

**ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, MARYLAND,
MASSACHUSETTS, MINNESOTA, NEW JERSEY, OREGON, PENNSYLVANIA,
AND THE DISTRICT OF COLUMBIA**

April 12, 2021

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Via Electronic Submission

EPA-HQ-OW-2017-0300

RE: *National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates*, 86 Fed. Reg. 14,063 (Mar. 12, 2021)

Dear Administrator Regan:

The Attorneys General of New York, California, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, and the District of Columbia submit these comments regarding the U.S. Environmental Protection Agency's ("EPA") proposed rule delaying the effective and compliance dates of the *National Primary Drinking Water Regulations: Lead and Copper Rule Revisions*, published at 86 Fed. Reg. 4,198 (Jan. 15, 2021) (the "Revised Lead and Copper Rule"), for which notice was published on March 12, 2021. EPA states that the proposed delay will allow sufficient time for EPA to complete its review of the Revised Lead and Copper Rule in accordance with the presidential directives issued on January 20, 2021¹ and conduct consultation with affected parties, including underserved communities disproportionately affected by exposure to lead. 86 Fed. Reg. at 14,064. We welcome this review and outreach. Given the paramount importance to public health, we also urge EPA to expeditiously remedy the deficiencies in the Revised Lead and Copper Rule and implement an updated rule that uses the best available science, 42 U.S.C. § 300g-1(b)(3), protects the health of all Americans, and rectifies the environmental injustice in access to safe drinking water.²

Congress long ago recognized the substantial threat that unsafe drinking water poses to America's residents and enacted the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq.*, to protect against harmful contaminants. The SDWA requires that EPA, among other things, establish "primary drinking water regulations" that limit exposure to contaminants that

¹ See *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7,037 (Jan. 25, 2021); The White House, Memorandum for the Heads of Executive Departments and Agencies, Regulatory Freeze Pending Review, 86 Fed. Reg. 7,424 (Jan. 28, 2021).

² See Charles Lee, *Confronting Disproportionate Impacts and Systematic Racism in Environmental Policy*, ELR 10207 (Mar. 2021), https://www.eli.org/sites/default/files/docs/elr_pdf/51.10207.pdf.

“may have any adverse effect on the health of persons.”³ Because of the critical importance of protecting America’s drinking water from harmful contamination, Congress mandated that EPA continuously review its drinking water regulations at least every six years.⁴ Congress further required that each subsequent revision “maintain, or provide for greater, protection of the health of persons.”⁵ Furthermore, to the extent EPA identifies treatment techniques to limit exposure to contaminants in lieu of establishing a maximum contaminant level, the treatment techniques must “prevent known or anticipated adverse effects on the health of persons to the extent feasible.”⁶ In addition, Executive Order 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994), requires that the Revised Lead and Copper Rule must not have “disproportionately high and adverse human health or environmental effects . . . on minority populations and low-income populations.”

Our States have a significant interest in ensuring that EPA promulgates the Revised Lead and Copper Rule in accordance with the SDWA and Executive Order 12,898. As EPA recognizes, the impact of lead exposure, including through drinking water, is a public health issue of paramount importance. 86 Fed. Reg. at 14,064. No amount of lead is safe for consumption. 86 Fed. Reg. at 4,208. Even low levels of lead in blood poses serious health risks for children and adults (e.g., less than 5 micrograms per deciliter (µg/L) for children and less than 10 µg/L for adults). 86 Fed. Reg. at 14,064. Exposure to lead can damage the brain and nervous system, especially in developing fetuses, infants, and young children. *Id.* This exposure can lower intelligence quotient (IQ) and result in attention disorders in children. *Id.* Lead exposure can also cause adverse cardiovascular effects, renal effects, reproductive effects, immunological effects, neurological effects, and cancer. *Id.*

Lead may leach into the drinking water of the approximately 6.3 to 9.3 million homes currently served by lead service lines in thousands of communities nationwide. 86 Fed. Reg. at 4,199; 86 Fed. Reg. at 14,064. Lead may also leach into the drinking water in millions of older buildings with lead solder and faucets that contain lead. 86 Fed. Reg. at 4,199. EPA estimates that drinking water can make up at least 20 percent of a person’s total exposure to lead. 86 Fed. Reg. at 4,205; 86 Fed. Reg. at 14,064. Infants who consume mostly formula mixed with tap water can, depending on the level of lead in the system and other sources of lead in the home, receive 40 percent to 60 percent of their exposure to lead from drinking water used in the formula. 86 Fed. Reg. at 4,205; 86 Fed. Reg. at 14,064.

Because of various inequities, including disparities in the quality of housing, community economic status, and access to medical care, lead in drinking water (and other media) disproportionately affects lower-income people. 86 Fed. Reg. at 14,064. Minority and low-income children, who more likely live near lead-emitting industries and in urban areas, face increased exposure to lead. *Id.* Additionally, non-Hispanic black individuals are more than twice as likely as non-Hispanic whites to live in moderately or severely substandard housing which also presents greater risks from deteriorating lead based paint. *Id.* Limited resources

³ 42 U.S.C. § 300f(1)(B).

⁴ 42 U.S.C. § 300g-1(b)(9).

⁵ 42 U.S.C. § 300g-1(b)(9).

⁶ 42 U.S.C. § 300g-1(b)(7)(A).

available for remediating lead service lines and other sources of lead exposure may further exacerbate the disparate impacts on low income and minority populations. *Id.*

In the Revised Lead and Copper Rule, EPA failed to remedy the deficiencies that a number of Attorneys General and other commenters identified in the proposed revisions to the rule.⁷ Among other things, the treatment techniques identified by EPA in the Revised Lead and Copper Rule, including the action level of 15 µg/L, lead service line replacement provision, and sampling procedures, do not “prevent known or anticipated adverse effects on the health of persons to the extent feasible,” in violation of 42 U.S.C. § 300g-1(b)(7)(A). Furthermore, the lead service line replacement provision, which decreases the replacement rate, does not “maintain, or provide for greater, protection of the health of persons” as did the prior rule, in violation of the SDWA’s anti-backsliding provision, 42 U.S.C. § 300g-1(b)(9). In addition, the lead service line replacement provision, which depends on the ability of home and other building owners to pay to replace private water lines, does not address—and indeed is likely to exacerbate—the baseline health risk disparity among minority and low-income populations, which causes disproportionately high and adverse health and environmental effects on these populations in violation of Executive Order 12,898. In light of these deficiencies, certain Attorneys General and other petitioners filed petitions for review of the Revised Lead and Copper Rule in the U.S. Court of Appeals for the District of Columbia.⁸

EPA now commits to engaging with communities disproportionately impacted by lead drinking water contamination in reviewing the Revised Lead and Copper Rule. *See* 86 Fed. Reg. at 14,064. Specifically, EPA commits to meeting with underserved and overburdened communities, along with disadvantaged homeowners who may not be able to afford the costs of replacing their portion of lead service lines. *Id.* The Attorneys General commend these commitments and encourage EPA to conduct deliberate and meaningful outreach with the affected public, including communities disproportionately affected by exposure to lead in our respective jurisdictions.⁹ We stand ready to work with the agency in this important effort to protect vulnerable communities from the known harmful effects of lead in drinking water.

In addition, the Attorneys General urge EPA to consider new information, including the December 2020 report of the U.S. Government Accountability Office, which concluded, among other things, that areas with older housing and vulnerable populations (i.e., families in poverty) in Rochester, Pittsburgh, Providence, and Cincinnati have higher concentrations of lead service

⁷ *See, e.g.*, Comments of the Attorneys General of California, Oregon, Minnesota, Connecticut, Pennsylvania, Wisconsin, Illinois, Maryland, New York, and New Jersey (Feb. 12, 2020), <https://www.regulations.gov/comment/EPA-HQ-OW-2017-0300-1468>. The Attorneys General’s comments are attached hereto, and thereby incorporated, as Attachment A.

⁸ *See State of New York, et al v. EPA, et al*, No. 21-1076 (D.C. Cir. Mar. 1, 2021). The Attorneys General’s petition for review has been consolidated with *Newburgh Clean Water Project, et al v. EPA, et al*, No. 21-1019 (D.C. Cir. Jan. 15, 2021) (lead case), and *Natural Resources Defense Council v. EPA, et al*, No. 21-1020 (D. C. Cir. Jan. 25, 2021).

⁹ *See, e.g.*, New York League of Conservation Voters Fund, *5 is the New 15: A Case for Reducing the Action Level for Lead in New York State’s Public School Drinking Water Program from 15 parts per billion (ppb) to 5 ppb* (Feb. 2021), https://nylcvef.org/wp-content/uploads/2021/02/Lead-Report_drinking-water.pdf; Hannah Northey, *Duckworth, Durbin Want State Say in EPA Lead Rulemaking*, E&E News (Apr. 1, 2021), <https://www.eenews.net/eedaily/2021/04/01/stories/1063728969>.

lines.¹⁰ The GAO determined that by developing guidance for water systems that outlines methods for identifying high-risk locations using publicly available data, EPA could better ensure that public water systems test water samples from locations at greater risk of having lead service lines and identify areas with vulnerable populations to focus lead service line replacement efforts. The Attorneys General further point EPA to several other recent studies which further support remedying the deficiencies of the Revised Lead and Copper Rule.¹¹ The Attorneys General look forward to engaging with EPA in remedying the Revised Lead and Copper Rule.

¹⁰ U.S. Government Accountability Office, *Drinking Water: EPA Could Use Available Data to Better Identify Neighborhoods at Risk of Lead Exposure*, GAO-21-78 (Dec. 2020), <https://www.gao.gov/assets/gao-21-78.pdf>.

¹¹ See, e.g., Sheldon V. Masters, Timothy A. Bartrand, and Chad J. Seidel, Examining the Proposed Lead and Copper Rule Trigger Level, *Journal AWWA* (Nov. 2020); Amina Grant, Michelle M. Scherer, Danielle Land, David M. Cwiertny, Marc A. Edwards, Jerry Mount, and Drew E. Latta, *Estimating Consumers at Risk from Drinking Elevated Lead Concentrations: An Iowa Case Study*, *Environmental Science & Technology Letters* (Oct. 2020); Shu Ning Chan, Lu Chang, King Wah Choi, Joseph H. W. Lee, John K. Fawell, and Kelvin Y. T. Kwok, *Unraveling the Causes of Excess Lead in Drinking Water Supply Systems of Densely Populated High-Rise Buildings in Hong Kong*, *Environmental Science & Technology* (Oct. 2020); Darren A. Lytle, Michael R. Schock, Casey Formal, Christina Bennett-Stamper, Stephen Harmon, Mallikarjuna Nadagouda, Daniel Williams, Michael K. DeSantis, Jennifer Tully, and Maily Pham, *Lead Particle Size Fractionation and Identification in Newark, New Jersey's Drinking Water*, *Environmental Science & Technology* (Oct. 2020); Simoni Triantafyllidou, Jonathan Burkhardt, Jennifer Tully, Kelly Cahalan, Michael DeSantis, Darren Lytle, Michael Schock, *Variability and Sampling of Lead (Pb) in Drinking Water: Assessing Potential Human Exposure Depends on the Sampling Protocol*, *Environmental International* (Oct. 2020); Ronnie Levin, Carolina L. Zilli Vieira, Marieke H. Rosenbaum, Karyn Bischoff, Daniel C. Mordarski, Mary Jean Brown, *The Urban Lead (Pb) Burden in Humans, Animals and the Natural Environment*, *Environmental Research* (Oct. 2020); Darren A. Lytle, Casey Formal, Evelyne Doré, Christy Muhlen, Stephen Harmon, Daniel Williams, Simoni Triantafyllidou & Maily Pham, *Synthesis and Characterization of Stable Lead (II) Orthophosphate Nanoparticle Suspensions*, *Journal of Environmental Health and Science* (Sept. 2020); Anushka Mishra, Ziqi Wang, Vicky Sidorkiewicz, Daniel E. Giammar, *Effect of Sodium Silicate on Lead Release from Lead Service Lines*, *Environmental Science: Water Research and Technology* (Sept. 2020); Lindsay W. Stanek, Jianping Xue, Claire R. Lay, Erik C. Helm, Michael Schock, Darren A. Lytle, Thomas F. Speth, and Valerie G. Zartarian, *Modeled Impacts of Drinking Water Pb Reduction Scenarios on Children's Exposures and Blood Lead Levels*, *Environmental Science & Technology* (July 2020); Noelle Chesley, Helen Meier, Jake Luo, Immaculate Apchemengich and W. Hobart Davies, *Social Factors Shaping the Adoption of Lead-Filtering Point-of-Use Systems: An Observational Study of an MTurk Sample*, *Journal of Water and Health* (May 2020).

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Attachment A

**ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, OREGON,
MINNESOTA, CONNECTICUT, PENNSYLVANIA, WISCONSIN, ILLINOIS,
MARYLAND, NEW YORK, AND NEW JERSEY**

February 12, 2020

Andrew Wheeler
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Via Electronic Submission

RE: Comments regarding Notice of Proposed Rulemaking, *Proposed Rule, National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions*, 84 Fed. Reg. 61684 (Nov. 13, 2019), RIN 2040-AF15, docket identification number EPA-HQ-OW-2017-0300-0001.

Dear Administrator Wheeler:

On November 13, 2019, the United States Environmental Protection Agency (EPA) published proposed regulatory revisions to the National Primary Drinking Water Regulation (NPDWR) for lead and copper under the authority of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.* This rule, commonly referred to as the Lead and Copper Rule (LCR), is intended to protect public health and safety by reducing the harmful exposure to lead and copper in drinking water. *See Proposed Rule, National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions*, 84 Fed. Reg. 61,684 (Nov. 13, 2019) (Proposed LCR). The Proposed LCR revises the NPDWR only with respect to lead, leaving the existing rule in place for copper. The undersigned Attorneys General of California, Oregon, Minnesota, Connecticut, Pennsylvania, Wisconsin, Illinois, Maryland, New York, and New Jersey (collectively, the Attorneys General) submit these comments to urge the EPA to improve the Proposed LCR and fulfill Congress's mandate to protect America's residents from lead in drinking water.

INTRODUCTION

For the first time in decades, the EPA has proposed substantive changes to the LCR, the set of regulations required by the SDWA to protect America's drinking water and its residents from the pernicious health impacts associated with lead contamination. The undersigned Attorneys General recognize that reducing the impacts associated with lead in drinking water will not include a quick, one-size-fits-all solution, but a comprehensive program that takes into account the varied resources of water systems, while still protecting America's drinking water supply and complying with the SDWA's mandates. To that end, the Attorneys General believe that several aspects of the Proposed LCR are significant improvements over the current regulation, including its requirement for lead service line (LSL) inventories, support for full LSL replacement (LSLR) over partial LSLR, and new requirements for lead testing in schools and childcare facilities. However, certain provisions in the Proposed LCR fail to protect public

health to the extent feasible, as required by the SDWA. Therefore, the Attorneys General submit these comments to the EPA for consideration and urge the EPA to include all of these revisions in the Final Rule.

IMPACTS OF LEAD IN DRINKING WATER

Lead is a highly toxic heavy metal that can adversely affect almost every organ and bodily system.¹ In adults, lead exposure can result in: decreased cognitive function, including attention, memory, and learning problems; altered neuromotor and neurosensory functioning; altered mood and behavior; and decreased peripheral nerve conduction velocity.² It can also lead to an increased risk of heart disease and mortality from cardiovascular disease, renal problems, hematological effects, decreased resistance to disease, reproductive harm, and developmental challenges.³ According to one multi-year study on the impacts of low-level lead exposure, “of 2.3 million [cardiovascular] deaths every year in the USA, about 400,000 are attributable to lead exposure.”⁴ This study concludes that lead, even at low levels, is a key risk factor for deaths from cardiovascular disease.⁵

The health risks associated with lead exposure are even more dire for children. Childhood lead exposure can cause serious neurological effects, including: decreased cognitive function; altered mood and behaviors that may contribute to learning deficits; altered neuromotor and neurosensory function; peripheral neuropathy; and encephalopathy.⁶ In particular, there is abundant evidence that links high lead levels in 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 (IQ), and (3) reductions in specific cognitive measures.”⁷ Lead exposure can also result in delayed puberty and decreased kidney function in children over 12 years of age.⁸

The American Academy of Pediatrics (AAP) states that no amount of lead exposure is safe for children, and recommends mandatory requirements that reduce lead levels to less than or equal to one µg/L.⁹ Similarly, a 2017 study on low-level toxin exposures found that “no

¹ Agency for Toxic Substances and Disease Registry, Toxicological Profile for Lead, 13-14 (May 2019), <https://www.atsdr.cdc.gov/toxprofiles/tp13-c2.pdf>.

² *Id.* at 14.

³ *Id.* at 14-15.

⁴ Lanphear, et al., “Low-Level Lead Exposure and Mortality in US Adults: a Population-Based Cohort Study,” 3 *Lancet Public Health* e177, e182 (March 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).

⁵ *Id.*

⁶ Agency for Toxic Substances and Disease Registry, Toxicological Profile for Lead, 14.

⁷ National Toxicology Program, Health Effects of Low-Level Lead, xviii (June 2012), https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffectslowlevellead_newissn_508.pdf.

⁸ *Id.*

⁹ AAP, “Prevention of Childhood Lead Toxicity,” 138(1) *Pediatrics* 1 (July 2016), <https://pediatrics.aappublications.org/content/138/1/e20161493>; AAP, With No Amount of Lead

threshold appears to exist” for certain ubiquitous non-carcinogens, including lead.¹⁰ The study also found 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).”¹¹ Based on these findings, the author recommends that regulatory agencies strive to achieve “near-zero exposures” for several toxins, including lead, to better protect public health.¹²

Drinking water can be a significant source of lead exposure, as demonstrated by the EPA’s Safe Drinking Water Information System (SDWIS).¹³ A report published by the Natural Resources Defense Council (NRDC) analyzed data obtained from the SDWIS database and found that 5,363 community water systems across the United States had a total of 8,093 violations of the LCR in 2015.¹⁴ These LCR violations include failures to properly monitor, report, or treat water contaminated with lead.¹⁵ Of the 5,363 community water systems with violations in 2015, 233 reported 303 health-based violations that affected nearly 600,000 people.¹⁶ Additionally, 1,110 of the community water systems – serving approximately 3.9 million people across the country – had lead levels in excess of the EPA’s 15 µg/L action level.¹⁷

While LCR violations affect large populations, disadvantaged communities are affected at greater rates due to lack of infrastructure and investment in their communities and the 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.”¹⁸ The Environmental Justice Coalition for Water (EJCW) 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

Exposure Safe for Children, American Academy of Pediatrics Calls For Stricter Regulations (June 20, 2016), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/With-No-Amount-of-Lead-Exposure-Safe-for-Children,-American-Academy-of-Pediatrics-Calls-For-Stricter-Regulations.aspx>.

¹⁰ 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>.

¹¹ *Id.* at 3.

¹² *Id.* at 6.

¹³ EPA, SDWIS Search, <https://www.epa.gov/enviro/sdwis-search>.

¹⁴ NRDC, What’s In Your Water: Flint and Beyond, 15 (June 2016), <https://www.nrdc.org/sites/default/files/whats-in-your-water-flint-beyond-report.pdf>.

¹⁵ *Id.*

¹⁶ NRDC, Threats on Tap: Widespread Violations Highlight Need for Investment in Water Infrastructure and Protections, 16 (May 2017), <https://www.nrdc.org/sites/default/files/threats-on-tap-water-infrastructure-protections-report.pdf>.

¹⁷ *Id.*

¹⁸ 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>.

color and low-income communities to contaminated drinking water.”¹⁹ This EJCW report describes how a lack of resources in these communities leads to an inability to “construct, operate, and maintain water infrastructure.”²⁰ 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.²¹

BACKGROUND

I. THE SDWA REQUIRES THE EPA TO ESTABLISH RULES THAT PROTECT PUBLIC HEALTH FROM DRINKING WATER CONTAMINANTS.

Congress long ago recognized the substantial threat that unsafe drinking water poses to America’s residents and passed the SDWA to limit exposures to harmful contaminants.²² The SDWA requires that the EPA, among other things, establish “primary drinking water regulations” applicable to public water systems intended to limit exposure to contaminants that the EPA has determined “may have any adverse effect on the health of persons.”²³ Because protecting America’s drinking water supply from harmful contamination is of such critical importance, Congress mandated the EPA to continuously review its standards for drinking water, no less than once every six years, to ensure protection to the greatest extent feasible.²⁴ Congress further required each subsequent revision to drinking water regulations to be at least as protective as the former regulation. This “anti-backsliding” provision in the SDWA mandates: “[a]ny revision of a national primary drinking water regulation... shall maintain, or provide for greater, protection of the health of persons.”²⁵

After identifying contaminants that pose a threat to public health and safety, the SDWA requires the EPA to determine a Maximum Contaminant Level Goal (MCLG) for each contaminant, “the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.”²⁶ For most contaminants that threaten public health, the SDWA further requires that the EPA establish a Maximum Contaminant Level (MCL), the maximum permissible level of the contaminant that is “as close to the [MCLG] as is feasible.”²⁷ Congress defined “feasible” using a high threshold, meaning “feasible with the use of the *best* technology, treatment techniques, and other means which... are available (taking cost

¹⁹ EJCW, *Thirsty for Justice: A People’s Blueprint for California Water*, 72 (Aug. 5, 2005), <https://www.issuelab.org/resources/2885/2885.pdf>.

²⁰ *Id.* at 78, 80.

²¹ Cieselski, et al., “The Microbiologic Quality of Drinking Water in North Carolina Migrant Farmer Camps,” 81 *American Journal of Public Health* 762 (June 1991); Calderon, et al., “Health Risks from Contaminated Water: Do Class and Race Matter?,” 9 *Toxicology and Industrial Health* 879 (Sept. 1, 1993).

²² Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660.

²³ 42 U.S.C. § 300f.

²⁴ *Id.* § 300g-1(b)(9).

²⁵ *Id.*

²⁶ *Id.* § 300g-1(b)(4)(A); *see also id.* § 300g-1(a)(3).

²⁷ *Id.* § 300g-1(b)(4)(B).

into consideration).”²⁸ “[T]he purpose of the MCLs is to protect the public, as much as feasible, from the adverse health effects of drinking contaminated water.”²⁹

In limited circumstances, however, the SDWA permits the establishment of a treatment-based set of rules in lieu of an MCL.³⁰ If the EPA finds that “it is not economically or technologically feasible to so ascertain the level of such contaminant,” instead of adopting an MCL, the EPA’s drinking water regulation must specify “each treatment technique... which leads to a reduction in the level of such contaminant....”³¹ This alternative route requires that the EPA instead adopt a treatment technique regulatory regime that will “prevent known or anticipated adverse effects on the health of persons to the extent feasible.”³² The SDWA uses the same high-threshold definition of “feasible” for treatment techniques as it does for MCLs.³³ Further, nothing in the SDWA “allows the EPA to choose a treatment technique other than the most stringent feasible.”³⁴ Therefore, while this treatment-based regulatory program is not subject to all of the same standards as MCLs, the SDWA still requires it to protect the public from exposures to harmful contaminants to the maximum extent feasible.

II. THE LCR’S REGULATION OF LEAD IN DRINKING WATER.

Lead is one of the most prevalent and pernicious water contaminants. Therefore, pursuant to the SDWA, the EPA regulates lead as a contaminant likely to have adverse health impacts and has established an MCLG, “the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.”³⁵ Because any lead exposure can cause adverse health impacts, the EPA set the MCLG for lead at *zero* µg/L.³⁶ However, the EPA has not established an MCL for lead. The LCR is instead an alternative treatment-based standard promulgated pursuant to 42 U.S.C. § 300g-1(b)(7)(A).³⁷ This “drinking water treatment technique regulation” is required by the SDWA to protect the public health and safety by reducing lead to the greatest extent feasible.³⁸

The existing LCR was first promulgated in 1991, and while minor revisions were made in 2000 and 2007, the Proposed LCR is the first major overhaul of the drinking water standards for lead in a generation. It is therefore critical that the Proposed LCR reflect both: (1) new information on the health impacts of lead and the related benefits of reducing lead exposure in

²⁸ *Id.* § 300g-1(b)(4)(D) (emphasis added).

²⁹ *City of Waukesha v. EPA*, 320 F.3d 228, 243 (D.C. Cir. 2003).

³⁰ 42 U.S.C. § 300g-1(b)(7)(A).

³¹ *Id.* § 300f(1)(C).

³² *Id.* § 300g-1(b)(7)(A).

³³ *Id.* § 300g-1(b)(4)(D).

³⁴ *City of Portland, Or. v. EPA*, 507 F.3d 706, 712 (D.C. Cir. 2007).

³⁵ 42 U.S.C. § 300g-1(a)(3), (b)(4)(A).

³⁶ 40 C.F.R. pt. 141, subpt. Q, app. B; 84 Fed. Reg. at 61,773.

³⁷ The EPA did not establish an MCL for lead since it determined in 1991 that it was not economically or technologically feasible for water systems to determine system-wide levels of lead. The Proposed LCR does not revisit this determination.

³⁸ *See* 84 Fed. Reg. at 61,685.

America's drinking water supply; and (2) new technologies, techniques, and other best practices available to reduce the costs of minimizing lead exposure, including the removal of lead pipes that are now known to be a major source of lead contamination nationwide.

III. STANDARD OF REVIEW FOR AMENDMENTS TO THE LCR.

The Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.*, requires the EPA to justify its proposed regulation by “examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”³⁹ Under the APA, a “reviewing court shall ... hold unlawful and set aside” an agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority or limitations,” or “without observance of procedure required by law.”⁴⁰ An agency action is arbitrary and capricious under the APA where the agency: (1) relied on factors that Congress did not intend it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or (4) action is so implausible that it could not be ascribed to a difference of view or the product of agency expertise.⁴¹

Agencies must provide a reasoned explanation for changing their policies.⁴² The agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.”⁴³ Further, where, as here, a new policy rests on factual or legal determinations that contradict those underlying the agency's prior policy, the agency must provide a more detailed explanation for its policy.⁴⁴ “Unexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”⁴⁵

In its current form, the Proposed LCR violates the APA because the revisions reflect an unjustified and unsupported departure from the EPA's prior position. Furthermore, the EPA's explanation that the Proposed LCR does not violate the SDWA's anti-backsliding provision and represents the most health protective standards feasible is insufficient and contrary to the evidence presented.

³⁹ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”).

⁴⁰ 5 U.S.C. § 706(2)(A), (C), (D).

⁴¹ *State Farm* at 43.

⁴² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

THE EPA MUST EVALUATE THE DISPROPORTIONATE IMPACTS OF LEAD-CONTAMINATED DRINKING WATER IN ENVIRONMENTAL JUSTICE COMMUNITIES

Environmental justice communities are most likely to be impacted by lead exposure in drinking water, and it is critical that the EPA evaluate potential disparate impacts created by the LCR. The EPA previously prioritized “Environmental Justice” as one of the “Key Principles for LCR Revisions” to be addressed in the Proposed LCR, noting that “[b]ecause of disparities in the quality of housing, community economic status, and access to medical care, lead in drinking water (and other media) disproportionately affects lower-income people.”⁴⁶ This disparity has borne out repeatedly over the past decade, as examples of low-income communities of color exposed to unsafe levels of lead have been uncovered, including Flint, Pittsburgh,⁴⁷ Newark, and Washington, D.C.

The most critical environmental justice issue posed by the LCR is how to remove and replace existing LSLs in communities with limited resources. While Congress mandated the use of “lead-free” pipes starting in 1986, the EPA estimates that between 6.5 and 10 million homes nationwide still receive drinking water through LSLs.⁴⁸ Where those LSLs remain, they are the most significant source of exposure to lead in drinking water, and their timely removal is critical to eliminating the threat they pose as long as they remain in use.⁴⁹ Ensuring that LSLR is conducted in a manner that does not have a disparate impact on low-income communities that already bear a disproportionate share of environmental burdens is critical to any successful LCR.

A key reason that LSLR is such an important environmental justice issue is the dual-ownership nature of LSLs, since a portion of the LSL is typically owned by the water system with the remainder owned by the landowner. The following illustration demonstrates the standard arrangement, where the section of LSL from the water main to the curb is owned by the

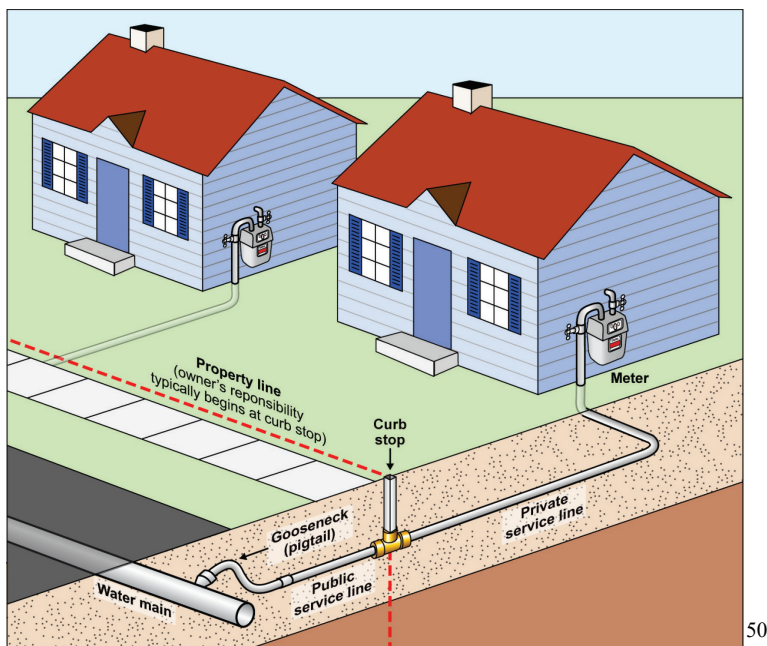
⁴⁶ EPA, Lead and Copper Rule Revisions White Paper, 4 (Oct. 2016), https://www.epa.gov/sites/production/files/2016-10/documents/508_lcr_revisions_white_paper_final_10.26.16.pdf.

⁴⁷ According to the EPA, the Pittsburgh Water and Sewer Authority (PWSA) is the second largest water system in the nation to have exceeded the EPA’s lead levels, with approximately 144,000 homes at risk for lead-contaminated tap water. In circumstances similar to the crisis in Flint, Michigan, PWSA switched its lead corrosion control chemicals without getting a state permit. After elevated lead levels were discovered, PWSA began replacing lead service lines per the EPA’s regulations under the SDWA. However, PWSA failed to meet the seven percent per year replacement rate. Additionally, while conducting the replacement, PWSA failed to notify residents of its plans and failed to conduct lead sampling. These violations led the Pennsylvania Office of Attorney General to file criminal charges against the PWSA with respect to 151 impacted residences. In addition, PWSA settled a lawsuit with a coalition of local organizations in which PWSA agreed to remove LSLs, using blood lead levels to prioritize which LSLs to replace first. The agreement capped rate hikes and required PWSA to provide increased rate assistance to economically vulnerable households.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.*

water system and the other segment from the curb to the home is owned by the private landowner.



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Under both the existing and Proposed LCR, a water system is only responsible for funding LSLR of the publicly-owned portion of the LSL, leaving the remaining cost, typically several thousand dollars, to the landowner.⁵¹ But many people simply cannot afford to pay thousands of dollars out-of-pocket to fund removal of the private portion of a LSL. The EPA has recognized that, “[t]o the extent water systems rely on homeowners to pay for replacement of privately owned portions of lines, there are concerns about consumers’ ability to pay and the possibility that lower-income homeowners will be unable to replace lines, resulting in disparate levels of protection.”⁵² The result of the existing framework, unchanged in the Proposed LCR, is that full LSLR, in which both the public and private LSL segments are removed, happens largely in affluent communities, while America’s lower-income populations remain exposed to the harmful health impacts caused by lead in their drinking water. Unsurprisingly, studies show strong correlations between full LSLR in communities with residents making over \$200,000 a year versus residents making less than \$10,000 a year.⁵³ A strong correlation also exists between

⁵⁰ United States Government Accountability Office, *Drinking Water: Approaches to Identifying Lead Service Lines Should Be Shared with All States*, 7 (Sept. 2018), <https://www.gao.gov/assets/700/694648.pdf>.

⁵¹ 84 Fed. Reg. at 61,697 (“[W]ater systems are not required to pay for replacement of customer owned lead service lines...”). The EPA estimates that the average customer-side LSLR will cost \$3,000. Appendix A-13, Exhibit A.8: Summary of LSLR Costs from Surveys.

⁵² EPA, *Lead and Copper Rule Revisions White Paper*, at 9.

⁵³ Environmental Defense Fund, *Lead in Drinking Water: Equity Concerns in Replacing Lead Service Lines*, American Public Health Association Annual Meeting Presentation (Nov. 5, 2019), https://www.lslr-collaborative.org/uploads/9/2/0/2/92028126/apha_presentation_lsls_and_equity_lindsay_mccormick.pdf.

full LSLR and race, with water systems serving white populations substantially more likely to conduct full LSLR than those water systems serving black populations.⁵⁴ Such disparate impacts in a federally funded program are unacceptable and impermissible, and the LCR must adequately address such environmental justice concerns.⁵⁵ Unfortunately, the Proposed LCR falls short in this critical area and should be amended as provided below.

COMMENTS ON THE PROPOSED LCR

The SDWA requires that the LCR protect America's residents from the damaging health impacts from lead exposure in drinking water to the greatest extent feasible in order to achieve the EPA's established MCLG of zero $\mu\text{g/L}$. The undersigned Attorneys General submit the following comments to ensure that the final LCR fulfills this mandate.

I. THE LCR SHOULD REDUCE THE ACTION LEVEL.

Given new information regarding both the health impacts of lead in drinking water, and the reduced costs and improved techniques for removing LSLs, the EPA should evaluate whether a lower action level is feasible. The Proposed LCR leaves the existing action level unchanged at 15 $\mu\text{g/L}$, the level established in 1991 "based on feasibility and not based on impact on public health."⁵⁶ However, over the past decades, there have been significant advancements in lead detection, LSLR techniques, and treatment options, in addition to overwhelming new evidence regarding the serious health impacts caused by lead exposure. For example, a 2019 study conducted by the City of Newark's Department of Water and Sewer Utilities found that Point of Use Filters, when properly installed and maintained, provided water with lead levels at or below 10 $\mu\text{g/L}$.⁵⁷ The SDWA requires continuous review and revision of the LCR to determine the most health protective, feasible standards.⁵⁸ Therefore, since the 15 $\mu\text{g/L}$ action level was established decades ago, the EPA must evaluate whether it is now feasible to reduce the lead action level below 15 $\mu\text{g/L}$, and if so, adopt a lower action level in the Proposed LCR. Given that the Proposed LCR includes a 10 $\mu\text{g/L}$ threshold as the "trigger level," the EPA must explain its determination that the 15 $\mu\text{g/L}$ action level continues to remain the "most health protective, feasible standard" mandated by law.

⁵⁴ *Id.*

⁵⁵ Federal agencies have a unique responsibility to prevent environmental injustice and discrimination based on race, including in federally assisted housing. Benfer, "Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color," 41 *Harv. Envtl. L. Rev.* 493, 537-38 (2017); *see also* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

⁵⁶ 84 Fed. Reg. at 61,691.

⁵⁷ City of Newark, Point-of-Use Filter Study (Nov. 19, 2019), <https://static1.squarespace.com/static/5ad5e03312b13f2c50381204/t/5dd70e112421805afa68ebd9/1574374964737/Newark+Point-of-Use+Filter+Study+-+Aug-Sept+2019+Final.pdf>.

⁵⁸ 42 U.S.C. § 300g-1(b)(9).

II. THE PROPOSED LCR'S REQUIREMENTS FOR LEAD SERVICE LINE REPLACEMENT MUST BE AMENDED TO ADEQUATELY PROTECT AMERICA'S DRINKING WATER.

A. The Mandatory LSLR Rate for Water Systems Exceeding the Lead Action Level Should Not Be Reduced.

The Proposed LCR rolls back the requirements for water systems to remove LSLs and insufficiently protects public health as required by the SDWA. The current LCR requires water systems that exceed the lead action level replace LSLs at a rate of seven percent annually. The Proposed LCR reduces the required replacement level to three percent, a nearly *60 percent* decrease.⁵⁹ The EPA nonetheless asserts that lead exposures will be reduced, and that, in fact, more LSLs will be replaced under the Proposed LCR.⁶⁰ The EPA justifies this conclusion by changing the types of actions that count towards a public water system's required LSLR rate, including removing credit for "test-outs" and partial LSLR.

The Attorneys General agree with the EPA's decision to exclude partial LSLR and "test-outs" from inclusion in a water system's mandatory LSLR rate. Partial LSLR is not a solution because it removes only the water system-owned portion of the LSL, leaving in place LSLs on homeowners' and renters' properties. Partial LSL also significantly increases short-term lead exposure and associated health risks.⁶¹ "Test-outs," which allow an LSL at which samples are taken below the lead action level to be counted as "replaced," are unwise because several different factors may cause future lead exposure from the LSL left in use. However, the EPA's improvements on these issues do not justify the Proposed LCR's decrease of the amount of LSLR that a water system must otherwise complete. The Attorneys General therefore recommend that the EPA continue with its plan to exclude "test-outs" and partial LSLR but maintain the mandatory LSLR rate for water systems exceeding the action level at seven percent.

The EPA also argues that, despite the significant reduction in the mandatory LSLR rate, the Proposed LCR will result in more LSLR through a new, "goal-based" LSLR program for water systems that exceed a "trigger level" of 10 µg/L.⁶² However, the EPA's assumptions regarding the number of LSLs that will be replaced under this program appear exaggerated. The Proposed LCR requires that water systems exceeding the trigger level implement a "goal-based" LSLR program, which provides "flexibility" in establishing a LSLR rate. Rather than establishing a minimum LSLR rate, the Proposed LCR only requires state approval of a water system's LSLR plan, allowing a water system to propose a LSLR rate of zero percent and

⁵⁹ 84 Fed. Reg. at 61,699-700.

⁶⁰ 84 Fed. Reg. at 61,700.

⁶¹ See EPA Science Advisory Board, Evaluation of the Effectiveness of Partial Lead Service Line Replacements, 1 (Sept. 28, 2011) (Partial LSLR "is frequently associated with short-term elevated drinking water lead levels for some period of time after replacement, suggesting the potential for harm, rather than benefit during that time period. Available data suggest that the elevated tap water lead levels tend to then gradually stabilize over time following [partial] LSLR, sometimes at levels below and sometimes at levels similar to those observed prior to [partial] LSLR.").

⁶² 84 Fed. Reg. at 61,698-99.

conduct no LSLR if a state agency approves. Despite not establishing a baseline standard for these water systems with lead levels exceeding the trigger level, the Proposed LCR presumes that this optional, “goal-based” LSLR requirement will nonetheless make up the bulk of all LSLR conducted in the next decades. Specifically, the EPA asserts that despite the rollback of the mandatory LSLR from seven to three percent, the Proposed LCR will result in an incremental increase of 205,452 to 261,701 full LSLR compared to the current rule in the next 35 years.⁶³ However, the EPA assumes that the overwhelming majority of the incremental LSLR, *over 70 percent*, will come not from the mandatory LSLR, but from this optional, “goal-based” program.⁶⁴ The EPA’s assumption that the majority of LSLR under the Proposed LCR will occur under this “goal-based” program is unrealistic and unsupported, and is an insufficient basis to roll back the mandatory replacement rate.

The EPA must, at minimum, better explain whether a rationale exists for concluding that the LSLR program in the Proposed LCR will better protect America’s drinking water supply despite the significant reduction in the mandatory LSLR rate. Absent such explanation and clear evidence in support of such a decision, the Proposed LCR implicates the SDWA’s “anti-backsliding” requirement.⁶⁵ The Attorneys General request that the Final LCR include the proposed policies regarding “test-outs” and partial LSLR but maintain the existing requirement that water systems exceeding the action level implement LSLR at a minimum rate of seven percent per year.

B. The LCR Should Evaluate and Adopt Methods to Help Ensure Full LSLR in Low-Income Communities to Reduce Disparate Impacts.

The Attorneys General share the EPA’s concern regarding the health risks associated with partial LSLR, including increased lead exposure from pipe cutting and the loosening of existing corrosion control coatings. However, we are also concerned that the EPA has not adequately considered the potential unintended consequences of the Proposed LCR’s provisions related to partial LSLR. In order to discourage partial LSLR, the Proposed LCR does not count partial LSLR towards the water system’s mandatory LSLR rate. While the proposal may reduce partial LSL, it will also incentivize water systems to prioritize LSLR in communities where the private homeowners have the resources to cover the out-of-pocket cost of replacing the private portion of the LSL. Conversely, it will discourage water systems from implementing *any* LSLR in low-income communities, where, as discussed above, homeowners are less likely to have the resources to cover these costs. Low-income communities also tend to have more renters than homeowners, and landlords are far less likely to invest in the substantial cost to replace LSLs in these rental units than home-owning residents. The Proposed LCR does not adequately address these already existing disparities, which the Proposed LCR as drafted will likely exacerbate. In fact, the EPA explicitly recognizes that the Proposed LCR’s reliance on “household-level

⁶³ 84 Fed. Reg. at 61,700.

⁶⁴ Of the 205,452 LSLs replaced under the low estimate, 144,032 LSLs are estimated to be replaced under the “goal-based” replacement (also called “proactive” LSLR by the EPA). Proposed LCR Economic Analysis, Appendix C, Exhibit C.1: System Counts and Population Impacted (Over 35 Year Period of Analysis) - All Public Water Systems.

⁶⁵ 42 U.S.C. § 300g-1(b)(9).

changes that depend on ability-to-pay *will leave low-income households with disproportionately higher health risk.*⁶⁶

While the EPA previously recognized that addressing these issues was critical to any future successful LCR, the Proposed LCR does little to address these issues of equity. The EPA earlier asserted that “[i]n assessing options for an LCR revision proposal, EPA is evaluating: ...

- How to provide for full LSLR where the utility does not own the full line, including an evaluation of whether a potential change to the definition of [public water systems] “control” under the SDWA would facilitate full LSLR.⁶⁷
- How to address potential equity concerns with LSLR requirements and consumers ability to pay for replacement of their portion of the LSL.
- How to address LSLR in rental properties, particularly where low income residents do not control the property or have the ability to contribute to the cost of LSLR.⁶⁸

The EPA also stated that “a number of cities and towns across the nation have successfully implemented full LSLR and have developed innovative approaches to addressing these challenges, including Lansing, Michigan; Madison, Wisconsin; and more recently Boston, Massachusetts—and EPA is looking at this experience in the context of developing proposed revisions to the LCR.”⁶⁹

In addition, the LCR Working Group (LCRWG) to the National Drinking Water Advisory council also raised “important questions of disparate impact and environmental justice.”⁷⁰ “The LCRWG discussed and agreed that the EPA guidance should encourage PWSs to make every effort to ensure that LSL replacement provides equal protection to low income

⁶⁶ See EPA, Environmental Justice Analysis for the Proposed Lead and Copper Rule Revisions, Exhibit ES-1 (Oct. 2019).

⁶⁷ The SDWA’s definition of a “public water system” includes “(i) any collection, treatment, storage, and distribution facilities under *control* of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.” 42 U.S.C. § 300f(4)(A) (emphasis added).

⁶⁸ EPA, Lead and Copper Rule Revisions White Paper, at 10 (Oct. 2016) (footnote omitted).

⁶⁹ *Id.*

⁷⁰ Report of the LCRWG to the National Drinking Water Advisory Council, 5, 7 (Aug. 25, 2015), <https://www.epa.gov/sites/production/files/2016-01/documents/ndwaclcrwgfinalreportaug2015.pdf>; see also Earthjustice, Comments on the Report of the Lead and Copper Rule Working Group to the National Drinking Water Advisory Council (Jan. 15, 2015), https://earthjustice.org/sites/default/files/Comments%20to%20EPA%20and%20NDWAC%20Regarding%20Proposed%20Revisions%20to%20the%20Lead%20and%20Copper%20Rule%2018-16_updated.pdf.

customers (or rental units with low income residents), people of color and others protected by civil rights law and policy.”⁷¹ The LCRWG stated that “[e]nvironmental justice and civil rights considerations are particularly important in those jurisdictions where the PWS requires the property owner to pay a share of the costs of removing the LSL. Making environmental justice a priority can be achieved through creative financing programs for low-income customers and setting priorities for which neighborhoods are targeted first for LSLR to ensure equal treatment of low income neighborhoods.”⁷²

Despite the EPA and LCRWG previously identifying these matters as critical to a future successful LCR, the Proposed LCR does not consider or evaluate any of these issues in sufficient detail. In fact, the EPA *expressly* states that its reliance on private side LSL will have a disproportionate impact on low-income households already disadvantaged due to high levels of lead exposure.⁷³ The EPA must address these critical environmental justice issues as part of the LCR, as the agency earlier envisioned. At minimum, we request that the LCR require that water systems inform customers of potential avenues available to mitigate the costs associated with private-side LSLR, including the Drinking Water State Revolving Fund.

C. The LCR Should Require Water Systems to Continue Replacing LSLs Until Removal is Complete.

In order to address the ongoing threat to public health that LSLs pose, the Attorneys General recommend that the LCR require water systems to continue implementing LSLR after an action level or trigger level exceedance until LSLR is complete. The Proposed LCR allows water systems to cease LSLR if sampling tests below the action level for four consecutive monitoring periods (i.e., two years).⁷⁴ However, any existing LSLs remain a threat to public health and safety, even if they temporarily do not cause lead exposures, and should also be removed to ensure the public is protected.⁷⁵ While a reduced mandatory LSLR rate for water systems that no longer exceed the action level may be an appropriate incentive, the LCR should require water systems with known LSLs that have exceeded the lead action level continue implementing their LSLR plan. For example, Michigan’s LCR requires water systems that exceed the action level to conduct LSLR at a rate of seven percent, and if a system subsequently tests below the action level, the LCR still requires that water systems maintain a five percent LSLR rate.⁷⁶ Allowing a water system to stop and resume its LSLR plan based on test results will create inefficiencies and could substantially delay the timeline for complete removal of LSLs. The Attorneys General recommend that the LCR require water systems that exceed the

⁷¹ *Id.* at 18.

⁷² *Id.*

⁷³ See 84 Fed. Reg. at 61,740; see also EPA, Environmental Justice Analysis for the Proposed Lead and Copper Rule Revisions, Exhibit ES-1 (Oct. 2019).

⁷⁴ 84 Fed. Reg. at 61,757 (proposed 40 C.F.R. §141.84(g)(6)).

⁷⁵ For example, changes in water source or disturbances to the main line or service lines may create new lead exposure where none previously existed.

⁷⁶ Michigan Admin. Code R 325.10604f (6)(b). In fact, Michigan’s LCR requires that *all* water systems with LSLs replace them at a rate of five percent *regardless of sampling results*.

lead action level to continue implementation of LSLR until it is finished, regardless of test results.

D. The LCR Should Include Stronger Measures for Failure to Meet the Mandatory LSLR Rate.

The Attorneys General recommend that the LCR include stronger provisions for when water systems fail to meet the mandatory LSLR rate and require additional action should the water system fail to remove the required LSLs. Under the Proposed LCR, a water system that fails to replace LSL at the mandatory rate must conduct only one of the following activities after the first year out of compliance and only two in subsequent years of violation:

- 1) conduct a social media campaign;
- 2) contact organizations representing plumbers and contractors by mail to provide information about lead in drinking water including health effects, sources of lead, and the importance of using lead free plumbing materials;
- 3) send certified mail to customers with an LSL to inform them about the water system's goal-based LSLR program and opportunities for LSLR;
- 4) conduct a town hall meeting or participate in a community event to provide information about its LSLR program and distribute public education materials;
or
- 5) visit targeted customers to discuss the LSLR program and opportunities for replacement.⁷⁷

These options are of neither equal cost nor benefit, and the Attorneys General request that the EPA amend the Proposed LCR to ensure the public is provided with critical information about its drinking water and to ensure that LSLR actually occurs. First, we recommend that notification by certified mail to each customer with an LSL be required after the first year in which the LSLR is not met (Option 3), in addition to holding public meetings and distributing education materials about the LSLR requirement (Option 4). If a water system continues to fail to conduct the requisite LSLR in subsequent years, the water system should be required to implement all five options. Just as importantly, the LCR should require that water systems that fail to meet the required LSLR increase the rate of LSLR in future years in order to, at minimum, replace the LSLs that should have been replaced before. Absent such a mechanism, water systems can indefinitely delay LSLR with minimal repercussions, indefinitely extending the timeframe for complete LSLR. Finally, the Attorneys General request additional guidance regarding these requirements. Conducting a "social media campaign" is a vague, undefined requirement that will result in only certain segments of the population being informed about the water system's failure to comply with the LCR. Similarly, visiting "targeted customers" is undefined and unquantified, leaving it for water systems to determine the amount and type of customers to

⁷⁷ 84 Fed. Reg. at 61,702 (proposed 40 C.F.R. § 141.85(g)).

whom outreach should be directed. Lastly, and probably least effective, informing “organizations representing plumbers and contractors” of the need to use lead-free plumbing, which has been banned since 1986, will have limited impact on the industry and provide no notice to the exposed public water system’s customers regarding the lack of compliance. Absent adequate disincentives, water systems will continue to violate the LCR and threaten the public health and safety of their customers with little consequence.

III. WATER SYSTEMS SHOULD MAKE LEAD SERVICE LINE INVENTORIES AVAILABLE ONLINE.

The Attorneys General support the Proposed LCR’s requirement that water systems create inventories identifying the presence of LSLs.⁷⁸ Enhancing the water systems’ and public’s understanding of the number and location of LSLs is critical to any successful plan to remove remaining LSLs that continue to pose a threat to public health and safety.⁷⁹ While such inventories are currently required under several individual state LCRs, all public water systems nationwide should be mandated to create such LSL inventories. However, the Attorneys General believe the Proposed LCR’s LSL inventory requirement should be improved in the following ways.

First, all public water systems should make LSL inventories publicly available online, and, at minimum, all water systems with more than 500 customers should be required to do so. The Proposed LCR requires that only large water systems serving over 100,000 customers make LSL inventories available online. The remaining water systems are only required to make paper copies of their inventories available upon request at the public water system offices. Based on the EPA’s own numbers, the Proposed LCR will only require *one percent* of the nation’s public water systems serving less than half of the nation’s population to post LSL inventories online.⁸⁰ However, given the de minimis costs associated with hosting a website, the availability of free social media platforms (e.g., Facebook, Twitter, etc.), and multiple other online forms of communication, all public water systems have the capability to make their LSL inventories available online.⁸¹ Even if smaller water systems publish their LSL inventory in the paper format required by the EPA, this paper copy can easily be uploaded to a publicly-accessible internet site. At the very least, the LCR should require smaller water systems to: (1) maintain paper copies of their LSL inventory at their office permanently, not just on request; (2) notify customers of the LSL inventory and its availability for public viewing; and (3) ensure that paper

⁷⁸ 84 Fed. Reg. at 61,693-96.

⁷⁹ 84 Fed. Reg. at 61,696 (“The EPA believes that water systems need accurate information about the number and locations of lead service lines in order to effectively implement actions to reduce drinking water lead exposure.”).

⁸⁰ Mary Tiemann, Cong. Research Serv., *Safe Drinking Water Act (SDWA): A Summary of the Act and Its Major Requirements*, 4 (2017), <https://fas.org/sgp/crs/misc/RL31243.pdf>.

⁸¹ The EPA cites the online inventory created by DCWater, a public water system in the nation’s capital, as an example. DCWater’s LSL interactive online platform is an excellent model for public water systems nationwide. However, the Attorneys General recognize the disparity in available resources to create such a site. Nonetheless, the burden for public water systems to, at a minimum, upload the inventory document itself, is minuscule.

copies of the the LSL inventories are available in the native languages spoken by the water systems' customers.

Furthermore, not making these LSL inventories available online will have a disproportionate impact on low-income environmental justice communities, the same communities already suffering a high burden from lead exposure in drinking water. Under the Proposed LCR, 99 percent of water systems will be required to only make these LSL inventories available at the water system's public office, typically open Monday to Friday from 9 to 5 PM. Limiting access to this critical information will have a disparate impact on working-class residents who are often unable to take time off of their job to travel to the water agency office and collect this important health-related data. Finding out whether your home is serviced by a LSL should not require taking a day off from work; it is information that should be readily available. While the cost of placing these LSL inventories online is minimal, the public benefit of increased access to this critical information is enormous.

Finally, the EPA should consider a shorter timeframe for completion of these LSL inventories. The Proposed Rule gives water systems three years to complete the inventory, without explaining why such a lengthy period is necessary given the important public health and safety concerns. Other states have passed similar LSL inventory laws requiring that inventories be completed with significantly shorter deadlines.⁸² For the majority of water systems, it is feasible to complete these LSL inventories within a substantially shorter period than three years. While a program to provide for necessary extensions at the water system's request may be appropriate, the Proposed LCR should default to a shorter timeframe.

IV. THE LCR'S REQUIREMENTS FOR SCHOOLS AND CHILDCARE FACILITIES SHOULD BETTER PROTECT CHILDREN FROM LEAD CONTAMINATION.

The Proposed LCR includes new lead education and testing requirements for K-12 schools and childcare facilities built prior to January 1, 2014. Under the Proposed LCR, water systems are required to identify every school and childcare facility they serve and provide these locations with: (1) annual information about the health risks associated with lead; (2) notification of future lead testing; (3) EPA's current guidance for lead testing (presently the "3Ts for Reducing Lead in Drinking Water Toolkit"); and (4) instructions for identifying drinking water outlets for sampling.⁸³ Water systems must test five drinking water outlets at each school and two drinking water outlets at each childcare facility that are typically used for consumption.⁸⁴ Further, water systems have to sample 20 percent of schools and childcare facilities in their jurisdiction each year and sample each location at least once every five years, unless a school or childcare facility refuses to participate.⁸⁵ Within 30 days after lead testing, water districts must send test results to the school or facility, the health department that oversees the tested location,

⁸² See Cal. Health & Safety Code §116885(a); Mich. Admin. Code R.325.11604(c)(i).

⁸³ 84 Fed. Reg. at 61,707, 61,769 (proposed 40 C.F.R. § 141.92).

⁸⁴ 84 Fed. Reg. at 61,769 (proposed 40 C.F.R. § 141.92). If a school or childcare facility has less than the required number of drinking water outlets, the water system must sample all outlets used for drinking water consumption. *Id.*

⁸⁵ *Id.*

and the state water agency.⁸⁶ Water districts are also required to provide information about lead remediation options to schools and childcare facilities when providing the test results.⁸⁷

The Attorneys General strongly support the Proposed LCR's mandatory lead testing requirements and public education requirements for schools and childcare facilities. Considering the serious health risks for children exposed to lead, it is imperative that the LCR include meaningful requirements to address lead in school and childcare drinking water. Children typically spend the majority of their waking hours at schools or daycares that provide drinking water from fountains and faucets, so it is essential for the EPA to regulate the detection and response to lead at these facilities. Further, it is appropriate and feasible for water systems to manage this lead testing program since water systems have the necessary technical expertise from their experience complying with the LCR and other drinking water standards. For all of these reasons, the Attorneys General urge the EPA to reject the "upon request" option in the Proposed LCR that would make lead testing a voluntary program, rather than a mandatory program, for schools and childcare facilities.⁸⁸ We also encourage the EPA to strengthen the Proposed LCR to further protect children from lead in drinking water in at least the following ways.

First, while the Proposed LCR's mandatory testing and public education requirements for schools and childcare facilities are a step in the right direction, the LCR should be revised to include additional public education requirements that will benefit parents, guardians, school and childcare facility employees, and the general public. In particular, water systems should be required to post all lead test results online as soon as practicable after testing occurs. At a minimum, the test results should be available on a water system's website in the native languages of the water system's customers, especially if the water system is a larger entity that serves at least 3,300 customers. Test results can also be easily shared with the public via social media or other methods used by water systems to reach customers, including mailings, emails, and water quality reports. This requirement would help ensure that all members of the public are informed of lead levels in drinking water at local schools and childcare facilities, and would further the EPA's stated objective to "inform and educate targeted [water system] customers and users about risks from lead in premise plumbing at schools and childcare facilities."⁸⁹

Second, the Attorneys General are concerned that the Proposed LCR does not include any meaningful standards for evaluating lead test results, responding to lead contamination, and investigating additional lead problems at a school or childcare facility. To ensure that water systems, schools, and childcare facilities have a benchmark for assessing whether actions are needed to reduce lead in drinking water, the Proposed LCR should include an action level for the lead in schools and childcare facilities program. This action level should be as low as feasible since there is no safe level of lead in drinking water, especially for children. In addition, we urge the EPA to require water systems to do more than provide "information about remedial options"

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See* 84 Fed. Reg. at 61,731-32.

⁸⁹ *Id.* at 61,707.

to schools and childcare facilities.⁹⁰ Instead, the Proposed LCR should require water systems to send schools and childcare facilities with lead test results above a health-protective action level specific information developed by the EPA that discusses how to respond to high lead levels. This information should include the following: (1) options for notifying parents, guardians, and employees of lead test results; (2) instructions for investigating the source of lead contamination, including additional testing; (3) EPA guidance for testing additional drinking water outlets; (4) instructions for replacing fixtures that may contain lead or brass; (5) options for providing safe short-term drinking water, such as installing point-of-use water filters⁹¹ and providing replacement water; (6) EPA guidance for retesting drinking water outlets to ensure remediation efforts are effective; and (7) funding opportunities for corrective actions and additional testing.

Third, as discussed above, the Proposed LCR requires water systems to collect only representative samples at schools and childcare facilities that are not related to the actual size of a facility.⁹² This proposal is contrary to the EPA's own sampling guidance in the 3Ts for Reducing Lead in Drinking Water Toolkit, which recommends testing at all outlets possibly used for water consumption.⁹³ The EPA provides no justification for not requiring sampling at all drinking water outlets, and provides no justification for requiring sampling at fewer outlets in childcare facilities than schools. Research indicates that young children are particularly vulnerable to the effects of lead, so the LCR should require the most protective sampling protocols for facilities with the youngest children. The Attorneys General urge the EPA to require testing of as many drinking water outlets in schools and childcare facilities as feasible, especially if a school or childcare facility has reason to believe that there may be lead contamination at additional drinking water outlets.⁹⁴ All lead testing should be conducted according to the protocols outlined in the Proposed LCR, including the EPA's sampling protocol to avoid pre-stagnation flushing.

V. THE LCR SHOULD INCLUDE STRONGER RULES FOR "SMALL" WATER SYSTEMS.

Like the EPA, the Attorneys General recognize the disparity in resources between water systems across the nation and the need for flexibility to address this reality. However, the proposed compliance alternatives for water systems serving under 10,000 customers must be

⁹⁰ *Id.* at 61,769 (proposed 40 C.F.R. § 141.92(f)).

⁹¹ Point-of-use filters are often a way to reduce lead levels in the short-term, but not always. According to a recent Environmental Defense Fund (EDF) study, if lead levels are less than 5 µg/L, point-of-use filters may slightly increase lead levels due to dislodged particles when the fixture was initially installed or random fluctuations. Therefore, water systems should only recommend point-of-use filters if appropriate considering the circumstances. EDF, "Putting Children First: Tackling Lead in Water at Child Care Facilities," (2018), https://www.edf.org/sites/default/files/documents/edf_child_care_report-062518.pdf.

⁹² 84 Fed. Reg. at 61,769 (proposed 40 C.F.R. § 141.92).

⁹³ EPA, 3Ts for Reducing Lead in Drinking Water Toolkit, 31 (Oct. 2018), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100VLI2.PDF?Dockey=P100VLI2.PDF>.

⁹⁴ Selection of additional drinking water sources for testing should take into account whether and where lead has been detected, as well as the age, material, location, and/or plumbing configuration of the fountains and faucets at the school or childcare facility.

amended to better protect public health and the safety of people served by these systems. Rather than subjecting all water systems to the same standards, the Proposed LCR permits small water systems that exceed the action level to choose three remedial options. These options include: (1) full LSLR within 15 years; (2) installation of optimized corrosion control treatment (OCCT); or (3) installation and maintenance of point-of-use devices such as filters.⁹⁵

First, as drafted, the “alternative” compliance system for “small” water systems is too broad since it would apply to over *ninety percent* of the nation’s water suppliers.⁹⁶ This will allow an unacceptably high amount of water systems to opt out of the LCR’s most protective requirements, even though most of these systems likely have sufficient resources to comply with the LCR. The Attorneys General recommend that the EPA reevaluate whether any such regulatory alternatives should apply to “small” water systems serving no more than 500 customers.

Further, the Proposed LCR would allow “small” water systems to continue to exceed the lead action level without ever conducting LSLR. If an eligible water system chooses the OCCT option and continues to exceed the action level, the Proposed LCR only requires that system to “re-optimize” its OCCT.⁹⁷ Similarly, a water system that chooses the point-of-use option can continue to violate the lead action level with the only recourse being that it “take corrective action” at the site at which a sample exceeds 10 µg/L, a mandate that requires additional clarity.⁹⁸ Smaller water systems by nature contain a smaller number of LSLs, and, as the EPA has determined, LSLR may be more cost effective than installing and maintaining OCCT or point-of-use devices indefinitely.⁹⁹ While the Attorneys General recognize the need for flexibility, the Proposed LCR permits eligible water systems that repeatedly exceed the action level to avoid taking the appropriate action, LSLR, to address the existing public health threat. The Proposed LCR should require water systems that continue to exceed the lead action level to conduct LSLR to best mitigate the threat from ongoing high lead levels.

CONCLUSION

The undersigned Attorneys General appreciate the opportunity to submit these comments on the Proposed LCR so that the final Rule ultimately satisfies the SDWA’s directive to protect public health to the greatest extent feasible. In order to achieve such a result, the Attorneys General respectfully request that the EPA revise the Proposed LCR to: (1) lower the lead action level; (2) retain the LSLR replacement rate of seven percent a year while maintaining the exclusions for test-outs and partial LSLR; (3) evaluate and adopt methods to help achieve full, equitable LSLR in all communities, including through public outreach on funding options; (4) require water systems to continue replacing LSLs after an action level exceedance until all LSLs are replaced; (5) strengthen the required measures for water systems that fail to comply with the

⁹⁵ 84 Fed. Reg. at 61,700-01.

⁹⁶ Mary Tiemann, Cong. Research Serv., *Safe Drinking Water Act (SDWA): A Summary of the Act and Its Major Requirements*, 4 (2017).

⁹⁷ 84 Fed. Reg. at 61,770 (proposed 40 C.F.R. § 141.93(a)(2)).

⁹⁸ *Id.* at 61,770 (proposed 40 C.F.R. § 141.93(a)(3)).

⁹⁹ *Id.* at 61,701.

mandatory LSLR requirements; (6) mandate water systems to post all LSL inventories online and complete inventories in a shorter timeframe; (7) further protect children from lead in schools and childcare facilities by ensuring that lead testing requirements are mandatory, improving the transparency of lead test results, and developing a system for identifying and correcting high lead levels; and (8) narrow LCR exceptions for small water systems to increase LSLRs. These revisions will help ensure that every American is adequately protected from the serious health risks caused by lead in drinking water.

Respectfully Submitted,

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