an exceedance of the lead action level could avoid having to replace lead service lines if subsequent sampling showed levels below the action level for four consecutive monitoring periods (*i.e.*, two years). We advocated for EPA to discard this approach, arguing that it would create inefficiencies and could substantially delay the timeline for complete removal of lead service lines and that any existing lead service lines remain a threat to public health and safety, even if they temporarily do not cause lead exposures.<sup>34</sup>
- ***Lead action level.*** EPA proposed to leave the lead action level—which activated systems’ obligation to undertake remedial measures—at

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<sup>31</sup> *Id.* at 14.

<sup>32</sup> *Id.* at 11-13.

<sup>33</sup> *Id.* at 18-19.

<sup>34</sup> *Id.* at 13-14.

15 micrograms per liter ( $\mu\text{g/L}$ ), but to create a “trigger level” of 10  $\mu\text{g/L}$ , pursuant to which water systems would have to undertake additional testing. We urged EPA instead to lower the lead action level, which would provide a more protective and simpler approach.<sup>35</sup>

- ***Making lead service line inventories available online.*** In the proposal, water systems serving over 100,000 customers would have to make their lead service line inventories available online. Although we supported this provision, we urged EPA to broaden its scope to cover at least water systems that served more than 500 customers.<sup>36</sup>
- ***More protective requirements for schools and daycare facilities.*** The proposal included new lead education and testing provisions for K-12 schools and childcare facilities built prior to January 1, 2014. We supported these provisions but advocated for more protective measures, including: rejecting the “upon request” option in the proposal that would make lead testing a voluntary program; requiring systems to post all lead test results online as soon as practicable after testing occurs; including a health-protective lead action level and requiring water systems to send schools and childcare facilities with lead test results above that action level specific information on how to respond to high lead levels; and mandating testing of as many drinking water outlets in schools and childcare facilities as feasible.<sup>37</sup>

## 2. Litigation Over 2021 Rule

After EPA issued its final rule,<sup>38</sup> which failed to remedy many of the deficiencies discussed in our comments, many of our states—along with several public health and environmental organizations—filed a lawsuit in the D.C. Circuit challenging the rule (*Newburgh Clean Water Project v. EPA*, D.C. Cir. No. 21-1019 and consolidated cases). In our opening brief, the state petitioners discussed how several aspects of the 2021 rule were unlawful.

First, we argued that the rule’s lead service line replacement provision impermissibly allowed “backsliding” from the previous rule, contrary to the Safe

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<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.* at 15-16.

<sup>37</sup> *Id.* at 16-18.

<sup>38</sup> National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198 (Jan. 15, 2021).

Drinking Water Act’s anti-backsliding provision, 42 U.S.C. § 300g-1(b)(9).<sup>39</sup> We cited both the rule’s elimination of the previous rule’s mandate that small water systems replace their lead service lines when the water in their systems exceeds the lead action level and the reduction in the annual mandatory minimum rate of lead service line replacement for large systems from 7 percent to 3 percent of the system’s total lead service lines.

Second, we argued that EPA failed to reasonably explain its conclusion that the rule would not disproportionately harm minority and low-income populations within the meaning of Executive Order 12,898.<sup>40</sup> We explained that replacement of privately-owned portions of lead service lines under the rule generally would be available only where the homeowner paid thousands of dollars to replace that portion of the line. And that minority and low-income populations, who face greater lead exposure, would be less likely to be able to pay for the replacement of privately-owned service lines and more likely to live in rental housing where a landlord refuses to pay for replacement of privately-owned service lines. Under those circumstances, EPA failed to explain how the rule’s lead service line replacement provision would not exacerbate these disparate impacts.

After the petitioners’ opening briefs were filed, EPA filed a motion for a voluntary remand. EPA stated that although it believed that the 2021 rule improved on the prior rule in several respects, it nonetheless had commenced a new rulemaking “to revise and strengthen the rule” and “[g]iven that EPA’s new rule could address all of Petitioners’ concerns about the Rule,” EPA requested remand without vacatur.<sup>41</sup> Although the D.C. Circuit denied the motion, it placed the case in abeyance pending the completion of EPA’s rulemaking.

## II. COMMENTS ON PROPOSED RULE

In Section II, our comments on the Proposed Rule are set forth in the following subsections: (A) lead service line replacement; (B) lead action level and corrosion control treatment; (C) compliance flexibilities for small systems; (D) public education; and (E) lead sampling at schools and childcare facilities.

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<sup>39</sup> Initial Opening Brief of State Petitioners in *Newburgh Clean Water Project v. EPA*, D.C. Cir. No. 21-1019 (Aug. 8, 2022), Doc. # 1958332, at 19-20.

<sup>40</sup> *Id.* at 20-21.

<sup>41</sup> Respondents’ Consent Motion for Voluntary Remand in *Newburgh Clean Water Project v. EPA*, D.C. Cir. No. 21-1019 (Dec. 9, 2022), Doc. # 1977031 at 1-2.

## A. Lead Service Line Replacement

Our comments on the proposed lead service line provisions include seven aspects: (1) mandatory replacement; (2) deferred deadlines; (3) “under control” provision and cost sharing; (4) “reasonable attempt” to access; (5) mitigation activities; (6) service line replacement plans; and (7) environmental justice.

### 1. Mandatory Replacement

The Proposed Rule would require full service line replacement of all lead service lines and galvanized requiring replacement (GRR) service lines<sup>42</sup> under a water system’s control within 10 years.<sup>43</sup> This requirement is a much-needed improvement over the 2021 rule, which did not mandate full replacement, and that EPA projected would, over 35 years, result in replacing only 854,000 to 1.3 million of the estimated 9.2 million lead service lines in the United States.<sup>44</sup> Under the 2021 rule, lead service lines accounting for 50 to 75 percent of lead contamination in drinking water would have remained in active use.<sup>45</sup> In contrast, the Proposed Rule would require 96 percent of systems nationwide to replace all lead service lines under their control on a 10-year timeline, with only four percent of systems being potentially eligible for additional time to complete replacement.<sup>46</sup>

Given the danger that lead-contaminated water poses to the health of our states’ residents, the Attorneys General strongly support EPA’s proposal to mandate the full replacement of all lead service lines because: (1) lead service lines are a major source of lead-contamination in tap water; (2) prior EPA rules that did

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<sup>42</sup> The Proposed Rule applies both to lead service lines and galvanized requiring replacement (GRR) lines. Galvanized service lines are iron or steel pipes that have been dipped in a protective zinc coating to prevent corrosion and rust. As EPA explains, “[g]alvanized service lines that are or ever were downstream of an [lead service line] can adsorb upstream lead particulates and contribute to lead in drinking water even after the original lead source has been removed.” 88 Fed. Reg. at 84,918. Where systems are unable to demonstrate that a galvanized service line was never downstream of a lead service line, it would be categorized as a GRR service line and be subject to the Proposed Rule’s mandatory replacement requirement. For ease of reference, we use the term “lead service lines” as referring to both types of lines.

<sup>43</sup> 88 Fed. Reg. at 84,910. As will be discussed below, there are limited exceptions from the 10-year timeframe for very large water systems and for systems with a high proportion of LSLs and GRR service lines.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 84,912.

not mandate replacement proved insufficient to protect public health; and (3) not all systems are proactive in replacing lead service lines, especially in underserved communities.

First, it is critical to mandate the removal of lead service lines because, when present, they are the main contributor of lead contamination in water, contributing an average of approximately 50 to 75 percent of the total lead mass measured at the tap.<sup>47</sup> In comparison, premise piping (*i.e.*, piping within the home or other building) contributes about 20 to 35 percent of total lead mass, while faucets contribute about 1 to 3 percent.<sup>48</sup>

Second, as EPA acknowledges based on its over 30 years of implementing the 1991 Lead and Copper Rule, prior measures such as requiring lead service line replacements based on 90<sup>th</sup> percentile lead levels<sup>49</sup> have proved insufficient at protecting public health.<sup>50</sup> One major problem with the prior approach is that the rule structure—which the 2021 rule kept—only compelled protective actions *after* public health threats were identified—that is, after periodic tap sampling results showed an exceedance of the action level for lead.<sup>51</sup> Moreover, EPA found that “the sampling and process steps of that rule created implementation uncertainties, difficulties, and errors that, in some cases, resulted in significant lead exposures.”<sup>52</sup> Although actions such as corrosion control treatment and risk mitigation measures can provide some protection from lead contamination, the former can be prone to error and the latter are not always applied. EPA notes that improper implementation of corrosion control treatment has been one of the primary causes of significant lead exposures in multiple water systems.<sup>53</sup> And although water systems must take risk mitigation measures to prevent disturbances of lead service lines

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<sup>47</sup> *Id.* at 84,880 (citing a 2008 study by Sandvig et al.).

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

<sup>49</sup> In 1991, the Lead and Copper rule established action levels of 0.015 mg/L for lead and 1.3 mg/L for copper. If more than 10 percent of tap sample results (*i.e.*, the 90<sup>th</sup> percentile value of tap sample concentrations), collected during any monitoring period, exceed the action level, water systems had to take actions including corrosion control treatment and replacing lead service lines if the system continued to exceed the action level after completing corrosion control treatment. *Id.* at 84,898.

<sup>50</sup> *Id.* at 84,880.

<sup>51</sup> *Id.* at 84,899.

<sup>52</sup> *Id.* at 84,911.

<sup>53</sup> *Id.*

that can cause lead particulates to be released to drinking water, other utilities, heavy traffic, or even cold weather can also disturb lead service lines, in which case there would be no risk mitigation measures taken.<sup>54</sup> As long as lead service lines remain in place, they pose a threat to public health.

Third, while some states and water systems have been proactive in replacing all lead service lines without a federal mandate, EPA cannot assume that all systems will take such initiative on their own, even when funding is available. A nationwide mandate ensures that all water users—including those in states that do not require replacement or where systems are not proactively replacing lead service lines—will be free of the major source of lead contamination in tap water.<sup>55</sup> This is particularly significant for underserved communities, as discussed more specifically below, which tend to bear the impacts of lead infrastructure disproportionately in every state.

The Attorneys General also agree with EPA's conclusion that most water systems nationwide can feasibly replace all lead service lines within 10 years.<sup>56</sup> Three states—New Jersey, Rhode Island, and Minnesota—recently enacted laws requiring the replacement of all their lead service lines within 10 years.<sup>57</sup> New Jersey and Rhode Island are among the states with the most lead service lines, with 14 and 25 percent, respectively, of all their service lines requiring replacement.<sup>58</sup> The fact that these states found it feasible to replace all lead service lines in 10 years shows that this timeline is possible for most states, which likely have many fewer lead service lines, by comparison.

In addition, the experience of several cities supports EPA's conclusion that—with adequate funding—full lead service line replacement is possible for most systems within 10 years and, for some systems, even sooner. The cities of Stoughton, Wisconsin; Mayville, Wisconsin; Tucson, Arizona; and Spokane, Washington each had less than 1,000 lead service lines and completed their replacement programs in one to two years. Most water systems in the country (96.5

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 84,912.

<sup>57</sup> N.J. Stat. Ann. §§ 58:12A-40-12A-47; Minn. Stat. Ann. §§ 446A.077-446A.078; 23 R.I. Gen. Laws Ann. § 23-24.6-28.

<sup>58</sup> 88 Fed. Reg. at 84,911.



percent) also have less than 1,000 lead service lines.<sup>59</sup> For this reason, the Attorneys General agree with EPA's decision to retain the proposed requirement that states set a faster replacement rate where feasible for systems.<sup>60</sup> Many small systems will not need 10 years to complete replacement and, as states are better positioned than EPA to assess the conditions facing local water systems, states should make such feasibility determinations. To that end, guidance from EPA would assist states in making these determinations in a consistent manner.

Even large systems with greater numbers of lead service lines have completed replacement in less than ten years. Newark, New Jersey replaced its approximately 23,000 lead service lines in four years.<sup>61</sup> Flint, Michigan replaced approximately 12,000 lead service lines in seven years.<sup>62</sup> Furthermore, the Proposed Rule does not require that systems start their replacement programs until three years after promulgation of the final rule, effectively giving them 13 years to complete replacement from the effective date of the rule. Madison, Wisconsin and Lansing, Michigan replaced their lead service lines in 11 years and 12 years, respectively, providing further evidence of the feasibility of EPA's proposed replacement timeline for most water systems.<sup>63</sup>

The Attorneys General also agree with EPA's conclusion that it will be feasible for service line replacement to be conducted by all systems simultaneously.<sup>64</sup> Five states—Illinois, Michigan, Minnesota, New Jersey, and Rhode Island—all enacted state-wide mandatory, accelerated lead service line replacement programs between 2018 and 2023. These states have more than one-fifth of the lead service lines in the country.<sup>65</sup> In these states' experience, it is possible to have a broad service line replacement mandate in effect across a large geographic region without running into workforce or materials shortages.

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<sup>59</sup> *Id.* at 84,912.

<sup>60</sup> *Id.*

<sup>61</sup> EPA notes that a 2019 ordinance that allowed entry to private property to evaluate service line materials and replace lead service lines likely contributed to Newark's fast replacement rate. *Id.*

<sup>62</sup> EPA notes that Flint's replacement program was slowed by the paper format and unreliable accuracy of its service line material records. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 84,913.

<sup>65</sup> *Id.* at 84,911.

## 2. Deferred Deadlines

Under the Proposed Rule, water systems are eligible for deferral of the 10-year deadline for mandatory full service line replacement if they meet one of two eligibility criteria. The first eligibility criterion applies to systems with a high proportion of lead service lines in their distribution systems relative to the total number of households served. EPA determined that the fastest feasible replacement rate for systems is 0.039 replacements per household per year (equivalent to 39 service line replacements for every 1000 households).<sup>66</sup> Therefore, under the first criterion, a system qualifies for a deferred deadline if it would need to achieve a replacement rate of more than 0.039 replacements per household per year to meet the 10-year deadline. EPA estimates that 1.1 to 4.4 percent of water systems (716 to 2,174 systems) would meet this criterion.<sup>67</sup> Of those systems that qualify for deferred deadlines under this criterion, 74 percent would receive between one and five additional years to complete replacement.<sup>68</sup>

The second eligibility criterion applies to the largest water systems nationally. EPA determined that the maximum feasible annual replacement threshold is 10,000 service lines per system. Therefore, under the second criterion, a system is eligible for a deferred deadline if it would be required to replace more than 10,000 service lines per year to meet the 10-year replacement deadline. EPA identified four cities that would meet this criterion and noted the total time each city would require for full lead service line replacement under this threshold: Chicago (44.6 years), Houston (33.1 years), Cleveland (18.5 years), and New York (13.8 years).<sup>69</sup> Alternatively, EPA proposes an 8,000 service line maximum threshold, which would allow three additional systems to qualify for deferred deadlines: North Texas MWD (11.9 years), Detroit (10.6 years), and Wichita (10.1

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<sup>66</sup> *Id.* at 84,913.

<sup>67</sup> EPA, [Technical Support Document for the Lead and Copper Rule Improvements](#), at 11 (Nov. 2023).

<sup>68</sup> *Id.* at 12.

<sup>69</sup> *Id.* at 15. EPA estimated New York City's replacement timeline based on 137,542 known lead service lines, but recent data show over 227,000 service lines of unknown composition. See Anne E. Nigra et al., ["Geospatial Assessment of Racial/Ethnic Composition, Social Vulnerability, and Lead Water Service Lines in New York City,"](#) 131(8) *Envtl. Health Perspectives* 087015-1, 087015-4 (Aug. 2023). Depending on the number of these unknown service lines that turn out to be lead, New York City's compliance timeline could be significantly extended under the Proposed Rule's deferred deadlines approach.

years).<sup>70</sup> Utilizing an 8,000 service line replacement threshold would also increase the deferred deadlines for Chicago (55.8 years), Houston (41.5 years), Cleveland (23.2 years), and New York (17.2 years).<sup>71</sup> Also, EPA requests comment on whether the maximum feasible replacement threshold should increase from 10,000 to 20,000 service lines after the first 10 years.

The Attorneys General support deferred deadlines that are no less stringent than what EPA has proposed (0.039 replacements per household or 10,000 replacements total per year). Systems with a high proportion of lead service lines or with a high number of lead service lines may need additional time to complete replacement. However, the Attorneys General believe there should be limits placed on these provisions. First, as EPA proposes, systems should be permitted to count only known lead service lines reported in their baseline inventory for their replacement rates and/or thresholds. This condition would prevent systems from qualifying for deferred deadlines by overestimating the number of lines that need replacement. Second, a state, as a condition of primacy, should be required to approve the use of the deferred deadline provision where a water system qualifies for it. As part of this approval process, the state should determine whether it is feasible for a system to replace all of its lead service lines by the 10-year deadline and only if it finds that it is not feasible should the deferred deadline be approved.

Third, EPA should not lower the proposed 10,000 service line minimum feasibility threshold to 8,000 service lines. There is support for the 10,000 service line threshold from large cities that are currently or have previously replaced their lead service lines: Detroit plans to replace 10,000 service lines per year and Newark achieved replacement rates equivalent to 12,000 lines per year.<sup>72</sup> Fourth, after 10 years, the maximum replacement threshold for large cities should be increased to 20,000 lines per year. After 10 years, 96 percent of systems will have completed their replacements, freeing up contractors to perform replacements and making materials more readily available, which should allow the remaining systems to speed up their replacement rates. Moreover, as EPA notes, after 10 years, supply chains will have expanded to meet demand, replacement efficiency will have

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<sup>70</sup> Technical Support Document, *supra* note 67, at 15.

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

<sup>72</sup> 88 Fed. Reg. at 84,914.

increased following a decade of experience, and there could be new technology or procedures to expedite replacement.<sup>73</sup>

### 3. “Under Control” Provision and Cost Sharing

In this subsection, we discuss the proposed regulations that trigger the obligation of water systems to replace lead service lines and the related issue of who should pay the costs of full replacement (including the line sections that are located on private property). Although we appreciate EPA’s consideration of how its regulatory approach could address longstanding inequities associated with lead service line replacement, we are concerned that the proposed regulations fall significantly short in that respect. After outlining those proposed regulations, we provide information on relevant state laws, and then offer some proposed changes to the regulations to better address inequity in lead service line replacements.

#### *Proposed Rule Provisions Regarding Control/Access and Cost Sharing*

EPA proposes to condition mandatory replacements on “service lines under the control of the water system.”<sup>74</sup> The question of “control” turns on whether a water system has access to the service line. Specifically, “[w]here a water system has access (*e.g.*, legal access, physical access) to conduct full service line replacement, the service line is under its control, and the water system must replace the service line.”<sup>75</sup> If a water system does not have “access to conduct full service line replacement,” it is not required to replace the line, but must document the reason(s) it lacks access and provide that documentation to the relevant state agency.<sup>76</sup> EPA further states that it is not establishing criteria for determining whether a system has access to conduct full service line replacement “because of the wide variation of relevant state and local laws and water tariff agreements as well as the potential for these to change over time.”<sup>77</sup> Relatedly, “where a water system has legal access to conduct full service line replacement only if property owner consent is obtained, the water system must make a ‘reasonable effort’ to obtain property owner consent.”<sup>78</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> 40 C.F.R. Proposed § 141.84(d)(1).

<sup>75</sup> *Id.*, Proposed § 141.84(d)(2).

<sup>76</sup> *Id.*

<sup>77</sup> 88 Fed. Reg. at 84,920; *see also* 40 C.F.R. Proposed § 141.84(d)(2)(i).

<sup>78</sup> *Id.*, Proposed § 141.84(d)(3).

Regarding whether a water system should bear the full cost of lead service line replacement or can share the cost of replacing the section on private property with the landowner, EPA states that it has considered—but rejected—the idea advanced by certain advocates that the agency has the authority under the Safe Drinking Water Act to ban cost sharing. Although acknowledging that the practice of cost sharing can disproportionately impact low-income populations, EPA states that it “is not aware of a factual basis to support” the assertion that water systems control all portions of service lines and concludes that banning cost sharing “would be met with a protracted legal challenge that would delay implementation of the rule.”<sup>79</sup> Instead, EPA proposes to “remain[] neutral on this matter of state and local law.”<sup>80</sup> At the same time, the agency states that it “strongly encourages customer-side service line replacement to be offered at no direct cost to the customer wherever possible to achieve higher customer participation rates and reduce potential environmental justice impacts.”<sup>81</sup>

Based on our experience, the Attorneys General are concerned that the proposed regulations will perpetuate the pattern of fewer lead service line replacements occurring in low-income communities and on rental properties. Prior to recommending suggested changes to attempt to remedy this problem, we provide some information below on relevant state laws and experiences.

#### *Relevant State and Local Laws and Experience*

In this section, we discuss state and local funding laws that proactively seek to address inequities associated with lead service line replacements as well as the status of laws that may be relevant to whether water system ratepayer funds or municipal bonds can be used to fund full lead service line replacements. In discussing these types of state and local laws in the preamble to the proposal, EPA referred to a 2019 study by Harvard Law School and the Environmental Defense Fund, which evaluated the laws of thirteen states (Florida, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas, and Wisconsin) that have the most lead service lines in the U.S. As EPA notes, the authors concluded that six states (Indiana, Michigan, Missouri, New Jersey, Pennsylvania, and Wisconsin) have expressly authorized the

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<sup>79</sup> 88 Fed. Reg. at 84,923.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

use of ratepayer funds for lead service line replacement on private property.<sup>82</sup> The study further found “no explicit barriers” to using water rates to fund replacements on private property in the state laws and policies of these thirteen states.<sup>83</sup> The undersigned Attorneys General are not aware of any flaws in this finding as to their respective states, with the exception of those corrections, clarifications, and updates summarized below.

- **Massachusetts.** Massachusetts is proposing to increase the availability of loan forgiveness on its loans to its community water systems for the purposes of full (public and private) lead service line replacements.<sup>84</sup>
- **Michigan.** Michigan updated its regulations in 2018 to effectively make full lead service line replacements available to all customers, regardless of their income.<sup>85</sup> The Harvard study noted that these rules were the subject of ongoing litigation. That litigation has now been resolved, with state courts upholding the rules. Those courts rejected, among other arguments, that the rules ran afoul of the state constitution’s prohibition of requiring municipalities to give something away for free. Because the rules conferred a benefit on municipalities by reducing lead contamination systemwide, the prohibition did not apply. Furthermore, the rules had a public purpose in that they required removal of lead service lines and promoted of public health.<sup>86</sup>
- **Minnesota.** Minnesota passed a law last year that establishes a goal of replacing all lead service lines within ten years and allocates \$240 million for replacements.<sup>87</sup> The statute was amended to allow for public funds to be used for the specific purpose of replacing private lead service lines.<sup>88</sup>

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<sup>82</sup> 88 Fed. Reg. at 84,926.

<sup>83</sup> *Id.* at 84,926-27.

<sup>84</sup> Mass. Dept. of Env’tl. Protection, [2024 Draft Intended Use Plan For the Drinking Water State Revolving Fund](#), at 10-11 (Dec. 2023).

<sup>85</sup> 88 Fed. Reg. at 84,926.

<sup>86</sup> *Shaw v City of Dearborn*, 329 Mich App 640 (2019); *Oakland Cty Water Resources Comm et al v Dep’t of Environmental Quality*, Court of Claims No. 18-000259-MZ, Oct. 9, 2019, Opinion and Order; *Oakland Cty Water Resources Comm et al v Dep’t of Environmental Quality*, Court of Claims No. 18-000259-MZ, Jul. 26, 2019, Opinion and Order.

<sup>87</sup> Minn. Session Laws, Ch. 39—H.F. No. 24 (2023)

<sup>88</sup> *See id.*

- ***New Jersey.*** New Jersey passed additional legislation related to lead service lines in 2021. In July 2021, Governor Murphy signed into law P.L.2021, Ch. 183, which requires community water systems to identify all lead service lines, provide public notification regarding the presence of all lead service lines, and replace all lead service lines by 2031. Additionally, a section of the statute addresses who bears the cost of the project, and explicitly states that, “100 percent of the costs associated with undertaking and funding the replacement of lead service lines pursuant to this act, excluding any portion funded by grants or other subsidies, shall be borne by all of the customers, in the State, of an investor-owned public community water system and shall be included in the investor-owned public community water system’s rate base or otherwise be recoverable from the system’s customers.”<sup>89</sup>
- ***New York.*** In addition to the legal authority cited in the Harvard study, the New York Attorney General is aware of both municipal water systems and privately owned utilities in New York that have funded lead service line replacement on customer property. New York’s Public Service Commission (which regulates privately owned water utilities) has specifically authorized the use of rate revenue for this purpose, stating: “Water safety, particularly related to the dangers of potential lead poisoning, is of utmost importance. No customer should suffer the risk associated with lead service lines because they lack the resources to have the line replaced.”<sup>90</sup>

Regarding states that were not included in the Harvard report, we provide the following information: Rhode Island, which EPA discusses in the Proposed Rule in the context of the state’s mandatory lead service line replacement law,<sup>91</sup> requires all water systems in the state to create a lead water supply replacement program for both public and private service lines.<sup>92</sup> The District of Columbia prohibits the use of ratepayer funds for water utility work on private property.<sup>93</sup>

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<sup>89</sup> N.J.S.A. § 58:12A-45.

<sup>90</sup> *In re SUEZ Water New York Inc. et al.*, Cases 19-W-0168, 19-W-0269, Order Adopting Terms of Joint Proposal, Approving Merger, and Establishing Rate Plan, at 54 (N.Y. Pub. Serv. Comm’n July 16, 2020).

<sup>91</sup> 88 Fed. Reg. at 84,911.

<sup>92</sup> *See* R.I. Gen. Laws § 23-24.6-28.

<sup>93</sup> D.C. Code §§ 8-205(b), 34-2158(c).

## *Proposed Approaches to Address or Mitigate Inequities*

The most effective way to address the longstanding inequities in lead service line replacement would be to prohibit cost sharing. As EPA notes in the preamble, advocates argue that EPA has the authority under the statute to take this action because water systems exert control over the entire service line and full service line replacement is the best available technology to address lead contamination in drinking water.<sup>94</sup>

If EPA adheres to its position in the Proposed Rule rejecting the idea of prohibiting cost sharing, it could revise the Proposed Rule in other ways to better address inequity than the “neutral” stance toward cost sharing set forth in the proposal. First, EPA could make changes to the proposal’s interpretations of control and access. Second, the agency could include in the final rule one or more alternatives to incentivize full replacements where cost sharing would otherwise pose an obstacle.

First, EPA could consider reverting to the presumption in the 1991 Lead and Copper Rule that a water system controls the full length of a lead service line, including any portion on private property.<sup>95</sup> The original rule provided that “control” for the purpose of lead service line replacement came in the forms of “authority to set standards for construction, repair, or maintenance of the line, authority to replace, repair, or maintain the service line, or ownership of the service line.”<sup>96</sup> These forms of control continue to hold true as a factual matter. Under various applicable sources of authority—state law, local law, easement rights, or water tariffs or other service agreements—utilities can generally exercise control over customer service lines through one or more of the following rights, among others:

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<sup>94</sup> 88 Fed. Reg. at 84,923.

<sup>95</sup> See Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460, 26,504-05 (June 7, 1991) (preamble); *id.* at 26,553 (rule text).

<sup>96</sup> *Id.* at 26,553. As EPA explained in the preamble to the rule:

Water systems generally retain authority to specify standards for construction, maintenance, and composition of service lines to be able to safeguard the integrity of the distribution system and, thereby to ensure the delivery of safe water to the consumer. . . . The Agency believes, moreover, that it is reasonable to interpret “control” as being present in cases where a system has authority to replace or repair or maintain the line since lead service line replacement under the final rule is a form of “repair” or “maintenance” which is necessary to prevent further exposures to elevated levels of lead.

*Id.* at 26,504.



(1) dictating the specifications of service lines on customer property;<sup>97</sup> (2) requiring customers to provide access for maintenance purposes;<sup>98</sup> (3) shutting off water to a service line for failure to maintain the line or provide the utility access;<sup>99</sup> or (4) unilaterally entering customer property for purposes that may include service line maintenance or replacement.<sup>100</sup> These types of rights provide utilities with control over the full length of a lead service line to the extent necessary to effectuate line replacement.

With respect to access, the Proposed Rule leaves it solely to state and local law to determine what constitutes legal and physical access. Alternatively, EPA could specify that for purposes of lead service line replacement, the only permissible basis to excuse a water system from performing full replacement would be a lack of owner or resident consent to physical access if such consent is required by state or local law. Under this approach, EPA would strike the language in proposed (d)(2)(i) that states “[t]his rule does not establish the criteria for determining whether a system has access to conduct full service replacement” and add language to the effect that access may only depend on “receipt of consent, if required by state or local law, from (a) the owner of any property to which the system requires physical access to complete full lead service line replacement, or (b) any other person who

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<sup>97</sup> See, e.g., 15 Rules of the City of N.Y. §§ 20-02, 20-03 (regulations promulgated by city-run water system governing the specifications, connection, and installation of service lines).

<sup>98</sup> See, e.g., Pittsburgh Water and Sewer Authority, [Rates, Rule, and Regulations Governing the Provision of Water Service to the Public in the Territory Described Herein](#) Part III § B(12)(e) (“Should the condition of a customer service line be such that there is a risk to public health or safety or of damage to public property, and the property Owner fails to take prompt action to cure the problem following notice to do so, the Authority shall have the right . . . to make the necessary repair or replacement[.]”).

<sup>99</sup> See, e.g., West Valley Crystal Water Co., Inc., [Schedule for Water Service Applicable in Village of West Valley, County of Cattaraugus](#) § 12(A)(2) (allowing utility to discontinue service “for failure to protect and maintain the service pipe or fixtures on the property of the customer in a condition satisfactory to the company” or “[f]or failure to provide the company’s employees reasonable access to the premises supplied”); see also [Erie Cty. Water Authority Tariff](#) § 2.31(F) (allowing utility to discontinue water service “[f]or refusal of reasonable access to the property for the purpose of . . . replacing service lines containing lead or galvanized requiring replacement”).

<sup>100</sup> See, e.g., Wis. Stat. Ann. § 196.171(1) (“Any officer or agent of any public utility furnishing or transmitting water . . . to the public or for public purposes may enter, at any reasonable time, any place supplied with . . . water by the public utility, for the purpose of inspecting, examining, repairing, installing or removing . . . pipes . . . for supplying or regulating the supply of . . . water[.]”).

may be authorized by state or local law to provide such consent.” The rule could also provide that a request for access consent cannot be conditioned upon the owner or resident’s agreement to bear costs associated with the service line replacement. Such an approach would prevent utilities from using an owner’s inability to share costs as a purported reason for lack of access and provide direct benefits to communities least able to afford lead service line replacement.

Second, we present some alternatives that are logical extensions of concepts included in the Proposed Rule. These alternatives are not mutually exclusive, so EPA could choose to adopt one or some combination of the three.

***Funding exhaustion approach.*** Under this approach, a water system would not be relieved of its mandatory lead service line replacement obligation unless it first exhausted federal and state funding opportunities. EPA recognizes in the Proposed Rule that there is significant funding available to pay for replacement of lead service lines (some of it directed to disadvantaged communities least likely to afford full service line replacement) and that using such funding for full replacements “would mitigate or eliminate any barrier to full service line replacement as a result of customer cost-sharing.”<sup>101</sup> The agency spends several pages in the preamble listing the numerous funding sources available and notes that it has developed a guidance document describing strategies to achieve full service line replacement and discussing available funding sources.<sup>102</sup> In light of these resources, EPA could add a condition that, before a water system could be relieved of its obligation to do mandatory replacement, it would have to demonstrate that it has sought—and failed to secure—funding under the Bipartisan Infrastructure Law and other relevant sources identified by the agency. Such a requirement would need to include specific criteria that would demonstrate any claimed funding exhaustion.

***Incentive approach.*** EPA should evaluate a mechanism that would incentivize water systems to fund full service line replacements by giving them “extra credit” for not pursuing cost sharing. Specifically, systems could receive extra credit (*e.g.*, 1.5 times) toward their annual replacement rate target for any full lines they replace at no cost to the property owner. This approach (which could be used in conjunction with the funding exhaustion approach described above) would apply where a system uses sources of funding such as municipal bonds, rate revenue, or federal or state grants to replace both the public and private portion of a given lead

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<sup>101</sup> See 88 Fed. Reg. at 84,924, 84,926.

<sup>102</sup> *Id.* at 84,903-05.

service line. In such instance, the system would be able to count that replacement as greater than one (*e.g.*, 1.5:1) for the purpose of calculating the annual lead service line replacement rate. This would create an incentive for systems to proactively secure funding to complete line replacement at properties with low-income residents—rather than concluding they lack access to such lead service lines—because it would make it easier to hit the system’s annual replacement targets. The system would still need to achieve 100 percent replacement, but may be given additional time beyond the 10-year baseline as a result of the extra credit. EPA could also cap this additional time for such systems at a certain point (*e.g.*, 13 years total). If it decides to pursue this approach, EPA should carefully evaluate whether it would, on net, result in more replacements in underserved communities relative to a cost-sharing approach, and would not inequitably delay replacement in such communities.

***Additional testing and filtration approach.*** Under this approach, EPA would require water systems to do testing and, as warranted, filtration, where cost sharing poses the obstacle to full lead service line replacement. If a water system is excused from mandatory replacement because the landowner refuses or is unable to pay for the necessary costs of private service line replacement, the water system would be required to attempt to gain access to that property for the purpose of lead testing on some set interval (*e.g.*, twice a year). If the system either fails to gain access for testing, or the testing indicates lead in drinking water above the action level (or some other threshold), then the system would be required to provide pitcher filters or point-of-use filtration equipment to the property—and, if given access, to install and maintain that equipment—and to conduct repeated testing and supply of filtration equipment on a periodic basis. This would reduce the risk of lead exposure at properties where lead service lines remain in place.

#### 4. Reasonable Attempts to Access

As discussed immediately above, we recommend changes to the proposed regulations related to the issues of control, access, and cost sharing. Depending on whether EPA adopts any of those approaches, the concept of water systems needing to attempt reasonable access to obtain property owner consent to replace the portion of lead service lines on private property could be obviated or changed. Under the assumption that the reasonable access concept continues to be used, we offer the following comments.

EPA proposes that water systems would make a “reasonable attempt” to engage property owners about lead service line replacement, which would entail at

least four attempts using at least two different communication methods (*e.g.*, in-person conversation, phone call, text message, email, letter).<sup>103</sup> EPA also proposes that states “may require systems to conduct additional attempts and may require specific outreach methods to be used.”<sup>104</sup> Systems would have to comply with these requirements again within six months of a change in ownership of a property.<sup>105</sup>

We generally support the proposed reasonable attempt provisions. As EPA notes, there are numerous examples of municipal water systems successfully using multiple methods of outreach (*e.g.*, brochures, community meetings, social media, in-person follow ups) to achieve high levels of customer participation in lead service line replacements.<sup>106</sup> We also support the approach that states may require additional attempt measures beyond the four attempts using two different methods that EPA has proposed.

We further suggest that EPA consider requiring that water systems renew some form of access attempts annually, even in the absence of a change in ownership of the property on which access is being sought.

## 5. Mitigation Activities

For situations in which a lead service line has been disturbed, such as due to partial replacement or replacement of a lead connector, EPA proposes that water systems undertake several mitigation actions before returning the line to service. As the agency has previously found, these types of disturbances can result in short-term spikes in lead levels, posing harms to human health. We support these mitigation requirements, which build on measures EPA put in place in its 2021 rule.

First, EPA proposes to maintain the requirement from the 2021 rule that water systems provide pitcher filters or point-of-use devices certified to reduce lead levels.<sup>107</sup> This requirement would apply following full and partial replacement of lead service lines, lead connectors, inline water meters, and water meter setters.<sup>108</sup> As EPA explains, filtering is necessary to protect public health in light of studies

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<sup>103</sup> 40 C.F.R. Proposed § 141.84(d)(3)(i).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*, Proposed § 141.84(d)(3)(ii).

<sup>106</sup> *See* 88 Fed. Reg. at 84,921 (discussing experiences in Lansing (MI), Quincy (MA), Green Bay (WI), Denver, Chicago, Philadelphia, and Pittsburgh).

<sup>107</sup> 88 Fed. Reg. at 84,924.

<sup>108</sup> *Id.*

that found that flushing the line is insufficient to adequately reduce lead levels following these types of disturbances.<sup>109</sup>

Second, EPA is proposing to change the 2021 rule by requiring that water systems provide filters and replacement cartridges to every occupancy, rather than to every residence.<sup>110</sup> As EPA notes, this change should ensure that tenants and businesses also receive filters following replacement or disturbances.<sup>111</sup> Filter replacement cartridges would need to be provided for six months, which would allow consumers to continue drinking filtered water while waiting for the results of a follow up tap sample, which EPA proposes be taken between three and six months following the replacement.<sup>112</sup>

Third, EPA proposes a new mitigation requirement that, following partial service line replacement, water systems would have to install a dielectric coupling separating the remaining lead service line and replacement service line unless the replaced service line is made of plastic.<sup>113</sup> This requirement would address the risk of lead being released as a result of galvanic corrosion between lead and other metallic pipes.<sup>114</sup> As EPA explains, multiple studies have shown that if the electric connection between the pipes is broken or a dielectric coupling is inserted, this results in a reduction in lead levels in drinking water.<sup>115</sup> Although we support this provision, we note that EPA could instead require that systems use the best available technology, which would serve the same purpose but allow for alternatives as the technology develops.

In sum, we support these proposed mitigation requirements, which should improve existing protections to public health in the scenario in which a lead service line is partially replaced or disturbed.

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

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

<sup>113</sup> *Id.* As noted in the following subsection, we have concerns about the use of plastic materials in replacement piping and urge EPA to issue guidance on appropriate replacement materials that do not pose public health concerns. *See* Section II.A.6, *infra*.

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

<sup>115</sup> *Id.*

## 6. Service Line Replacement Plan

Under the Proposed Rule, water systems would have to prepare lead service line replacement plans, a concept EPA introduced in the 2021 rule. EPA explains that a well-developed plan can facilitate timely compliance with mandatory lead service line replacement, therefore providing greater public health protection and replacement program efficiency.<sup>116</sup> In addition to maintaining plan elements from the 2021 rule that remain relevant (e.g., a procedure for conducting full lead service line replacement, a strategy for determining the composition of lead status of unknown lines in the system's inventory), EPA proposes to add additional elements requiring (i) the identification of state and local laws relevant to a water system's ability to gain access to complete full service line replacement, and (ii) a communication strategy to inform both customers and consumers.<sup>117</sup>

Regarding the first additional element, by requiring water systems to identify any state and local laws and water tariff agreements relevant to the system's ability to gain access to conduct full service line replacement, EPA seeks to accomplish two objectives: First, to facilitate water systems' compliance by making sure that they know the actual law and do not make decisions on whether they have "control" to do full lead service line replacement based on perceived barriers.<sup>118</sup> Second, to facilitate public engagement on the effect that existing state or local laws or water tariff agreements have on a system's access to full service line replacement and how any barriers to full replacement can be overcome.<sup>119</sup>

With respect to the second element, EPA explains that broadening the scope of the communication strategy for lead service line replacements to encompass consumers (in addition to customers) would ensure that renters and tenants, as well as landowners and landlords, would be made aware of the water system's replacement program.<sup>120</sup>

Subject to our comments in subsection 3, above, suggesting different alternatives or approaches to better promote full lead service line replacements, we support the lead service line replacement plan requirement, including the two additional elements EPA has proposed. The additional requirements should result

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<sup>116</sup> *Id.* at 84,925.

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

<sup>118</sup> *Id.* at 84,920.

<sup>119</sup> *Id.* at 84,921.

<sup>120</sup> *Id.* at 84,925.

in better communications between water systems and their customers and consumers, including identifying any actual barriers to full replacements that could then be addressed.

Finally, we note that EPA proposes that the replacement plans include “plans for procurement of materials” as part of identifying a standard operating procedure for conducting full service line replacement.<sup>121</sup> Given that replacement piping will be in the ground for many years, we ask that EPA thoroughly evaluate and provide guidance to water systems on recommended material to use or to avoid in the replacement service lines. We have specific concerns, for example, with replacement piping comprised of plastic materials, such as polyvinyl chloride (PVC) and chlorinated polyvinyl chloride (CPVC), given the potential health concerns associated with using such piping to supply drinking water.<sup>122</sup>

## 7. Environmental Justice

As EPA has recognized and as discussed in the introduction to these comments, underserved communities, including low income, people of color, rural, and Tribal communities, have historically shouldered a disproportionate burden of harm caused by exposure to lead in water.<sup>123</sup> The Proposed Rule includes several important provisions that aim to achieve more equitable outcomes in service line replacements that are essential to protect the communities most affected by lead contamination. These efforts are improvements over the current regulations and should be adopted and strengthened to better protect to underserved communities from lead.

### a. Prioritizing lead service line replacement in underserved communities

Given the detrimental effects of lead contamination on underserved communities and the historical underinvestment in improvements, it is imperative that EPA include provisions that will compel water systems to prioritize replacement of lead service lines in these communities. Numerous studies of lead exposure across the country have demonstrated that children with high levels of lead in their blood tend to live in neighborhoods with high rates of poverty, high

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<sup>121</sup> 40 C.F.R. Proposed § 141.84(c)(1)(ii).

<sup>122</sup> See Meg Wilcox, et al., “The Perils of PVC Plastic Pipes,” (Apr. 2023), [https://static1.squarespace.com/static/5eda91260bbb7e7a4bf528d8/t/6491ce414930f2385aedb80c/1687277125680/The Perils of PVC Plastic Pipes-April 2023 Digital.pdf](https://static1.squarespace.com/static/5eda91260bbb7e7a4bf528d8/t/6491ce414930f2385aedb80c/1687277125680/The+Perils+of+PVC+Plastic+Pipes-April+2023+Digital.pdf).

<sup>123</sup> EPA, [EPA Strategic Plan FY 2022-2026](#), at 59 (March 2022).

concentrations of racial minorities, and low rates of homeownership and education.<sup>124</sup> While lead exposure can come from multiple sources, these studies are consistent with EPA’s findings in its seven-city case study that areas with lead service lines often have higher percentages of low-income residents, renters, and people of color.<sup>125</sup> Furthermore, EPA has previously recognized that communities of color and low-income communities are more likely to live in older homes with lead service lines,<sup>126</sup> while also less likely to be able to bear the cost of replacing them. Without intervention from EPA specifically designed to eliminate these disparities, water systems may decide not to prioritize replacements in underserved communities. Therefore, the Attorneys General strongly support the retention of the requirement in the 2021 rule that water systems identify a replacement strategy that includes prioritizing disadvantaged consumers and the populations most sensitive to the effects of lead.

We are concerned, however, that the Proposed Rule does not effectively direct water systems on how to prioritize underserved communities, or create enforceable requirements for that prioritization. The Proposed Rule provides that water systems must develop a “strategy to prioritize service line replacement” based on several factors, including communities “disproportionately impacted by lead, and populations most sensitive to the effects of lead.”<sup>127</sup> No further guidance on how to identify these communities or what actions constitute prioritization are specified.<sup>128</sup>

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<sup>124</sup> See, e.g., Carmen M. Dickinson-Copeland et al., “Increased Risk of Sub-Clinical Blood Lead Levels in the 20-County Metro Atlanta, Georgia Area – A Laboratory Surveillance-Based Study,” 18 Int. J. Environ. Res. Public Health 5163 (2021) (finding that children in metro Atlanta who lived in geographical areas with higher proportions of renters and lower proportions of people with a GED/high school diploma were at a higher risk for having lead in their blood); Emily E. Lynch & Helen C. S. Meier, “The Intersectional Effect of Poverty, Home Ownership, and Racial/Ethnic Composition on Mean Childhood Blood Lead Levels in Milwaukee County Neighborhoods,” 15 PloS One e0234995 (2020) (analyzing average level of blood in children by area and finding that the census tracts with the highest average childhood blood levels were areas with low home ownership, high poverty, and majority non-white); Jessie A. Gleason et al., “Drinking Water Lead and Socioeconomic Factors as Predictors of Blood Lead Levels in New Jersey’s Children Between Two Time Periods,” 169 Environ. Res. 409 (2019) (finding that race, older housing, and poverty were predictors of children’s blood lead levels).

<sup>125</sup> 88 Fed. Reg. at 84,927.

<sup>126</sup> Review of the National Primary Drinking Water Regulations: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71,574, 71,575 (Dec. 17, 2021).

<sup>127</sup> 88 Fed. Reg. at 85,064.

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



Without more specific, enforceable language directing water systems on how to identify underserved communities and to replace lead service lines in these communities before addressing other areas, we are concerned that these communities may continue to be overlooked.<sup>129</sup>

b. Disconnections at vacant buildings

We do not support EPA's proposal to permit water systems to count disconnections at vacant buildings toward their annual replacement requirements.<sup>130</sup> Disconnecting pipes that are not in use does not contribute to the overall goal of reducing lead exposure now, since out-of-use pipes are not currently contributing to lead exposure. Counting these disconnections would allow water systems to artificially meet their requirements and discourage or delay conducting replacements in the communities that need them most, while generating no public health benefits. Furthermore, because the Proposed Rule does not prohibit reconnection to these lines in the future, this runs the risk of potentially increasing exposure to lead if state law later allows these buildings to become occupied and the water service to be turned back on. The priority should be on replacing lead service lines that are causing risk of lead exposure as soon as possible, and allowing disconnection of lines at vacant buildings detracts from this goal.

c. Banning of partial replacements

The Attorneys General strongly support the proposed ban on partial service line replacements, unless conducted in response to emergency repairs or planned infrastructure work.<sup>131</sup> Partial replacements only remove the portion of the lead service line owned by the water system and leave in place the portion used to deliver water to homeowners and renters, which leaves them vulnerable to lead exposure. As EPA has recognized, partial replacements can cause elevated levels of lead in drinking water in the period after the replacement, and do not reduce long-term levels of lead in drinking water.<sup>132</sup> Therefore, a ban on partial replacements furthers the goal of reducing lead exposure.

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<sup>129</sup> EPA's EJScreen mapping tool is one method available to identify overburdened communities. Available at <https://www.epa.gov/ejscreen>.

<sup>130</sup> See 88 Fed. Reg. at 84,917.

<sup>131</sup> See *id.* at 84,917-18.

<sup>132</sup> *Id.* at 84,917.

We recognize that emergency situations may arise that would require water systems to conduct partial service line replacements. In these situations, water systems should be required to make every effort to do full service line replacements. For this reason, we support the Proposed Rule’s additional requirements for water systems to provide advance notice to customers (where possible) when an emergency partial replacement will occur as well as an offer to replace the customer-owned portion of the lead service lines.<sup>133</sup> After an emergency partial replacement, we agree that water systems must be required to take mitigation actions to avoid the consequences of partial line replacements, such as providing public education and water filters. This is especially important in underserved communities, where there is a higher risk of partial service line replacements occurring.

d. Funding strategy for full service line replacement

The Attorneys General also strongly support the requirement that water systems identify a funding strategy for achieving full service line replacement that accommodates customers who are unable to pay for the replacement of private services lines. As we highlighted in previous comments, typically the water system owns the portion of a service line that connects to the main water line, but the landowner owns the portion of the line that connects to the premise piping.<sup>134</sup> Under the Proposed Rule, water systems are not required to fund the cost of replacing the landowner-owned portion, potentially placing the burden of this cost instead on the landowner. As discussed above, lower-income homeowners may be unable to afford to pay the thousands of dollars it may cost to replace these lines, and landlords of rental buildings may be unwilling to pay that cost.<sup>135</sup> As a recent study in Washington, D.C. demonstrated, when homeowners bear the cost of replacing private service lines, low income neighborhoods are significantly less likely than wealthier neighborhoods to pay for replacements.<sup>136</sup> It is therefore critical that water systems be required to have a complete and detailed strategy for funding full lead service line replacement, including privately owned portions, to avoid further disparities in lead exposure.

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<sup>133</sup> *Id.* at 84,929

<sup>134</sup> *See* 2020 Multistate Comments at 7-8.

<sup>135</sup> *Id.*

<sup>136</sup> Karen J. Baehler et al., “Full Lead Service Line Replacement: A Case Study of Equity in Environmental Remediation,” 14 *Sustainability* 352 (2022).

We note with concern that the Proposed Rule would allow water systems to pass the cost of replacing the private portion of service lines on to homeowners, merely requiring that the funding strategy “include a description of whether and how the water system intends to assist customers who are unable to pay to replace the portion of the service line they own.”<sup>137</sup> Without a requirement that water systems provide funding or create a funding strategy for when homeowners are unable to pay for their portion of the replacement, there is a very serious risk—as discussed at length above—that lead service lines will remain in place in low-income and other at-risk communities. With the availability of federal and state funding for lead service line replacement,<sup>138</sup> water systems should be required at a minimum to seek such funding for full service line replacement before being allowed to forgo replacement in cases where a homeowner is unable to provide funding.<sup>139</sup>

e. Strategy for full service line replacements on rental properties

As discussed in Section II.A.3 above, EPA proposes that water systems replace lead service lines that are under the “control” of water systems.<sup>140</sup> In some situations, this will require obtaining consent from homeowners to conduct replacement of private service lines. Renters living in these homes do not have ownership rights and may be unable to provide “control” to water systems under the Proposed Rule’s definition to enable replacement of private lead service lines. Landlords, who may own the home but not live in it, have the ability to deny consent to water systems and tenants have little recourse to stop them, while bearing the risk of lead exposure. This increases the risk of lead exposure to renters, who may be living in homes affected by lead service lines but lack the power to consent to replacement of those lines.

This is a significant environmental justice issue, as a higher proportion of low-income households rent rather than own their homes.<sup>141</sup> Furthermore, the number of households that rent rather than own their homes has been increasing in the United States in recent years, with lower-income households renting nearly

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<sup>137</sup> 88 Fed. Reg. at 85,064.

<sup>138</sup> *Id.* at 84,903-04.

<sup>139</sup> See Section II.A.3, *supra*.

<sup>140</sup> 88 Fed. Reg. at 84,920.

<sup>141</sup> Peter J. Mateyka & Jayne Yoo, U.S. Census Bureau, [“Low-Income Renters Spent Larger Share of Income on Rent in 2021”](#) (Mar. 2, 2023).

two-thirds of units with substantial quality issues.<sup>142</sup> Given that the responsibility for water infrastructure typically falls on the landlord in a rental situation, tenants may not be aware of the potential risks associated with lead pipes. Therefore, EPA should adopt measures that not only require water systems to ensure that private lead lines are replaced in rental properties, but also to ensure that renters are informed about the quality of the water in their homes.

Although the preamble to the Proposed Rule states that EPA is adding a requirement that would “require systems to create a strategy to achieve full [lead service line replacement] at rental properties,”<sup>143</sup> the proposal falls short of this goal. Under the Proposed Rule, water systems are required to develop a communication strategy to inform renters of the water service line replacement plan,<sup>144</sup> but there are no further requirements related to renters. The Attorneys General strongly support EPA’s adoption of additional alternatives, such as those discussed in Section II.A.3, above, that could increase the likelihood that full lead service line replacements occur even if a landlord refuses to pay for service line replacement. EPA could require that water systems build these approaches into their replacement plans and communicate that information to tenants.

f. Online publishing of lead service line replacement plans

We support the Proposed Rule’s requirement that water systems make their service line replacement plans publicly available.<sup>145</sup> Online publication would allow community members to be aware of the water system’s plan for replacement and provide them with the opportunity to take action if they disagree with the design or implementation of the plan. This requirement is especially important for renters, who may otherwise not have any information about service line replacement offered to their landlords, and gives them the opportunity to advocate for full service line replacement when landlords refuse to pay for private-side piping replacement.

We disagree, however, with the proposed requirement that only water systems serving 50,000 people or more be required to publish service line replacement plans online. All water systems, or at least those serving a lower threshold number of customers, should be required to post service line replacement

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<sup>142</sup> U.S. Government Accountability Office, [“Rental Housing: As More Households Rent, the Poorest Face Affordability and Housing Quality Challenges”](#) (May 27, 2020).

<sup>143</sup> 88 Fed. Reg. at 84,928.

<sup>144</sup> *Id.* at 85,064.

<sup>145</sup> *See id.* at 84,928.

plans online. Accessing plans online is the easiest way for the public to gain quick access to the plan, rather than requiring customers to physically obtain the plan directly from the water system. Online availability would greatly increase the public's access to the plan while placing a very small burden on water systems.

g. Identification of potential barriers to full replacement

Water systems should also be required to identify potential barriers to access for full replacement in local ordinances and make this information available to the public in the service line replacement plan, as EPA proposes.<sup>146</sup> Water systems must make every effort to achieve full service line replacement, and in order to do so, they need to be aware of local ordinances affecting replacement. Furthermore, if water systems are going to rely on local ordinances as a justification for failing to conduct full service line replacement, they should be required to explain this to the state.

Relatedly, the Attorneys General generally support the proposed requirement that in order for states to have primacy enforcement of public water systems, they must identify any state laws creating a barrier to full service line replacement.<sup>147</sup> In order to achieve the goal of full service line replacement, barriers must be identified so that they can be addressed. States that are taking on the responsibility of enforcement must also be fully aware of these barriers, or the lack thereof, in order to ensure water systems are complying with all requirements. However, rather than being required to identify all state laws “*that pertain to a water system’s access to conduct full service line replacement,*” states should only be required to identify known barriers.<sup>148</sup>

## **B. Revised Lead Action Level and Corrosion Control Treatment**

### **1. Revision of Lead Action Level**

The Attorneys General strongly support EPA’s proposal to reduce the lead action level to 0.010 milligrams per liter (mg/L), and encourage EPA to consider methods to feasibly achieve a lower lead action level of 0.005 mg/L in the near future. In general, corrosion control treatment connotes steps that a water system can take to reduce the amount of lead and copper that is leached into drinking water from service lines and other drinking water equipment. The 2021 rule defined “optimal corrosion control treatment” as corrosion control treatment that minimizes

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<sup>146</sup> *See id.*

<sup>147</sup> *See id.*

<sup>148</sup> *See* 40 C.F.R. Proposed § 142.16(d)(8) (emphasis added).

lead and copper in drinking water while complying with national primary drinking water standards.<sup>149</sup> Under existing rules, water systems are generally required to implement these treatment methods when an exceedance of the lead action level or lead trigger level occurs—exact requirements vary based on the size of the water system, previous steps already taken, and other factors.

EPA established the current lead action level of 0.015 mg/L in 1991 to generally represent “effective corrosion control treatment” and to “simplify implementation.”<sup>150</sup> In other words, EPA set the lead action level at 0.015 mg/L because it could be feasibly implemented, rather than basing this level on the impact to public health.<sup>151</sup> EPA proposes to reduce the lead action level to 0.010 mg/L because it found that water systems have made great improvements to corrosion control treatments and can feasibly achieve lower levels of lead.<sup>152</sup> These improvements are reflected in data EPA collected from systems that have used corrosion control treatment.<sup>153</sup>

Given these findings, EPA must lower the lead action level, which has remained at the same level as when it was established decades ago. The Safe Drinking Water Act requires continuous review and revision of the lead action level and other standards to ensure it is the most health protective, feasible standard.<sup>154</sup> As EPA recognizes, there have been significant advances in corrosion control treatment options, as well as overwhelming evidence showing the serious health impacts caused by exposure to lead in even small quantities.

The Attorneys General also suggest that EPA consider methods to feasibly achieve a lower lead action level of 0.005 mg/L in the near future. EPA requested comment on setting the lead action level to 0.005 mg/L,<sup>155</sup> the level at which lead can be reliably detected.<sup>156</sup> EPA’s analysis predicts that 31.4 percent of systems would exceed this lower action level, mostly consisting of small and medium

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<sup>149</sup> See 88 Fed. Reg. at 84,936.

<sup>150</sup> Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460, 26,490 (June 7, 1991).

<sup>151</sup> See 84 Fed. Reg. at 61,691.

<sup>152</sup> 88 Fed. Reg. at 84,939-940.

<sup>153</sup> *Id.* at 84,940.

<sup>154</sup> See 42 U.S.C. §§ 300g-1(b)(7)(A), 300g-1(b)(9).

<sup>155</sup> 88 Fed. Reg. at 85,036.

<sup>156</sup> *Id.* at 84,943.

systems.<sup>157</sup> Because no level of lead is safe, EPA should explore methods to feasibly achieve the more protective lead action level of 0.005 mg/L as soon as practicable.<sup>158</sup>

## 2. Elimination of Lead Trigger Level

While the 2021 rule maintained the original 1991 lead action level of 0.015 mg/L, it introduced a new regulatory value called the “lead trigger level” at 0.010 mg/L.<sup>159</sup> Under that scheme, systems would have to take different sets of actions based on whether they exceeded the action level or trigger level. Citing administrative complexity, implementation issues, and communication challenges, the Proposed Rule would eliminate the trigger level and establish the lower action level instead.<sup>160</sup>

The Attorneys General support eliminating the trigger level in conjunction with reducing the action level to 0.010 mg/L (if not lower). Focusing on a single, health-protective number for systems to reach will be simpler to implement and reduce the risk of confusion about the necessary regulatory requirements.

## 3. Deferring Requirement to Optimize Corrosion Control Treatment

Although EPA’s proposal generally requires water systems with an exceedance of the lead action level to install or re-optimize corrosion control treatment, EPA would allow a water system to defer implementation until after all lead service lines are replaced, if such replacement is completed within five years and at a rate of at least 20 percent per year.<sup>161</sup> Other requirements that a water system must comply with in the case of an exceedance, such as public education and making filters available, would continue to apply while lead service line replacement proceeds. The Attorneys General urge EPA to address several major shortcomings of these provisions, which could allow water systems to significantly defer optimal corrosion control treatment requirements even while doing little or nothing to replace lead service lines.

EPA explains that the process of installing optimal corrosion control treatment generally takes five years to complete, and the public health benefits of

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<sup>157</sup> *Id.* at 84,941-942.

<sup>158</sup> The Attorneys General urge EPA to set the action level for childcare facilities and schools at 0.005 mg/L in the LCRI, as described *infra*, Section II.E.

<sup>159</sup> 86 Fed. Reg. at 4207-08.

<sup>160</sup> 88 Fed. Reg. at 84,939.

<sup>161</sup> *Id.* at 84,937-38.

complete lead service line replacement exceed those from installing this treatment.<sup>162</sup> Because the exact methods of implementing optimal corrosion control treatment depend on the types of pipes in a water system, the proper treatment may change after replacing lead or galvanized pipes in a system. Systems that are allowed to defer the treatment requirement and ultimately fail to meet their lead service line obligations would then be subject to the treatment requirements.<sup>163</sup>

The lack of any verification or enforcement method at the beginning of this process is a major concern that EPA must address. For instance, a water system could opt-in to the proposal's treatment deferral and do nothing to replace any lead service lines for a full year before the Proposed Rule would impose any requirements. In other words, these provisions offer water systems an automatic one-year deferral of installing optimal corrosion control treatment. We recommend that EPA require water systems that seek to defer treatment installation to demonstrate that they have the necessary funding available and access to service lines in order to remove all their lead service lines within five years at a rate no slower than 20 percent per year.

The Proposed Rule also allows small water systems or water systems with relatively few lead service lines to defer optimal corrosion control treatment for five years without making significant progress toward lead service line removal. For example, a water system with 50 lead service lines would only need to replace 10 per year to take advantage of the proposed treatment deferral. To avoid this situation where a water system would be incentivized to conduct lead service line replacement more slowly, EPA should only allow deferral for water systems that remove some minimum specific number of lead service lines per year, or 20 percent of the entire system—whichever number is higher.

Because removal of all lead service lines is the best method of reducing the public health impacts of lead exposure, the Attorneys General support EPA's proposal to defer optimal corrosion control treatment when water systems commit to rapid lead service line replacement. Importantly, the 2021 rule continues to impose all other requirements on the water system in response to an action level exceedance. This provision will allow systems to focus their resources and reduce the public health threat in an effective manner.

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<sup>162</sup> *Id.* at 84,938.

<sup>163</sup> *Id.*



### C. Compliance Flexibilities for Small Water Systems

The Attorneys General support EPA's proposal mandating service line replacements for all systems, including small systems. By including small systems in this replacement mandate, drinking water consumers in these systems would be protected from lead-tainted waters caused by lead service lines. This would advance EPA's goal of protecting human health by reducing the well-documented harms to children and adults caused by lead contamination.

Until such time that water systems replace lead service lines, an exceedance of the lead action level (discussed in Section II.B, *supra*), will trigger the requirement that the water system optimize corrosion control treatment.<sup>164</sup> The Safe Drinking Water Act requires EPA to identify affordable compliance technologies for all categories of small systems and, if none are available, identify variance technologies for compliance in accordance with section 1412(b)(15).<sup>165</sup> EPA has determined that corrosion control treatment is an affordable compliance technology for all categories of small systems in accordance with the Act, but the agency has also found that it is often difficult for small systems to find and retain operators that have the skills to implement and maintain corrosion control treatment.<sup>166</sup> Therefore, in the 2021 rule, EPA proposed several compliance options for small systems, as discussed above in Section I.B, *supra*.

In the Proposed Rule, EPA made two significant changes to the small system compliance flexibility provisions. First, EPA changed the eligibility requirements. Compared to the small system flexibility provision in the 2021 rule, EPA proposes to reduce the eligibility threshold from water systems serving 10,000 people to systems serving 3,300 or fewer people.<sup>167</sup> We support this revised approach, which would result in more lead service lines being replaced, thereby better protecting public health.

Second, the agency revised the compliance alternatives by eliminating lead service line replacement as an option (as discussed above, under the Proposed Rule, those replacements are mandatory for all water systems, regardless of size). The agency proposes to retain two compliance options it included in the 2021 rule: point-

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<sup>164</sup> 40 C.F.R. § 141.81(a).

<sup>165</sup> 42 U.S.C. § 300g-1(b)(4)(E)(ii).

<sup>166</sup> 88 Fed. Reg. at 84,942.

<sup>167</sup> 40 C.F.R. Proposed § 141.93.

of-use filtration and replacement of lead-bearing plumbing.<sup>168</sup> Eligible systems—those small water systems serving 3,300 or fewer customers and all non-transient, non-community water systems<sup>169</sup>—could choose to use these alternatives instead of optimizing corrosion control treatment.<sup>170</sup> EPA justifies this flexibility on the grounds that “these alternatives to the [optimizing corrosion control treatment] requirements are as effective at preventing known or anticipated health effects as [optimizing corrosion control treatment].”<sup>171</sup>

The point-of-use device installation option would require that filtration devices be installed and maintained in every household, at every tap used for cooking and/or drinking.<sup>172</sup> Although research shows that point-of-use devices can effectively eliminate lead from drinking water,<sup>173</sup> such devices still require regular maintenance, including monitoring water use patterns, testing for lead, and conducting filter replacements, in order to maintain maximum efficiency. EPA estimates that point-of-use device maintenance would require water systems to conduct filter cartridge replacements in up to 1,000 homes three-to-four times per year, and sample over 300 devices per year to monitor for action levels exceeding .010 mg/L.<sup>174</sup>

We generally support the installation of point-of-use devices (properly installed and maintained) and removal of lead-bearing plumbing alternatives, so long as the devices remain safe and effectively eliminate lead from drinking water, and as long as the states have the ability to decide which small water systems should have this alternative compliance option. We have concerns about the inherent complications involved with obtaining access to private premises in order to conduct such installation and maintenance. Obstacles to gaining access, like

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<sup>168</sup> 88 Fed. Reg. at 84,945.

<sup>169</sup> As compared to community water systems, which supply water to the same population year round, “non-transient, non-community water systems” are public water systems that regularly supplies water to at least 25 of the same people at least six months annually. See EPA, “Information About Public Water Systems,” (last visited Jan. 23, 2024), <https://www.epa.gov/dwreginfo/information-about-public-water-systems>

<sup>170</sup> 88 Fed. Reg. at 84,945; 40 C.F.R. Proposed § 141.93(c).

<sup>171</sup> 88 Fed. Reg. at 84,945.

<sup>172</sup> *Id.*

<sup>173</sup> Valerie Bosscher, et al., POU Filters Effectively Reduce Lead in Drinking Water: A Demonstration Field Study in Flint, Michigan, 54 J. Env’t Sci. & Health 484 (2019)

<sup>174</sup> 88 Fed. Reg. at 84,945.

unreachable or uncooperative homeowners or landlords, could impede water system operators' ability to perform the work that is necessary to satisfy the Proposed Rule's compliance requirements. Even small systems with 3,300 or fewer people have a large number of outlets for point-of-use installation and maintenance, which could potentially overburden small system operators.

To address concerns about access to private property, we recommend that EPA issue robust public education requirements and guidance that will aid small water system operators in property access, as well as to inform the public of the significant benefits that point-of-use devices and lead fixture replacements can yield. We also recommend that EPA issue guidance to small water systems to inform operators about how to conduct regular maintenance on point-of-use devices, and guidance to states concerning how to ensure small systems are in compliance. On the latter point, EPA might also consider revising the Proposed Rule to add criteria that states can rely on to determine whether to adopt either of the proposed alternatives in lieu of optimized corrosion control treatment, depending on the circumstances of the communities that water systems are serving. These criteria might include population density, population demographics, levels of water consumption, compliance history, and other factors that might help elucidate whether point-of-use devices or removal of lead-bearing plumbing, or both, is an appropriate alternative.

Either of the alternatives, if adopted by non-transient, non-community water systems, such as childcare centers, large schools and commercial office spaces, would presumably not result in the same access issues as private residential properties since these systems are more likely to have control over the premise plumbing and more likely to be able to implement the point-of-use filtration and plumbing replacement options. For this reason, we agree that the Proposed Rule's compliance alternatives would be an appropriate means of reducing lead contamination for these water systems, provided the devices are properly maintained. However, point-of-use devices are still temporary fixes; total replacement of lead service lines (or replacement of lead plumbing fixtures) is the only permanent solution to lead-contaminated drinking water.

Finally, EPA should consider requiring that small water systems and non-transient, non-community water systems that choose the filtration compliance option to adopt approaches to ensure that filters are regularly replaced as they reach the end of their effective lifespan. Two such approaches would be to require the use of filters equipped with signal lights to show when replacement is necessary or the installation of water meters in premises with point-of-use devices where

water consumption may be higher than what is otherwise typical. This could ensure that filters are checked in a more frequent basis in areas of high volume water use.

## **D. Public Education**

### **1. Testing Notification Requirements**

The Attorneys General support EPA's proposal to broaden the requirement that water systems provide notice of lead tap sampling testing results to persons served by that tap. Under the existing regulations, there are different notice requirements based on whether the testing results exceed the lead action level (currently 0.015 mg/L). Where there is an exceedance, the water system must provide notice within three days; where there is no exceedance, notice must be provided as soon as practicable but no later than 30 days.<sup>175</sup>

The Proposed Rule would instead require notice within three calendar days of *any* lead tap sampling, regardless of whether the results exceed the lead action level or not.<sup>176</sup> Strengthening this requirement is sensible because, as EPA acknowledges, when lead is found at any level, including levels below the action level, it presents a risk to public health. Increased communication of this kind will keep the public informed and in turn provide a health benefit. That being said, we believe it would be reasonable to afford water systems a bit more time (*e.g.*, seven calendar days) to notify customers of testing results when there is no exceedance of the action level. EPA also proposes to require written follow-up when a water system provides initial notification by phone.<sup>177</sup> The Attorneys General support this aspect of the proposal.

### **2. Language on Lead Hazard Communications**

Under existing regulations, water suppliers must provide public education in certain circumstances, such as when the lead action level is exceeded.<sup>178</sup> Among other requirements, this public education material must include specific language describing the health effects of lead. The Proposed Rule would modify this required language in several ways to better inform the public about the health effects from lead in drinking water—especially to specifically and unequivocally state that there

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<sup>175</sup> 40 C.F.R. § 141.85(d)(2).

<sup>176</sup> 88 Fed. Reg. at 84,949.

<sup>177</sup> *Id.*

<sup>178</sup> 88 Fed. Reg. at 94,953.

is no safe level of lead in drinking water. We support the proposed revision for that reason.

### 3. Language Translation Requirements

Existing regulations impose language translation requirements for public education materials provided by water systems serving “a large proportion” (a quantity determined by an individual state) of non-English speakers.<sup>179</sup> The public education materials must include either a translated statement about their importance or, in the alternative, contact information for obtaining a translated copy of the materials or translation assistance. EPA’s proposal strengthens these requirements, to help inform and protect people who have limited English language capabilities. Because expanding public education among non-English speaking communities will improve public health, the Attorneys General support EPA’s proposed provisions.

Under the Proposed Rule, water systems would be required to provide both a translated statement about the importance of the public education materials, as well as contact information for obtaining a translated copy or translation assistance, rather than one or the other.<sup>180</sup> The number of states that already assemble templates and otherwise assist water systems in providing translated education materials, as noted by EPA, show that this requirement is achievable.<sup>181</sup> EPA also is seeking comment on whether to require states to provide translation support to water systems, as a condition of primacy.<sup>182</sup> The Attorneys General support adding this requirement to the regulations because it would help further ensure that non-English speaking communities are being informed about the health risks presented by lead in drinking water.

#### **E. Lead Sampling at Schools and Childcare Facilities**

##### *Additional Background on Lead-Contaminated Drinking Water in Schools*

As discussed in the introduction, exposure to lead is hazardous to everyone’s health, and it is particularly harmful to young children. Children under the age of 6 years are at the greatest risk for developing health problems related to lead

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<sup>179</sup> 40 C.F.R. § 141.85(b)(1).

<sup>180</sup> 88 Fed. Reg. at 84,953.

<sup>181</sup> *Id.* at 84,953-54.

<sup>182</sup> 88 Fed. Reg. at 85,037.

exposure.<sup>183</sup> This is due to the physiological vulnerabilities present in young children, such as not-yet fully developed blood-brain barriers, increased gastrointestinal absorption, and frequent hand-to-mouth behaviors, each of which contributes greatly to increased levels of lead exposure.<sup>184</sup> As EPA is already aware, even minimal levels of lead exposure in children can result in significant adverse health effects, including slowed growth, reduced IQ, difficulties with hearing and speech, anemia, and behavior and learning problems.<sup>185</sup> Indeed, lead toxicity accounts for an estimated total loss of 23 million IQ points among children in the U.S.<sup>186</sup> Many of the devastating effects of lead that develop in early childhood persist well into the second decade of life.<sup>187</sup> Furthermore, pregnant and breastfeeding school administrators and faculty experience heightened risks of lead exposure, since lead consumption can lead to adverse effects on maternal health and infant outcomes, including gestational hypertension, spontaneous abortion, low birth weight, and impaired neurodevelopment.<sup>188</sup> Given these serious health complications that lead exposure poses to children and mothers, it is crucial that the final rule meaningfully addresses lead exposure in schools and childcare facilities.

Most schools in the United States were built prior to 1986, before the federal requirement that public water systems use “lead free” pipes and plumbing.<sup>189</sup> A

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<sup>183</sup> CDC, Childhood Lead Poisoning Prevention, <https://www.cdc.gov/nceh/lead/prevention/children.htm> (last visited Jan. 10, 2024).

<sup>184</sup> Mary Jean Brown & Stephen Margolis, Centers for Disease Control and Prevention, “Lead in Drinking Water and Human Blood Lead Levels in the United States,” *61 Morbidity & Mortality Weekly Rpt.* 1, 2 (2012).

<sup>185</sup> EPA, Basic Information about Drinking Water, <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#health> (last visited Jan. 10, 2024).

<sup>186</sup> American Academy of Pediatrics Council on Environmental Health, “Prevention of Childhood Lead Toxicity,” (July 2016) at 4, available at <https://publications.aap.org/pediatrics/article/138/1/e20161493/52600/Prevention-of-Childhood-Lead-Toxicity>.

<sup>187</sup> Brown & Margolis, *supra* n. 184, at 2.

<sup>188</sup> American College of Obstetricians and Gynecologists, “Committee Opinion: Lead Screening During Pregnancy and Lactation,” (Aug. 2012) at 2, <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2012/08/lead-screening-during-pregnancy-and-lactation.pdf>.

<sup>189</sup> Caroline Pakenham & Bethany Olson, “How States Are Handling Lead in School Drinking Water,” National Association of State Boards of Education, *Education Leaders*

recent study found that, in a dozen states, 44 percent of schools that tested their water sources for lead discovered one or more taps with a lead concentration level above the state’s lead action level.<sup>190</sup> In Pennsylvania, for example, a survey of 65 public school districts found that 91 percent of schools testing drinking water found lead contamination.<sup>191</sup> In Philadelphia, 61 percent of school district water outlets tested showed lead levels exceeding 1 ppb, with one school in particular showing a level of 8,768 ppb.<sup>192</sup> The issue of lead contamination in the drinking water at American schools has been well known, yet there was no federal requirement until 2021 that water systems test any schools for lead levels in drinking water except for those schools and childcare facilities that own and/or operate their own public water system. In sum, lead in the drinking water of our nation’s schools and childcare centers presents a significant and immediate public health threat to students and staff that needs to be addressed.

### *EPA’s Regulatory Approach*

To specifically address the problem of lead-contaminated drinking water at schools and childcare facilities, EPA proposes to retain some of the 2021 rule’s provisions and to add others. As a general matter, EPA takes the position that it lacks statutory authority to directly require schools or childcare facilities to sample or treat drinking water for lead contamination unless those facilities constitute public water systems.<sup>193</sup> Therefore, requirements related to lead sampling at schools

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*Report* (Nov. 2021) at 4, [https://nasbe.nyc3.digitaloceanspaces.com/2021/12/Pakenham-et-al\\_School-Lead-Testing-Report.pdf](https://nasbe.nyc3.digitaloceanspaces.com/2021/12/Pakenham-et-al_School-Lead-Testing-Report.pdf).

<sup>190</sup> Angie Cradock, et al., “Early Adopters: State Approaches to Testing School Drinking Water for Lead in the United States,” Prevention Research Center on Nutrition and Physical Activity at the Harvard T.H. Chan School of Public Health (2019), available at <https://www.hsph.harvard.edu/prc/projects/early-adopters/>.

<sup>191</sup> Kara Rubio, “The State of Environmental Health in Pennsylvania Schools,” Women for a Healthy Environment, (June 2021), at 3, <https://womenforahealthyenvironment.org/wp-content/uploads/2021/08/SOSexecsummaryREV-002.pdf>.

<sup>192</sup> Emma Horst-Martzt, et al., “Lead in the Water: Data reveals elevated levels of lead in Philadelphia school drinking water,” *Penn Environment Research & Pol’y Ctr.*, 1 (Feb. 2022), <https://publicinterestnetwork.org/wp-content/uploads/2022/02/Lead-in-the-Water.Feb2022.pdf>. The school district response to this study points out that outlets testing positive for lead have been taken out of service.

<sup>193</sup> *See, e.g.*, 88 Fed. Reg. at 84,956 (“EPA is authorized under SDWA to establish . . . legally enforceable standards that apply to public water systems . . . [the agency] does not have the authority under SDWA section 1412 to require schools and child care facilities that are not regulated as public water systems to act” under the statute).

and childcare facilities under the Proposed Rule would be imposed upon water systems. As part of this general framework, EPA recognizes that some states and municipalities have laws that require sampling and filtration at schools and childcare facilities, and therefore allows water systems to obtain waivers of EPA regulations in certain circumstances if those facilities are regulated under state or local law.<sup>194</sup> Although the Proposed Rule would improve on the 2021 rule's provisions concerning lead sampling at schools and childcare facilities, there are several areas in which we urge EPA to strengthen its requirements to better protect our children.

Below, we provide specific comments on improving the Proposed Rule in the following areas: (1) lead action level; (2) sampling; and (3) filtration.

### 1. Lead Action Level

In the Proposed Rule, EPA considered, but decided not to propose, a school-specific action level and/or remediation requirements for community water systems.<sup>195</sup> We urge EPA to reconsider that approach, and to adopt a lead action level for schools and childcare facilities of 0.005 mg/L. Because there is no safe level of lead and children are more vulnerable to lead exposure, a lower action level for the facilities that serve our nation's children is warranted.

In the context of rejecting a 0.005 mg/L (or 5 parts per billion (ppb)) action level for all water systems, EPA expressed concern that lowering the action level below 0.010 mg/L may pose an additional administrative burden on states' ability to provide meaningful input to individual systems and adequately oversee optimal corrosion control implementation.<sup>196</sup> EPA also asserts that larger buildings such as schools have a higher potential for elevated lead levels due to conditions such as complex plumbing arrangement that may not be improved by further changes to optimal corrosion control treatment.<sup>197</sup> However, many states have already implemented the equivalent of a 0.005 mg/L action level or lower for schools and childcare facilities, demonstrating the feasibility of such an approach.<sup>198</sup>

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<sup>194</sup> *See id.* at 84,958.

<sup>195</sup> *See id.* at 84,957.

<sup>196</sup> 88 Fed. Reg. at 84,942.

<sup>197</sup> *Id.* at 84,957.

<sup>198</sup> *See e.g.*, Cal. Health & Safety Code § 1597.16 (requiring drinking water testing in licensed childcare facilities constructed before 2010); Cal. Dept. of Social Services, Written



Furthermore, the American Academy for Pediatrics suggests that state and local governments take steps to ensure that school hydration locations do not exceed water lead concentrations of 0.001 mg/L, given the significant adverse health effects children encounter from lead exposure.<sup>199</sup> And the Food and Drug Administration requires that bottled water not exceed 0.005 mg/L.<sup>200</sup> Because EPA’s ultimate goal is to achieve a lead concentration level of 0 mg/L in our schools and childcare facilities (and elsewhere), and because many states have already demonstrated their ability to accommodate the administrative responsibility of maintaining lead levels below 0.005 mg/L in schools, we urge EPA to consider instituting a lead action level of 0.005 mg/L for schools and childcare centers.

## 2. Sampling

Under the Proposed Rule, at least once a year, systems would have to contact all schools and childcare facilities they serve to provide information about the health risks of lead in drinking water. And within five years, systems would have to notify schools and childcare facilities that they are eligible to be sampled for lead by the water system.<sup>201</sup> Water systems would be required to sample for lead at elementary schools and childcare facilities at a certain frequency (typically 20 percent annually) so that sampling of all of these facilities generally would be

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Directives for Lead Testing of Water in Licensed Child Care Centers, Provider Information Notice 21-21.1-CCP (notifying providers of lead action level of 5 ppb), [www.cdss.ca.gov/Portals/9/CCLD/PINs/2021/CCP/PIN-21-21\\_1-CCP.pdf](http://www.cdss.ca.gov/Portals/9/CCLD/PINs/2021/CCP/PIN-21-21_1-CCP.pdf); *see also* Colo. Rev. Stat. § 25-8-903(2) (instituting a lead action level of 5 ppb in childcare centers and schools); Mo. Rev. Stat. § 160.077(3) (requiring schools to provide drinking water with lead concentration that is less than 5 ppb); Mich. Comp. Laws Serv. § 722.113i (instituting a lead action level of 5 ppb in childcare centers); D.C. Code § 38-825.01a (instituting a lead action level of 5 ppb in public schools); Md. Code Ann., Envir. § 6-1501 (instituting a lead action level of 5 ppb in schools); Wash. Rev. Code Ann. § 28A.210.410 (defining “elevated lead level” as exceeding 5 ppb); N.H. Rev. Stat. Ann. § 485:17-a (requiring water lead concentrations at less than 5 ppb in schools and childcare facilities); Vt. Stat. Ann. tit. 18, § 1242(1) (defining lead action level at 4 ppb).

<sup>199</sup> American Academy of Pediatrics Council on Environmental Health, Prevention of Childhood Lead Toxicity (May 5, 2018) at 11, [https://publications.aap.org/pediatrics/article-pdf/138/1/e20161493/929122/peds\\_20161493.pdf](https://publications.aap.org/pediatrics/article-pdf/138/1/e20161493/929122/peds_20161493.pdf).

<sup>200</sup> Food and Drug Administration, Bottled Water Everywhere: Keeping it Safe, <https://www.fda.gov/consumers/consumer-updates/bottled-water-everywhere-keeping-it-safe> (current as of Apr. 22, 2022).

<sup>201</sup> *Id.*, Proposed § 141.92(c)(1), (2).

completed within five years.<sup>202</sup> EPA is not proposing a specified frequency of sampling at secondary schools, which water systems would only need to sample if requested by the school.<sup>203</sup> Sampling at schools and childcare facilities would have to be conducted pursuant to certain protocols, including collection of five samples per school and two samples per childcare facility at outlets typically used to provide water for human consumption.<sup>204</sup> The results of sampling would have to be provided within 30 days to the school or childcare facility, along with information about potential options to remediate lead in drinking water.<sup>205</sup>

The Attorneys General are concerned that the Proposed Rule's sampling requirements are too limited to address lead exposure in schools. As described in detail below, we recommend that EPA institute a more robust school and childcare facility sampling program by making the sampling program mandatory in all schools, including secondary schools. We urge EPA to increase sampling frequency requirements and increase sampling location requirements. Further, following EPA's "whole of government" approach of its 2023 Strategy to Reduce Lead Exposures and Disparities in U.S. Communities,<sup>206</sup> we advocate for EPA to work together with the U.S. Department of Education and any other relevant federal agency to develop and implement these testing requirements. In the rest of this subsection, we set forth more specific comments on several aspects of the Proposed Rule.

- ***Mandatory sampling in secondary schools.*** We encourage EPA to treat secondary schools the same as elementary schools and childcare facilities. Rather than merely allowing secondary schools the option to request that their water systems sample for lead, sampling should be mandatory for water systems. Although not as at risk as younger children, older children continue to be vulnerable to exposure to elevated levels of lead.<sup>207</sup> In addition, school

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<sup>202</sup> *Id.*, Proposed § 141.92(d).

<sup>203</sup> *Id.*, Proposed § 141.92(e).

<sup>204</sup> *Id.*, Proposed § 141.92(f)(1).

<sup>205</sup> *Id.*, Proposed § 141.92(g).

<sup>206</sup> EPA, Final Strategy to Reduce Lead Exposures and Disparities in U.S. Communities," (Oct. 2022), <https://www.epa.gov/lead/final-strategy-reduce-lead-exposures-and-disparities-us-communities>.

<sup>207</sup> See American Academy of Pediatrics Council on Environmental Health, *supra* note 199, at 4 (noting that national study of 8- to 15-year old children found that having a blood lead concentration of >13 ppb was associated with an elevated risk of attention-deficit/hyperactivity disorder (ADHD)).

buildings, regardless of grade level, are often utilized for community gatherings where children of all ages, parents, and staff congregate for extracurricular events. The efforts to address lead exposure in communities should be equally administered across all K-12 schools, to protect the secondary school students, and to account for community use of schools.

- **Improved outreach.** The Proposed Rule retains the requirement from the 2021 rule that community water systems conduct educational outreach once per year to schools and childcare facilities, while only requiring sampling outreach to schools and childcare facilities once every five years.<sup>208</sup> We suggest that EPA require increased sampling outreach such that all schools and childcare facilities are contacted every three years. EPA also should consider increasing the number of required outreach attempts to schools and childcare facilities to greater than two before the water system can classify a school or childcare facility as non-responsive.
- **Sampling frequency and number.** EPA proposes to retain the 2021 rule’s requirements for frequency and number of samples for schools and childcare facilities,<sup>209</sup> but those provisions are insufficiently protective. There are three ways in which the agency should strengthen those provisions.
  - First, EPA should require increased sampling frequency. Under the existing regulations, water systems have to sample only 20 percent of elementary schools and childcare facilities they serve annually, translating into sampling at each once every five years. Testing once every five years is inadequate, particularly in larger schools where the potential for lead exposure is greater given the higher number of water outlets and that water use patterns at each outlet vary substantially. Instead, EPA should mandate that water systems sample all schools and childcare centers—with the exception of those that do not respond or refuse testing—over the course of a three-year period (*i.e.*, a minimum of 33.33 percent per year).
  - Second, EPA should compel water systems to sample more locations. The current rules require that at least five samples be taken at each school and at least two samples from each childcare center.<sup>210</sup> EPA recognizes that “larger buildings, such as schools and childcare facilities, can have a higher potential for elevated lead levels due to

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<sup>208</sup> 88 Fed. Reg. at 84,957.

<sup>209</sup> *Id.*

<sup>210</sup> 40 C.F.R. 141.92(f)(1).

complex plumbing arrangements.”<sup>211</sup> This alone supports requiring sampling at more locations given that water stagnation times will vary depending on a water outlet’s frequency of use, particularly in a building that is intermittently used, like a school. EPA should consider requiring sampling at all outlets used for drinking water or at least adding a percentage requirement (e.g., 75-85 percent of drinking water outlets). More water quality data collected from a representative group of sample locations would provide the information needed to determine if children are being exposed to lead through the ingestion of drinking water at schools and childcare centers.

- Third, should EPA tighten the regulatory language that allows water systems to treat schools and childcare centers as “non-responsive” and thereby not covered by sampling requirements. At present, water systems are permitted to include toward their minimum annual percentage sampling total those schools and childcare facilities that did not respond to outreach to conduct sampling.<sup>212</sup> We suggest that EPA not permit systems to include lack of responses (or refusals) in the annual minimum sampling requirement (which we suggest, as noted above, EPA should increase from 20 percent per year to 33.33 percent annually).
- **Reporting of sampling results.** Finally, EPA should require water systems to promptly make available the results of any sampling so that the results are communicated to parents, guardians, teachers, and school staff. Some water systems may already be required to report sample results to their respective states. However, parents, guardians, teachers, and staff may not learn of the results after lead sampling. Publicizing results annually is not sufficient given the health hazards of lead contamination. As such, we suggest that EPA require that consumers—including parents, guardians, teachers, and other school staff—receive notices of lead tap sampling results within three calendar days of when the water system receives of the results, regardless of whether those results exceed lead action levels.

### 3. Filtration

As an alternative to imposing the suggested changes we discuss above with respect to increased sampling frequency and number at schools and childcare

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<sup>211</sup> 88 Fed. Reg. at 84,957.

<sup>212</sup> 40 C.F.R. § 142.92(d)(i)(B).

centers, EPA could consider allowing community water systems the option of installing and maintaining point-of-use water filters. The State of Michigan, for example, enacted a law in 2023 that adopts this type of “filter first” approach at schools and childcare centers.<sup>213</sup> The bipartisan law, signed by Governor Whitmer into law last October, requires schools and childcare facilities to install filtered water faucets within 15 months of the law’s enactment.<sup>214</sup> The “filter first” method is expected to save the state more than \$300 million over ten years compared to the “test and tell” approach embodied in the Proposed Rule.<sup>215</sup>

Allowing such an approach as a compliance option would be within EPA’s authority under the Safe Drinking Water Act. The statute allows, for example, small water systems to use point-of-use filters in complying with maximum contaminant levels or treatment techniques.<sup>216</sup> Furthermore, the 2021 rule specifically listed point-of-use filters as a compliance option for small water systems that exceed the lead action level and specifies procedures the water system must follow, among other things, to maintain the filter.<sup>217</sup> And given that the Proposed Rule already includes requirements for outreach to schools and childcare facilities regarding education about lead hazards and obtaining access to sample for lead, water systems could convey information to these consumers about water systems accessing schools and childcare facilities to install and maintain filters.<sup>218</sup>

EPA acknowledges, as noted above, that it has authority to apply requirements directly to schools and childcare facilities that are regulated public water systems and to impose these obligations on public water systems that have

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<sup>213</sup> Gov. Whitmer Press Release (Oct. 19, 2023), <https://www.michigan.gov/whitmer/news/press-releases/2023/10/19/whitmer-signs-bipartisan-legislation-to-ensure-clean-drinking-water-in-schools>

<sup>214</sup> See House Bill No. 4341, <https://www.legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0154.pdf>, and House Bill No. 4342, <http://www.legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0155.pdf>.

<sup>215</sup> See Natural Resources Defense Council, *Michigan Filter First Cost Estimate* (2020), <https://www.nrdc.org/sites/default/files/media-uploads/michigan-filter-first-cost-estimate-202001.pdf>.

<sup>216</sup> See 42 U.S.C. § 300g-1(b)(4)(E)(ii).

<sup>217</sup> See 40 C.F.R. § 141.93(a)(3).

<sup>218</sup> As noted further below in this subsection, EPA has proposed that states may waive EPA sampling requirements for community water systems at schools and childcare facilities if point-of-use filters have been installed pursuant to state or local law and the system or the school or facility is maintaining the filters.

schools and childcare facilities as customers. Although the latter would require a water system to take actions at facilities that it does not own or operate, the Proposed Rule, as discussed above, similarly authorizes small water systems to install and maintain point-of-use devices at customers' homes – requiring repeated access to private property.<sup>219</sup> Moreover, such requirements would be easier to implement as schools and childcare facilities have normal hours of operation and thus would be easier for an operator to access.

Although installing filter point-of-use devices would result in upfront costs for the water system, a recent analysis conducted by the Natural Resources Defense Council concerning Michigan's "filter first" approach showed that, over time, installing filters and conducting maintenance twice a year is more cost effective than testing and follow up remediation,<sup>220</sup> with the added public health benefits of an immediate reduction in lead contamination, and thus less costs incurred by health insurance and social welfare programs addressing the adverse effects of lead.

Despite these benefits, point-of-use filters may not be appropriate in all circumstances, and can also cause problems if improperly maintained. Therefore, if EPA were to allow this compliance option, the agency should require safeguards similar to those it already requires for small water systems that choose point-of-use filters as a compliance option.<sup>221</sup> First, EPA should require that point-of-use filters be certified. For example, filter devices that are certified by NSF International to meet NSF/ANSI Standard 53 for lead removal and NSF/ANSI Standard 42 for particulate lead reduction could be used to prevent child lead consumption.<sup>222</sup> Second, EPA should require that water systems sample filtered water right after installation to make sure that filters are effectively eliminating lead to below the lead action level (as noted above, we recommend a level of 0.005 mg/L for schools and childcare facilities). Third, EPA should require regular sampling and maintenance (*e.g.*, filter replacement) to ensure that the filters are operating efficiently. As discussed above, the use of filters equipped with signal lights indicating the need for replacement can help make sure that filters are replaced in

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<sup>219</sup> See Section II.C, *supra*.

<sup>220</sup> See *Michigan Filter First Cost Estimate*, *supra* note 215.

<sup>221</sup> See 40 C.F.R. § 141.93(a)(3).

<sup>222</sup> See NSF, Drinking Water Treatment Units Must Now Meet Stricter Requirements for Lead Reduction Certification (last visited Feb. 3, 2024), <https://www.nsf.org/news/drinking-water-treatment-units-stricter-requirements-lead-reduction-cert>.

timely fashion.<sup>223</sup> Fourth, EPA should require that in the event that filtration fails to reduce lead to below the lead action level, the water system promptly takes the necessary corrective actions.

Relatedly, we support EPA's proposal that where a school or childcare facility is being sampled for lead under a state or local law, states could waive EPA's sampling requirements under certain conditions, such as where the school or childcare facility maintains point-of-use filters on all outlets used to provide water for human consumption.<sup>224</sup> EPA should consider modifying the testing waiver option related to point-of-use devices to require that schools and childcare facilities that meet the criteria for the waiver adhere to appropriate periodic maintenance and sampling to measure point-of-use device efficacy. We further urge EPA to issue guidance for states and water systems to assist with implementation and enforcement in schools and childcare centers where point-of-use devices are installed.

Finally, it is important to recognize that a risk of requiring point-of-use filters is that these devices may be viewed as permanent solutions rather than temporary fixes until the source of lead is removed. Without proper maintenance and ongoing confirmatory sampling, consumers may falsely conclude that lead is being removed when, in fact, it is not. Therefore, removal of all lead-containing plumbing and fixtures in schools and childcare facilities must be the end goal.

### III. CONCLUSION

We commend EPA's efforts in the Proposed Rule to address many of the flaws in the 2021 rule. The agency's decision to mandate the replacement of all lead service lines in the country within ten years could have critical and lasting health benefits, and should be coupled with measures to ensure effective and equitable implementation. We urge EPA to make revisions in the final rule to increase the likelihood that full lead service line replacements will in fact occur in all communities, regardless of income levels. These changes and the additional improvements to the Proposed Rule recommended above would go a long way toward eliminating the threat posed by lead-contaminated drinking water.

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<sup>223</sup> See Section II.C, *supra*.

<sup>224</sup> *Id.*, Proposed § 141.92(h)(iv).

Sincerely,

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