



February 12, 2020

Mr. David Ross  
Assistant Administrator  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**RE: National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions, Docket No. EPA-HQ-OW-2017-0300**

Dear Assistant Administrator Ross:

On behalf of the nation's mayors, cities and counties, we appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) proposed Lead and Copper Rule revisions, which aims to reduce lead exposure through drinking water.

Collectively, our organizations represent the nation's 3,069 counties, 19,000 cities and the mayors of the 1,400 largest cities throughout the United States. The health, well-being and safety of our citizens and communities are top priorities for us. Local governments serve as co-regulators in implementing and enforcing many federal laws with states, including Safe Drinking Water Act programs, and our members take these responsibilities seriously. Additionally, some cities and counties also operate schools whose infrastructure will be directly impacted by this federal regulation.

To that end, it is important that federal, state and local governments work together to craft reasonable and practicable rules and regulations. As partners in protecting our citizens' public health, it is essential that local governments have a clear understanding regarding our responsibilities in implementing this rule.

In general, our organizations support provisions in the 1996 Amendments to the Safe Drinking Water Act, which require that drinking water standards be based on sound science, public health protection and occurrence of contaminants in drinking water supplies at levels of public health concern to reduce risk while balancing costs. Additionally, in general, we believe the National Primary Drinking Water Regulation for lead, and any regulatory or legislative initiative addressing lead in drinking water, should balance these public health and environmental priorities. Any federal mandate on local governments should include additional federal financial resources, as well as offer municipal water systems flexibility in implementation and compliance options. Finally, our organizations support programs for public education

regarding safe drinking water and innovative solutions that approach this problem beyond the traditional command and control.

EPA first promulgated the Lead and Copper Rule in 1991 to protect public health and reduce exposure to lead in drinking water. Implementation of this rule over the last 30 years has resulted in major improvements in public health. The Centers for Disease Control and Prevention states that there is no safe blood level for young children and recommends that all sources of lead exposure for children should be controlled or eliminated. For example, infants who drink formula prepared with lead-contaminated tap water may be at higher risk of exposure because of the large volume of water they consume relative to their body size. Preserving our constituents' health is our members' number one priority and helping implement the Lead and Copper Rule is critically important to local governments.

### **Local governments fund the majority of water infrastructure investments.**

Local governments fund 98 percent of all capital, operations, and maintenance investment in drinking water and wastewater infrastructure, primarily through user fees and bonds. The most recent U.S. Census data shows that, in 2017 alone, local governments spent over \$125 billion on water and wastewater, and from 2000-2017, have spent over \$1.7 trillion. During this same time period, the federal government appropriated approximately \$2 billion each year for both the Clean Water and Safe Drinking Water State Revolving Loan Fund (SRF) programs, which provides grants to states who, in turn, provide local governments with loans that must be repaid. Even with this significant investment by local governments, many communities struggle to upgrade their drinking water systems. The proposed Lead and Copper Rule Revisions will further add to the water infrastructure needs gap and will create additional unfunded mandates on local governments.

If EPA moves forward with the proposed rule, new funding sources and financing mechanisms must be created to assist local governments, homeowners, schools, and daycare facilities comply and implement the rule, particularly with regard to replacing lead pipes. Current levels and types of financing and funding opportunities are not adequate to address lead pipe remediation in communities across the country and an influx of money is necessary to meet the costs of replacing the estimated six to ten million pipes that are currently in use.

We are pleased to learn that the State of Ohio and EPA has provided Avon Lake, Ohio a zero-interest loan through the Drinking Water SRF program to give low interest loans to homeowners to help them pay for the replacement of their lead pipe laterals with a payback mechanism included on their water bill. Current appropriations levels for the SRF programs, however, are inadequate to address lead pipe remediation along with other drinking water infrastructure needs and requirements.

### **Comments, Concerns and Recommendations on Proposed Rule**

As EPA moves forward with this rulemaking process, we offer several areas of comments, concerns and recommendations for improving the proposed rule's implementability and effectiveness and reducing unnecessary costs on local governments. In general, we have the following overarching concerns:

- Legal concerns and liability issues - Several provisions in the proposed rule could open up local governments to legal challenges and financial liability. Any time a water provider starts doing work on privately owned piping or fixtures, on private property, they potentially take on liability even if legally the liability can be mitigated with waivers or releases. Any additions to the

proposed rule that can limit this liability and protect local governments and water providers should be considered. Moreover, the proposed rule does not address how local governments or water providers should legally handle customers that do not cooperate with the local government in removing lead service lines and/or finding and fixing plumbing fixtures, who cannot afford to do so, or do not grant access to their property.

- Cost concerns - There are an estimated six to ten million lead pipes in the nation, including the lateral pipes to homes, schools, and businesses. On average, it costs approximately \$4700 to replace a lateral from the main water line, resulting in a total estimated replacement cost of \$27-\$48 billion. The question remains as to who will end up paying for the replacement of all these pipes and how. If the federal government has deemed removing lead from drinking water as a top priority, we suggest creating a new funding source to help communities address this issue.
  - Community Costs: We are pleased that the proposed rule suggests a reasonable 3 percent change out of publicly-owned lead pipes per year as opposed to a more aggressive approach. However, as previously mentioned, local governments already spend approximately \$125 billion a year on all their water and wastewater costs. Diverting money to replace 3 percent of a community's water pipes per year might make sense for some communities but not others depending on the public health circumstances in the community. Additionally, due to liability concerns, many utilities are likely to contract out the responsibility of homeowner replacement, further adding to the cost borne by local governments, which was not considered in EPA's cost analysis.
  - Homeowner Costs: We are concerned that the proposed rule's "find and fix" requirement will place a high cost burden on homeowners if they test above the designated lead level. The proposed rule does not address the questions of what happens if the homeowner is unwilling or unable to pay for the replacement of their pipes, and who will ultimately be responsible for the cost of replacement or even to determine if the problem is the pipes versus the lead solder in the water fixtures. Local elected officials will be hard-pressed to ignore citizens whose homes have tested positive for lead and will feel political pressure to resolve the problem and bear the financial responsibility. If the local government takes the responsibility to replace a homeowner's hookup pipe, it raises additional questions besides the lack of financial resources including: gaining permission for access to the property, future ownership and maintenance of that pipe, safety of public workers on the site, liability issues, and what happens if the public worker witnesses illegal activity, etc.
  - Other Drinking Water Priorities: While replacing lead pipes might be a public health priority, local governments are concerned about other drinking water requirements that may have even a bigger public health impact and will also need to be addressed with urgency. For example, concerns have been raised regarding the removal of PFAS, PFOA, and perchlorate from drinking water. EPA should consider the limited financial resources available to local governments and address how lead pipe replacement should be prioritized along with current and future drinking water requirements and priorities.
- Notifications and risk communication management - We believe the proposed rule's requirement that notices must be made "no later than 24 hours after the water system learns of the tap

monitoring results” is problematic. Traditionally, 24 hour notifications are usually issued when there is an immediate health emergency that requires immediate action to prevent exposure. While lead in water is a public health concern and people should be notified expeditiously, in most cases it will not rise to the level of a public health emergency as compared to other drinking water emergencies, and to suggest otherwise might cause undue public panic. We recommend taking a more moderate approach to risk communication.

- Impacts on small and mid-sized communities - While the proposed rule offers some flexibility for small communities (community water system serving 10,000 or fewer persons), it is not clear how EPA will ensure that these small system flexibilities will be available in every state, since many of the flexibilities rely on the state to grant. For example, it is not clear in the proposed rule if the states will accept lead service line replacement in lieu of corrosion control or if they will rely on triggers in the rule to require additional action by individual systems. Additionally, the costs for implementation, compliance and administration of the proposed rule are compounded for small and mid-sized communities, which are particularly limited in their financial and other resources.
- Need for clarity and flexibility - The proposed rule is very complex and there are many details that need further clarification. For example, the language in the preamble and the proposed rule text is often inconsistent. This lack of consistency and ambiguity will lead to confusion for local governments who are charged with implementing the rule. Additionally, it’s critically important that the definitions are clear and understandable for local officials. Moreover, creating a trigger level for lead creates an additional regulatory level to the existing action level. Establishing two different regulatory levels, each with different regulatory requirements, could also cause public confusion and challenges for local governments around risk communication. Any opportunity to simplify the rule, clarify implementation requirements and provide flexibility for local governments will help achieve the best public health results with the limited financial resources that are available.

In addition to these overarching concerns, we offer these specific comments, concerns and recommendations for each of the six key issue areas.

### **Key Area 1: Identifying areas most impacted**

The proposed rule requires communities to conduct a full inventory of all pipes and materials within three years. We are concerned that this timeline might be too short, particularly considering that it may prove extremely difficult to determine pipe material without costly excavations. This is especially true for small and mid-sized communities. We suggest allowing for additional flexibility for conducting the inventory such as allowing communities to request additional time.

Furthermore, we suggest that instead of a broad range, community-wide inventory, EPA should allow a community to prioritize areas where lead pipes are more likely to be found, based on factors such as the age and type of housing/building stock, the known diameter of the existing pipe, and if or when any local or state ordinance or laws banning lead pipes were implemented etc.

Under the proposed rule, pipes of “unknown material” are considered to be lead pipes. This provision could cause undue public concern and cause pipes to be replaced unnecessarily. As

mentioned above, it may prove difficult to do an exact survey of pipe materials without costly excavations. We suggest that EPA allow a certain level of flexibility with this requirement as long as the community does a good faith effort to identify pipe materials.

### **Key Area 2: Strengthening treatment requirements**

The proposed rule revises the requirements for corrosion control treatment based on tap sampling results. At the trigger level of 10 parts per billion (ppb), systems that currently treat for corrosion would be required to reoptimize their existing treatment. Systems that do not currently treat for corrosion would be required to conduct a corrosion control study so that the system is prepared to respond quickly when necessary. As part of this study, the proposed rule specifies that systems should evaluate an orthophosphate-based inhibitor as corrosion control treatment (instead of a phosphate-based inhibitor).

Concerns have been raised that adding too much orthophosphate might have an undue cost burden on wastewater facilities and an environmental impact on waterbodies. If drinking water system operators add too much orthophosphate at the front end, wastewater system operators will be responsible for removing it once it goes through the system. Oftentimes, these system operators are the same entity. This will add additional costs at both ends of the spectrum, which will likely be passed on to ratepayers. Proper corrosion control which does not cause lead to leach from the pipe should be an allowable approach to protect public health.

### **Key Area 3: Replacing lead service lines**

The proposed rule maintains the maximum contaminant level goal of zero and action level of 15 ppb but proposes a new trigger level of 10 ppb. Systems above the trigger level would be required to work with their state to set an annual goal for replacing lead service lines. Water systems above the action level would be required to fully replace a minimum of 3 percent of the number of known or “unknown” lead service lines annually.

It is our understanding that if a community never hits the public health trigger for pipe replacement of 10 ppb, then the local government is not required to develop a plan to replace the lead pipes. If this is correct, we strongly recommend that this is clearly stated in the final rule.

The proposed rule raises several questions about equity. First, the proposed rule requires local governments to replace the lead main water pipes for a homeowner within 90 days of when they replace their hookup pipes. We are concerned that this may not only be an unrealistic time frame, but an inefficient use of time and resources. It could result in replacement projects being scattered around a city, and therefore more expensive for the local government. It could also result in projects being clustered in areas where homeowners can afford the high cost of replacing hookups. Rather, local governments should be able to develop a master plan to replace lead service lines with priority given to the most vulnerable neighborhoods where it is most needed.

Second, according to the proposed rule, EPA will not consider partial service line replacement as part of the overall goal of 3 percent replacement per year. If uncooperative homeowners do not replace their hookup lines, this will impact a community’s ability to meet their 3 percent obligation. A possible unintended consequence is that the utility, in order to meet their obligations, is likely to

do replacement in places where people can afford the cost of replacing their hookup pipes. We do not believe this is good public policy and could cause inequity in lead pipe replacement. In order to address this issue, local governments may potentially take on the costs for homeowner hookup line replacement, at an additional cost to local governments.

#### **Key Area 4: Increasing sampling reliability**

The proposed rule changes the sampling requirements, adjusts the sampling sites and requires systems with higher levels of lead to sample more frequently. Specifically, the proposed rule, among other requirements, requires wide-mouth bottles for collection and prohibits flushing and cleaning or removing faucet aerators before sampling.

With these changes to the sampling, it will be harder to identify the source of the lead in the sample--whether from main water pipes, the hookups/laterals to the residence, or lead solder used with plumbing fixtures. This can be especially true for older homes. By not allowing for both pre- and post-flushing tests, it may be more difficult to pinpoint the source of the lead, which may result in unnecessary and expensive removal of pipes when the actual problem is the fixtures. Additional flexibility should be allowed in the testing to allow for better pinpointing of the problem and not causing undue costs to incur.

#### **Key Area 5: Improving risk communication**

The proposed rule requires local governments to notify customers of an action level exceedance within 24 hour, as well as require that systems make the lead service line inventory publicly available and conduct regular outreach to homeowners with lead service lines.

As previously mentioned, we recommend taking a more moderate approach to risk communication so as not to cause undue public alarm and concern. We are concerned that the 24 hour notification time frame is unrealistic. Moreover, a 24 hour notification is usually reserved for acute public health emergencies. Effective risk communication may require longer than 24 hours to execute, as there may be various administrative issues to resolve, and several business days could elapse in some instances. The final rule should revise the notification requirements to encourage best efforts for rapid delivery, but not set a requirement.

Furthermore, while public information and transparency is important, informing customers of the existence of lead pipes can potentially raise undue public alarm if no lead is leaching due to proper corrosion control. Therefore, risk communication should be targeted to customers where there is a specific concern. We also recommend that EPA remove the provision related to customer notification of "service line of unknown material" with the assumption that it is a lead pipe. Lead service line notification will be politically challenging for local governments, and a requirement to notify customers when there is uncertainty will only make this process more challenging.

#### **Key Area 6: Protecting children in schools**

The proposed rule would require local governments to test schools and childcare facilities on an ongoing basis. In most states, the local government does not have direct authority over the school system. Additionally, since lead pipes were traditionally more expensive than alternatives, they tend to be smaller in diameter, making them ill-suited for use in a school building, which

serves a large population and would therefore need a larger pipe. The primary concern with lead contamination in school buildings is from the fixtures.

Many communities have already undertaken efforts to sample for lead and replace fixtures when necessary. The proposed rule does not address newly constructed schools, which would not contain any fixtures with lead and therefore not need to be tested. Additionally, the lack of a sunset date for this provision is concerning.

For these reasons, we recommend that this provision be removed from the final rule. Testing for lead in schools and childcare facilities may be an effort that is better spearheaded by the U.S. Department of Education or the U.S. Department of Health and Human Services, which currently work with schools and childcare facilities and have the ability to incentivize such testing as part of a comprehensive effort to reduce the risk of lead. Alternatively, the provision should be changed to a voluntary testing effort that is led by the school system, with support from the water utility.

### **Conclusion**

On behalf of the nation's cities, counties and mayors, thank you for considering the local government perspective on this important issue. As you move forward with the rulemaking process, we urge you to continue to consult with local governments to ensure that the rule is effective, implementable and cost efficient. If you have any questions, please contact us: Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org; or Adam Pugh (NACo) at 202-942-4269 or apugh@naco.org.

Sincerely,



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