

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC 20460

Re: Guidance for Investments in Lead Service Line Replacements and Drinking Water under the Infrastructure Investment & Jobs Act

Dear Administrator Regan,

We write to thank you and the EPA team for your efforts to jumpstart implementation of the bipartisan Infrastructure Investment and Jobs Act (“Infrastructure Law”), and to suggest important immediate actions that EPA should include in guidance related to the historic drinking water infrastructure investments in this landmark legislation.

As you know, the Infrastructure Law includes nearly \$36 billion in investments in EPA’s programs for drinking water infrastructure. This includes \$30.7 billion to be allocated to states to disburse to applicants, divided as follows: \$15 billion for lead service line replacement for the Drinking Water State Revolving Fund (DWSRF); \$11.7 billion for general DWSRF funds, and \$4 billion for PFAS/emerging contaminants allocated to the DWSRF. There is an additional \$5 billion in targeted funding for EPA’s Safe Drinking Water Act (SDWA) §1459A grant program to assist drinking water systems in small and disadvantaged communities to address PFAS/emerging contaminants.

DWSRF Funding and Compliance with the Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) provides that the DWSRF funds can be used “only for expenditures...of a type or category which the Administrator has determined, through guidance, will facilitate compliance with” EPA drinking water standards “or otherwise significantly further the health protection objectives of this subchapter.” 42 U.S.C. 300j-12(a)(2)(B). EPA can and should determine in this statutorily mandated guidance that certain expenditures *do*, and certain expenditures *do not*, facilitate compliance with EPA’s drinking water standards or significantly further the health protection objectives of the SDWA. In this letter, we discuss a few of the specific areas in which this will be important.

EPA must use all tools at the agency’s disposal to ensure that this new funding is distributed equitably and prioritized for the disadvantaged communities that need it most. In press releases, plans, and speeches, EPA and White House leadership have consistently promised that they would marshal every resource and tool available to further this goal. EPA and states will need to strike a careful balance between getting the funding out the door swiftly, so that the American public will quickly see and benefit from the positive impacts of these investments, and providing substantial outreach and technical assistance to disadvantaged communities, which may not have as many “shovel-ready” projects in the queue as their well-resourced counterparts.

I. Grants & 100% Principal Forgiveness Are Reserved for Disadvantaged Communities

EPA’s guidance must make clear that the “additional subsidies” of grants and 100 percent principal forgiveness in the Infrastructure Law’s SRF provisions must be allocated to disadvantaged communities.

Directing such funding to disadvantaged communities is mandated by the SDWA and will “facilitate compliance” with EPA standards “or otherwise significantly further the health protection objectives” of the SDWA. 42 U.S.C. 300j-12(a)(2)(B). The Infrastructure Law includes several provisions that make it manifest that Congress intended the DWSRF grant and fully forgiven loan funding to be provided only to

disadvantaged communities. Each of the DWSRF funding provisions includes explicit directions that 49 percent of the funds “shall be used by the State to provide *subsidy to eligible recipients* in the form of assistance agreements with 100 percent forgiveness of principal or grants (or any combination of these).” (emphasis added). The DWSRF allows such subsidies (referred to as “additional subsidization”) to go *only* to disadvantaged communities. See 42 U.S.C. §300j-12(d). Thus, those communities are the only “eligible recipients.”

This conclusion is reinforced by the Infrastructure Law’s direction that additional subsidies shall be provided “notwithstanding section 1452(d)(2) of the Safe Drinking Water Act (42 U.S.C. 300j–12).” That provision places an otherwise-applicable ceiling on the percent of funds available used for grants/principal forgiveness for disadvantaged communities. The Infrastructure Law provides that this ceiling does not apply to the 49 percent of funds specifically allocated to disadvantaged communities under it. Public Law 117-58; H.R. 3684 Enrolled Bill at 971-73 (emphasis added).

That this 49 percent of SRF funding for grants or fully forgiven loans in Infrastructure Law is intended for disadvantaged communities is made even more clear by contrasting those provisions with the America’s Water Infrastructure Act (AWIA) of 2018. AWIA demonstrates that when Congress intends to allow additional subsidization to be provided to non-disadvantaged communities, it says so. In AWIA, Congress authorized “additional subsidization” to water systems serving areas affected by natural disasters. AWIA then *expressly states* that additional subsidization is *not* limited to disadvantaged communities. See Pub. Law No. 115-270, §2020(b)(2), codified at 42 U.S.C. 300j-12 note. In contrast, in the Infrastructure Act, Congress provided no such exception, so this additional subsidization is available only to disadvantaged communities.

II. Promoting Technical Assistance and Transparency, and Eliminating Impediments

In addition to emphasizing the requirement that this funding be provided only to disadvantaged communities, EPA will need to work closely with the states to ensure that transparency and technical assistance—including financial management and engineering assistance to enable disadvantaged communities to develop, submit, and obtain funding for their projects—is a top priority. The guidance (as well as EPA and state programs) also must ensure that infrastructure projects in disadvantaged communities are included in state intended use plans and prioritized for funding. EPA can and should use this guidance to require reporting in a public database of funds provided including specifying funding to disadvantaged communities, and to significantly reduce or eliminate impediments to disadvantaged communities obtaining funding. Impediments such as a lack of technical and financial expertise and resources to prepare applications, and state requirements that communities fund the project up front and then seek reimbursement must be eliminated. These impediments make it virtually impossible for most disadvantaged communities to obtain funding.

We would welcome the opportunity to discuss with agency staff in more detail the actions that EPA could take to achieve this goal, including: issuing guidance, using administrative set-asides to provide technical assistance, conducting stakeholder outreach, coordinating with sister agencies that implement other infrastructure funding programs, establishing new tracking and reporting requirements, and increasing EPA capacity by drawing on expertise from community groups

III. No Funding for Partial Lead Service Line Replacements or for Programs Where Residents Must Pay

Clear EPA guidance that programs which do partial replacements are prohibited from funding is crucial to ensure that the funding will “facilitate compliance with” EPA drinking water standards “or otherwise significantly further the health protection objectives” of the SDWA. 42 U.S.C. 300j-12(a)(2)(B).

Partial lead service line replacements increase lead levels at least for some time and are prohibited from being counted towards lead service line replacement requirements under the Lead and Copper Rule. 40

C.F.R. 141.84(g). Additionally, Congress' view that the SDWA's health protection objectives are *not* furthered by partial lead service line replacements is reinforced by the Act's lead reduction program provisions, which prohibit funding under that program for partial lead service line replacements. 42 U.S.C. 300j-19b(a)(2)(B). Funding for partial lead service line replacements also creates a perverse incentive for water systems to target lead service line replacements for wealthier, often predominantly white communities where property owners can more readily afford to pay for replacement of "their portion" of the service line. This creates a serious environmental injustice and undermines the objectives of the SDWA and Civil Rights Act of 1964. 42 U.S.C. 2000d et seq. Thus, funding programs that do partial lead service line replacements will neither facilitate compliance with drinking water standards nor significantly further the health protection objectives of the SDWA and must be prohibited by EPA's guidance.

EPA's Science Advisory Board has advised against such partial replacements, which can result in higher lead contamination after replacement and do not fix the lead problem.¹ The 2021 Lead and Copper Rule Revisions that EPA recently allowed to go into effect do not allow partial lead service line replacements to be counted towards replacement goals.² Similarly, the Department of the Treasury's recent rule for funding under the American Rescue Plan Act prohibits funding partial lead service line replacements. As the rule explained,

Treasury is providing in the final rule that for lead service line replacement projects, recipients must replace the full length of the service line, and not just a partial portion of the service line. Some water utilities, when replacing service lines, will only replace the "public portion" of the service line and physically slice through the lead service line at the public/private line. This action can result in elevated drinking water lead levels for some period of time after replacement, suggesting the potential for harm, rather than benefit during that time period. Requiring replacement of the full length of the service line is also consistent with the requirements of the EPA's Lead and Copper Rule Revisions for water systems that have a lead action level exceedance for and certain other water systems.³

Treasury has banned funding for partial lead service line replacements, and EPA must do the same.

IV. ***LSLR Replacement Funds must not leave out people who cannot pay***

In addition, the guidance must ensure that funded programs will fully pay for replacements without charge to individual property owners to avoid exacerbating existing inequities and civil rights concerns.

If the guidance fails to include such requirements, many funded utilities will continue to charge property owners for removing the non-public portion of lead service lines—even in low-income communities or when renters cannot ensure that their landlord will make such a payment. As was recently documented in a peer-reviewed published paper,⁴ when Washington, D.C. imposed such a charge, it created a serious environmental injustice. In majority African American lower-income areas of D.C., very few lead service lines were replaced, whereas in wealthier predominantly white areas more service lines were replaced. Thus,

¹ EPA Science Advisory Board, Evaluation of the Effectiveness of Partial Lead Service Line Replacements, (September 2011), <https://www.epa.gov/sdwa/science-advisory-board-evaluation-effectiveness-partial-lead-service-line-replacements>.

² 40 C.F.R. 141.84(g). EPA concluded that partial lead service line replacements "have not been shown to reliably reduce drinking water lead levels in the short-term, ranging from days to months, and potentially even longer. Partial replacements are often associated with elevated drinking water lead levels in the short-term." 86 Fed. Reg. 4198, 4215 (Jan. 15, 2021)

³ Department of the Treasury, [Coronavirus State and Local Fiscal Recovery Funds: Final Rule](#), January 2022 (pending publication in the Federal Register), prepublication pdf at 284 (footnotes omitted).

⁴ Baehler KJ, McGraw M, Aquino MJ, Heslin R, McCormick L, Neltner T. Full Lead Service Line Replacement: A Case Study of Equity in Environmental Remediation. Sustainability. 2022; 14(1):352. <https://doi.org/10.3390/su14010352>

communities of color suffer disproportionately because they are unable to have their lead service lines replaced or their landlords refuse to make the investment. This result is occurring in many other communities. For example, Newark, NJ faced this problem when it initially charged property owners for replacing part of their lead service line. Facing poor participation rates (especially among lower-income rental properties) the city ultimately decided to pay for 100 percent of full lead service line replacements, enabling the city to replace over 22,000 LSLs in less than 3 years. Imposing such charges often means that utilities cannot sweep in and replace entire streets or neighborhoods' lead pipes at once, increasing costs, delays and inefficiencies.

Not only would funding a program that allows partial service line replacements and charges property owners for replacing part of the service line undermine compliance with EPA health standards and the health protection objectives of the SDWA, it also would create serious noncompliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and EPA's implementing regulations of that statute, 40 C.F.R. Part 7. Title VI and EPA's regulations prohibit funding that has a disparate impact on Black, Latinx, and Native American residents. A recent Title VI Civil Rights Act complaint filed with respect to Providence Rhode Island's lead service line replacement program highlights this issue.⁵ Clearly, requirements that property owners pay for some of the replacement results in fewer lead service line replacements in lower-income communities of color and particularly in rental properties in these communities, creating a disparate impact on people of color and serious compliance issues with the Civil Rights Act.

Thus, we urge EPA to issue guidance ensuring that all grant and fully forgiven loans are allocated only to disadvantaged communities, and that funded programs pay for complete replacements without charge to individual property owners and prohibit partial lead service line replacements. Such guidance is crucial to facilitate compliance with EPA drinking water standards or otherwise significantly further the health protection objectives of the SDWA, 42 U.S.C. 300j-12(a)(2)(B), and to comply with the Civil Rights Act.

V. *A Strengthened Lead & Copper Rule: Key to Success in Infrastructure Law's LSL Replacement Program*

Finally, while clear guidance will be necessary for an effective lead service line replacement program, a strong Lead and Copper Rule overhaul also will be critical to ensuring that the SDWA's and Infrastructure Law's goals are effectively and promptly achieved within 10 years, as promised by the Biden-Harris Administration. We are concerned that without a quickly strengthened Lead and Copper Rule to drive full replacement of all lead service lines within 10 years, the effort will take decades and may never be completed. This concern is underscored by recent reports that many states and water systems are planning to spend much of the Infrastructure Act funding on conducting inventories and studies and planning for lead service line replacement without swiftly removing their lead pipes. This could mean that there will be extensive delays, many lead pipes will not be removed, and the public will see little or no progress under the new law. Therefore, a key to avoiding this unfortunate outcome will be EPA's prompt issuance of a strong, overhauled Lead and Copper Rule that mandates expedited removal of all lead service lines.

Thank you for your attention to these important matters. It is crucial for EPA to ensure that there is swift and vigorous implementation of this historic, once-in-a-lifetime investment in our water infrastructure, with transparency and accountability in the years to come.

Sincerely,

⁵ Childhood Lead Action Project et al., Complaint Under Title VI of the Civil Rights Act of 1964, 41 U.S.C. § 2000d, 40 C.F.R. Part 7 against Providence Water, Jan. 5, 2022, available online at <https://drive.google.com/file/d/1aWpYMiHYFnpVi2SuFAeUvwZ5S2s6og41/view>

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RE Sources

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River Alliance of Wisconsin

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