

NOT YET SCHEDULED FOR ORAL ARGUMENT
Nos. 21-1019 (consolidated with 20-1020, 21-1076)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEWBURGH CLEAN WATER PROJECT, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Review of Final Agency Action of the
United States Environmental Protection Agency

RESPONDENTS' CONSENT MOTION FOR VOLUNTARY REMAND

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INTRODUCTION

Lead in drinking water poses serious hazards to young children and other groups because it adversely impacts brain development. The Environmental Protection Agency (“EPA”) regulates lead in drinking water through the Safe Drinking Water Act (“SDWA”). Pursuant to this statutory authority, in January 2021, EPA promulgated the “National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198 (Jan. 15, 2021)” (the “Rule”), which Petitioners are challenging in this litigation.

On March 12, 2021 and again on June 16, 2021, EPA delayed the Rule’s effective date while EPA reviewed the Rule. The delay enabled the Agency to engage meaningfully with the public on this important public health regulation to determine whether it should be withdrawn, modified, or take effect. EPA also extended the Rule’s compliance date from January 16, 2024 to October 16, 2024. And the parties stayed this litigation to allow EPA to complete its review of the Rule.

In December 2021, EPA concluded its review. EPA announced that although the Rule improves on the prior Lead and Copper Rule in many critical respects, EPA would initiate a new rulemaking to revise and strengthen the Rule. *See* 86 Fed. Reg. 71,574 (Dec. 17, 2021). EPA is currently engaged in that rulemaking process and is reconsidering the very provisions of the Rule that Petitioners are

challenging here. Declaration of Radhika Fox (“Fox Decl.”) ¶¶ 11-17, Ex. A; *see also* 86 Fed. Reg. at 71,578-9.

As part of the new rulemaking, EPA will develop a new record for every aspect of the Rule challenged by Petitioners. Given that EPA’s new rule could address all of Petitioners’ concerns about the Rule, EPA respectfully requests that the Court remand the Rule back to the Agency without vacatur. This would allow the Agency to evaluate Petitioners’ claims in an administrative forum without premature judicial review. EPA further requests that the Court retain jurisdiction over this proceeding during the pendency of the remand period. EPA has conferred with the parties regarding this motion and all parties have consented to these requests.

BACKGROUND

A. Statutory Background

In 1974, Congress passed the Safe Drinking Water Act (“SDWA”), responding to “accumulating evidence that our drinking water contains unsafe levels of a large variety of contaminants.” *Env’t. Def. Fund, Inc. v. Costle*, 578 F.2d 337, 339 (D.C. Cir. 1978). In passing SDWA, Congress intended to ensure “that water supply systems serving the public meet minimum national standards for protection of public health.” H.R. Rep. No. 93-1185, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 6454.

Under SDWA, EPA regulates contaminants (such as lead) through the promulgation of “national primary drinking water regulations,” which generally hold public water systems responsible for contaminants in drinking water. *See* 42 U.S.C. §§ 300g; 300g-1. EPA promulgates these regulations for a particular contaminant in two steps. *Id.* § 300g-1(b)(4).

First, EPA identifies a health-based regulatory goal for the contaminant at issue called a maximum contaminant level goal, the “level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.” *Id.* § 300g-1(b)(4)(A). Second, EPA proceeds to develop standards for that contaminant. One method for doing so is through establishing a “maximum contaminant level.” *Id.* §§ 300g-1(b)(2)(A); *id.* § 300f(1). A maximum contaminant level is a numerical limit. It sets the maximum permissible level of a contaminant in water that can be delivered to any user of a public water system and is generally to be set as close to the contaminant’s maximum contaminant level goal as is “feasible.” *Id.* §§ 300f(3), 300g-1(b)(4)(B). But if EPA finds that it is not “economically or technologically feasible” to ascertain the level of the contaminant at issue, EPA has the authority to instead require the use of a treatment technique for that particular contaminant. 42 U.S.C. § 300g-1(b)(7)(A). “In such case, the Administrator shall identify those treatment

techniques which, in the Administrator’s judgment, would prevent known or anticipated adverse effects on the health of persons to the extent feasible.” *Id.*

B. Regulatory Background

Shortly after SDWA was enacted, EPA issued interim regulations for lead in drinking water. *See* 40 Fed. Reg. 59,566, 59,570 (Dec. 24, 1975). In 1986, Congress amended SDWA and established a list of 83 contaminants for which EPA was required to develop maximum contaminant level goals and national primary drinking water regulations. 42 U.S.C. § 300g-1(b)(2)(A). Lead was a contaminant on this list. *Id.*

To satisfy this statutory requirement, in 1991, EPA promulgated the Lead and Copper Rule (“LCR”), the first non-interim national primary drinking water regulation for lead. 56 Fed. Reg. 26,460, 26,463 (June 7, 1991). EPA subsequently revised this rule in 2000 and 2007. 65 Fed. Reg. 1950 (Jan. 12, 2000) and 72 Fed. Reg. 57,782 (Oct. 10, 2007). In January 2021, EPA revised the LCR¹ again and promulgated the Rule. 86 Fed. Reg. 4198 (Jan. 15, 2021).

¹ Any reference to “LCR” in this motion refers to the national public drinking water regulation for lead in place prior to the Rule, which includes the amendments made in these two revisions.

C. Procedural History

On January 15, 2021, Community Petitioners filed two separate petitions challenging the Rule. [Doc. #1881638, 1881661]. Then, on March 1, 2021, State Petitioners filed their petition challenging the Rule. [Doc. #1888087].

In consideration of Executive Order 13,990, entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” 86 Fed. Reg. 7037 (Jan. 20, 2021), and given the significant concerns raised by stakeholders over the Rule, EPA delayed the effective date of the Rule from March 16, 2021 to June 17, 2021, and again to December 16, 2021. 86 Fed. Reg. 14,003 (Mar.12, 2021); 86 Fed. Reg. 31,939 (June 16, 2021). EPA also delayed the Rule’s compliance date from January 16, 2024 to October 16, 2024, to allow EPA to meet with stakeholders and review the Rule prior to it going into effect. *Id.*²

Accordingly, on April 9, 2021, and again on July 16, 2021, the parties moved to hold the proceeding in abeyance, which the Court granted. [Doc. #1893844, #1907053].

On December 17, 2021, EPA published a Federal Register Notice announcing the outcome of the Agency’s review of the Rule under Executive

² Different petitioners have challenged the delay rule, 86 Fed. Reg. 31,939 (June 16, 2021), in another proceeding before this Court. *See State of Arizona, et al. v. EPA, et al.*, Case No. 21-1159 (D.C. Cir.). Oral argument took place on October 4, 2022. *See* [Doc. #1967351].

Order 13,990. 86 Fed. Reg. 71,574 (Dec. 17, 2021). Concluding that the Rule provides additional protections relative to the LCR, EPA announced that the Rule would take effect on December 16, 2021, with a compliance date of October 16, 2024. However, EPA also determined that there are “significant opportunities to further improve” the Rule and stated its intention to “propose for public comment a rulemaking to revise the [Rule].” *Id.* at 71,577. EPA also explained that it “intends to primarily focus its rulemaking process on proposing approaches aimed at the policy goal of proactive and equitable [lead service line replacement], as well as proposals to address compliance tap sampling improvements; re-evaluation of the action and trigger levels; and consideration of prioritizing protections for historically disadvantaged communities.” *Id.* at 71,579. EPA noted that it will also consider input from stakeholders suggesting improvements to other aspects of the Rule. *Id.* EPA explicitly identified the Rule’s small system flexibility provision in this context. *Id.*

EPA also announced that it intends to take final action on a new rule *prior* to the Rule’s October 16, 2024 compliance date. *Id.* at 71,574; 71,580. EPA does not expect to propose changes to the initial inventory requirement, including the compliance date for the initial inventory. *Id.* at 71,580. But, EPA “intends to propose changes to the [lead service line replacement] and tap sampling requirements,” and therefore expects to propose corresponding changes to the

current October 16, 2024 compliance date for water systems to complete their lead service line replacement and tap sampling plans. *Id.*

In January 2022, based on this ongoing rulemaking effort, EPA moved to continue holding the case in abeyance. [Doc. #1932850]. Both sets of Petitioners, however, moved to lift the abeyance, which the Court granted. [Doc. #1932814, 1932832]; [Doc. #1943142]. While Petitioners filed their opening merits briefs on August 8, 2022, [*see* Doc. #1958365, #1958332], on November 10, 2022, the Court granted EPA's unopposed motion to suspend the remaining briefing deadlines to allow EPA to file this motion for remand. [Doc. #1973274].

STANDARD OF REVIEW

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Courts have broad discretion to grant or deny an agency's motion to remand. *See Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017). This Circuit "generally grant[s] an agency's motion to remand so long as the agency intends to take further action with respect to the original agency decision on review." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (internal quotations omitted).

In deciding a motion to remand, this Court “considers whether remand would unduly prejudice the non-moving party.” *Id.* And this Court has discretion to consider remanding a rule back to the agency with or without vacatur, where “[t]he decision whether to vacate depends on the seriousness of the order’s deficiencies . . . and the disruptive consequences of an interim change that may itself be changed.” *Allied–Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (internal quotations omitted); *see also Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). Ultimately, this Court “commonly grant[s]” voluntary remand requests. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993).

ARGUMENT

I. This Court Should Grant EPA’s Unopposed Request for Voluntary Remand.

All parties here agree that remanding the Rule back to the Agency is proper. Remand will allow EPA to appropriately reconsider the issues raised by the Petitioners through the administrative process as it develops a new record with new analyses for a new rule that is expected to significantly revise the Rule. EPA, in its new rulemaking, expects to make changes to its lead service line replacement provision, small system compliance flexibility provision, and the action level. 86 Fed. Reg. at 71,574; 71,578-9; Fox Decl. ¶¶10, 13-17. In so doing, EPA will be required to assess whether the new rule maintains or improves public health

protection, as required under SDWA. 42 U.S.C. § 300g–1(b)(9). EPA also intends to evaluate its record for continuing its use of a treatment technique rule for regulating lead in drinking water in lieu of a maximum contaminant level under 42 U.S.C. § 300g–1(b)(7)(A). Fox Decl. ¶ 14. EPA will also conduct a new analysis of the environmental justice impacts of the new rule consistent with Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations). Fox Decl. ¶¶ 12, 14, 20.

These are the very aspects of the Rule that are the subject of Petitioners’ opening briefs. *See* Cmty. Pet. Br. at 23-50 [Doc. #1958365] and State Pet. Br. at 24-48 [Doc. #1958365]. Thus, because EPA intends to “take further action with respect to” the very aspects of the Rule being challenged by Petitioners, its unopposed voluntary remand request should be granted. *Limnia*, 857 F.3d at 386.

Moreover, EPA’s request for remand will not prejudice any of the parties, as all parties have consented to this motion. In fact, granting this request will benefit the parties as it will preserve party resources by obviating the need for additional briefing on the merits of Petitioners’ claims. Granting this request would also preserve the integrity of EPA’s ongoing rulemaking process as it will allow Petitioners to raise their concerns regarding the Rule in an administrative forum in the first instance, rather than this Court, and allow EPA to respond to them in the new rulemaking. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir.

2012) (“ . . . letting the administrative process run its course before binding parties to a judicial decision prevents courts from ‘entangling themselves in abstract disagreements over administrative policies, and . . . protects the agencies from judicial interference’ in an ongoing decision-making process.”) (citation omitted).

Finally, EPA’s request for remand is neither frivolous nor in bad faith. As noted above, EPA is already in the process of promulgating a new rule. It has publicly announced that it expects to propose requiring mandatory replacement of all lead service lines and intends to re-evaluate the Rule’s action level and trigger level, its environmental justice analysis, as well as other components of the Rule, such as the small system flexibility provision, and the record supporting EPA’s use of a treatment technique rule. 86 Fed. Reg. 71,574, 71,578-9; *see also* Fox Decl. ¶¶ 13-14. In essence, EPA is already in the process of addressing all of Petitioners’ challenges to the Rule as it undertakes its new rulemaking, and so a remand here makes practical sense. *Id.*; *see also Util. Solid Waste*, 901 F.3d at 436 (noting that remand has the benefit of allowing “agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete” (*quoting Ethyl Corp.*, 989 F.2d at 524)). For these reasons, the Court should grant EPA’s unopposed motion for remand.

II. Remand Without Vacatur Is Appropriate.

Here, remand without vacatur is appropriate because all parties have consented to EPA's request to remand the Rule without vacatur and because this Court's vacatur standard has not been met. Under *Allied-Signal*, "[t]he decision whether to vacate depends on the 'seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" 988 F.2d at 150–51 (internal citation omitted).

First, all of Petitioners' claims primarily rest on alleged inadequacies in EPA's record supporting the Rule. As discussed above, EPA intends to revise the Rule and develop a new administrative record for that rule. *See supra* at 8-9. EPA can thus address on remand the very concerns Petitioners identify, which weighs in favor of leaving the rule in place.

Second, vacating the entire Rule and reinstating the prior regulatory regime, which no party has requested, may cause disruptions to the regulated community and would undermine public health as it would result in the reinstatement of the less protective LCR. Prior to the Rule's October 2024 compliance date, water systems are expected to prepare for the implementation of the Rule, including preparing their initial service line inventories. 86 Fed. Reg. at 71,579. EPA has announced that this requirement will not be revised and EPA has no plans to delay

its compliance date. *Id.* at 71,580. Vacating the Rule and reinstating the prior LCR would eliminate this inventory requirement (as it is not a requirement under the LCR) and undo water systems' current efforts to meet this provision of the Rule that is expected to remain in place. Moreover, an inventory of service line materials will be critical to the implementation of any lead service line replacement requirements under the new rule. *Id.* at 71,579-80.

Vacatur would also eliminate important provisions in the Rule, such as 40 C.F.R. § 141.85(e) (2021), which requires water systems to notify and provide public education materials to persons served by lead service lines, galvanized lines requiring replacement, and unknown service lines within 30 days of completion of the initial inventory. Vacatur would eliminate other provisions of the Rule that are more protective than the prior LCR, such as its more robust sampling requirements. *See id.* at 4201. Under such circumstances, vacatur is improper. *See North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (declining to vacate a rule that was more environmentally protective than the prior rule).

Ultimately, EPA views reinstatement of the whole LCR as being a step backward in its efforts to require water systems to identify and correct elevated lead levels. And given that all parties have consented to a remand without vacatur, no party would be prejudiced by such an order, and the Court should grant this request.

III. The Court Should Retain Jurisdiction During the Pendency of the Remand.

Should the Court grant EPA's request to remand the Rule without vacatur, EPA, with the parties' consent, requests that the Court retain jurisdiction of this proceeding during the pendency of the remand period. *E.g., Am. Iron & Steel Inst. v. Occupational Safety & Health Admin.*, 939 F.2d 975, 979 (D.C. Cir. 1991) (D.C. Circuit exercising discretion in retaining jurisdiction during the pendency of a remand of an agency decision). EPA intends to take final action on a new rule prior to the Rule's October 2024 compliance date and has taken several concrete steps to meet this target date. 86 Fed. Reg. at 71,580; Fox Decl. ¶¶ 22, 25. Notwithstanding EPA's diligent efforts to timely promulgate a new rule, retaining jurisdiction during the remand period would allow Petitioners to reinitiate this suit in the event EPA is somehow unable to meet its target date for completing the new rulemaking.

CONCLUSION

For these reasons, the Court should grant EPA's unopposed motion to voluntarily remand the Rule without vacatur. The Court should further retain jurisdiction of this proceeding during the remand period until EPA issues a final action regarding the new rulemaking.

Dated: December 9, 2022.

Respectfully submitted,

/s/ Hubert Lee

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,947 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point font.

/s/ Hubert Lee

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DECLARATION OF RADHIKA FOX

I, Radhika Fox, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge, information contained in the records of the United States Environmental Protection Agency (“EPA” or “the Agency”), and information supplied to me by current EPA employees.

1. I am the Assistant Administrator for the Office of Water in EPA. I have served in this position since June 2021. I was the Principal Deputy Assistant Administrator for the Office of Water in EPA between January 2021 and June 2021.

2. As the Assistant Administrator for the Office of Water, I am responsible for, and provide counsel to, the Administrator on policy, planning, program development and implementation, management, and control of the technical aspects of the Office of Water. I manage the Agency's programs under the Safe Drinking Water Act (SDWA), the Clean Water Act, and the Marine Protection, Research, and Sanctuaries Act.

3. Within EPA, the Office of Water has primary responsibility for the rulemaking process related to the SDWA.

4. On January 15, 2021, EPA published the "National Primary Drinking Water Regulation: Lead and Copper Rule Revisions" in the Federal Register (86 Fed. Reg. 4,198) ("the Rule").

5. On January 20, 2021, President Biden issued the "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) ("Executive Order 13990"). Section 1 of Executive Order 13990 states that it is "the policy of the Administration to listen to the science, to improve public health and protect our environment, to ensure access to clean air and water, . . . and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." Executive Order 13990 directed the heads of all Federal

agencies to immediately review regulations that may be inconsistent with, or present obstacles to, the policy it establishes.

6. On March 12, 2021 and again on June 16, 2021, EPA delayed the Rule's effective date while EPA conducted the review required under Executive Order 13990. The delay enabled the Agency to engage meaningfully with the public on this important public health regulation before it took effect. EPA also extended the Rule's compliance date from January 16, 2024 to October 16, 2024. A more detailed description of the reasons for EPA's delay of the effective date and compliance dates can be found in 86 Fed. Reg. 14,003 (March 12, 2021), 86 Fed. Reg. 14063 (March 12, 2021), and 86 Fed. Reg. 31,939 (June 16, 2021). *See also* EPA's "Notification of conclusion of review" at 86 Fed. Reg. 71,574 (Dec. 17, 2021).¹

7. As part of its review of the Rule in accordance with Executive Order 13990, EPA hosted a series of virtual engagements from April to August 2021 to obtain public input. EPA also opened a docket, from April 5, 2021 until July 30, 2021, to accept written comments, suggestions, and data from the public. Summaries of these engagements, including summaries of the meetings and written comments,

¹ Different petitioners have challenged the delay rule, 86 Fed. Reg. 31,939 (June 16, 2021), in another proceeding before this Court. *See State of Arizona, et al. v. E.P.A., et al.*, Case No. 21-1159 (D.C. Cir.). Oral argument took place on October 4, 2022. *See* Doc. # [Doc. #1967351].

can be found in the docket, EPA-HQ-OW-2021-0255 at <https://www.regulations.gov/>. Recordings of the public listening sessions and community, tribal, and national stakeholder association roundtables are also available in the docket. The virtual engagement meetings included two public listening sessions, ten community roundtables, a tribal roundtable, a national stakeholder association roundtable, a national co-regulator meeting, and a meeting with organizations representing elected officials. A diverse group of individuals and associations provided feedback through these meetings and the docket, including people from communities impacted by lead in drinking water, local governments, water utilities, tribal communities, public health organizations, environmental groups, environmental justice organizations, and co-regulators.

8. EPA specifically sought engagement with communities that have been disproportionately impacted by lead in drinking water, especially lower-income people and communities of color that have been underrepresented in past rule-making efforts. EPA hosted roundtables with individuals and organizations from Pittsburgh, PA; Newark, NJ; Malden, MA; Washington, DC; Newburgh, NY; Benton Harbor and Highland Park, MI; Flint and Detroit, MI; Memphis, TN; Chicago, IL; and Milwaukee, WI. These geographically-focused roundtables included a range of participants including local government entities, community organizations, environmental groups, local public water utilities, and public

officials. EPA obtained detailed, valuable feedback from these engagements, which often focused on the lived experiences of people impacted by lead in drinking water. Many commenters, in their statements at virtual engagements and in their written materials submitted to the docket, expressed concern that the Rule would not provide equitable public health protections and would be difficult to implement. While commenters provided feedback on all aspects of the Rule, most comments focused on lead service line replacement, the action level and trigger level,² tap sampling, public education, and sampling for lead in schools and child-care facilities. Some commenters suggested that EPA should promulgate a maximum contaminant level for lead.

9. At the end of EPA's review, EPA published a notification of the conclusion of its review in the Federal Register. 86 Fed. Reg. 71,574. Based on EPA's evaluation and stakeholder feedback, EPA concluded that EPA's actions to protect the public from lead in drinking water should consider the following policy objectives: (1) replacing 100 percent of lead service lines to protect all Americans

² If more than ten percent of a water system's tap samples collected exceed the lead "action level" of 15 µg/L (micrograms per liter), the water system is generally required to take additional actions to reduce lead exposure. *See, e.g.* 40 C.F.R. 141.80(c), (e), (f) (g)(2021). Under the Rule, water systems will also be subject to a 10 µg/L "trigger level." If the trigger level is exceeded, water systems will be required to take certain actions sooner so that they can more rapidly respond if they begin exceeding the 15 µg/L action level. *See* 40 C.F.R. §§ 141.80(c)(1), (4) (2021) and Rule at 4,207-8.

from the most significant source of lead in drinking water systems; (2) equitably improving public health protection for those who cannot afford to replace the customer-owned portions of their lead service lines; (3) improving the methods to identify and trigger action in communities most at risk of elevated drinking water lead levels; and (4) exploring ways to reduce the complexity of the regulations. 86 Fed. Reg. at 71,574. To achieve these policy objectives, EPA has initiated a number of regulatory and non-regulatory actions, including a rulemaking to propose revisions to the Rule given the significant stakeholder concerns identified during EPA's review of the Rule under Executive Order 13990.

10. While concluding that the new actions were necessary to achieve its policy goals, EPA also found that the Rule improves public health protection in comparison to the previous version of the rule. The Rule includes provisions such as the lead service line inventory requirement (40 C.F.R. § 141.84(a) (2021)), changes to the sampling requirements for lead (40 C.F.R. § 141.86 (2021)), and changes to the public notification requirements (e.g., 40 C.F.R. §§ 141.85(e) and 141.201(a)(3)(vi) (2021)) that will improve public health protection in comparison to the previous version of the rule. In particular, the lead service line inventory requirement will be critical to implementation of any lead service line replacement provision, including potentially a provision requiring far more replacement, because it will be used to identify the location of lines for replacement. 86 Fed.

Reg. at 71,574. The Rule also makes changes to the lead service line replacement provision that improve public health protection. These include a requirement to remove lead connectors when encountered and to follow risk mitigation procedures, and a prohibition on counting partial lead service line replacements in the calculation of lead lines replaced for either the mandatory replacement or goal-based replacement required under the Rule. 40 C.F.R. §§ 141.84(c), 141.84 (d) and (e), 141.84(f)(3), and 141.84(g)(3).

11. Given these improvements over the prior rule and to advance public health protection in the interim, EPA decided to allow the Rule to take effect while it conducts a new rulemaking. At the same time, EPA is developing a proposed rule for public comment to build upon and improve the Rule as part of its overall strategy to advance the policy goals identified in paragraph 9 above.

12. In its notification, EPA identified the lead service line replacement provision of the Rule as a primary focus of the new rulemaking to revise the Rule. 86 Fed. Reg. at 71,577-8. EPA noted that the Rule's requirements, three states' laws requiring mandatory lead service line replacement, and federal funding incentives may be insufficient to achieve 100 percent replacement of lead service lines and to reduce risks to families living in the homes served by these lines without more actions. *Id.* at 71,578. EPA intends to propose for comment requirements that, along with other non-regulatory actions, would result in the replacement of all lead

service lines as quickly as is feasible, while fully considering EPA's statutory authority and required analyses, including a new economic and environmental justice analysis. *Id.*

13. EPA also recognized an important opportunity to ensure that public health is protected equitably. The cost of replacing the customer-portion of a lead service line may leave the most vulnerable Americans disproportionately exposed to lead if they cannot afford the expense of replacement. 86 Fed. Reg. at 71,578. In the Economic Analysis for the Rule, EPA estimated that between 21 and 28 percent of the anticipated lead service line replacements under the Rule would be customer-initiated replacements. *Id.* Those are replacements where the water system replaces the public portion of a lead service line after being notified that a homeowner has replaced the private portion of the service line. *Id.* The remaining lead service line replacement predicted under the Rule would be done by systems that exceed the action level or trigger level. *Id.* at 71,578-9. Thus, to meet the Rule's mandatory 3 percent replacement or the state-approved goal-based replacement rate, some systems may focus on replacing lines where the customer could pay to replace their portion of the line. *Id.* at 71,579. To address these issues, EPA intends to propose for comment rule revisions to advance the policy goal of prioritizing distributional impacts. *Id.* For instance, EPA intends to

explore how to replace lead service lines in a manner that prioritizes historically disadvantaged communities. *Id.*

14. In developing a rule that addresses these distributional impacts, EPA will also further develop the record for the lead service line replacement provisions, and the environmental justice impacts of the rule. In the new rulemaking, EPA expects to enhance its record on these and other issues raised by stakeholders by completing (i) an analysis of the feasibility of a mandatory replacement of lead service lines to achieve the policy objective of replacing 100 percent of lead service lines including replacement rates; and (ii) an analysis of the action level based on the existing record and more recent data. EPA also intends to (i) conduct an analysis of the small systems flexibility provision based on any changes made to the lead service line replacement requirements; (ii) conduct a new health risk reduction benefits and costs analysis for the proposed rule; (iii) conduct a renewed environmental justice analysis; and (iv) evaluate its record for continuing to use a treatment technique rule in lieu of a maximum contaminant level for lead considering stakeholder comments.

15. The Rule requires lead service line replacement at two possible rates – 3% if the system exceeds the lead action level, and a “goal rate” determined case-by-case if a system exceeds the trigger level. As noted above, EPA intends to develop a proposed rule, and explore non-regulatory approaches, to achieve replacement of

all lead service lines. Such a requirement would demand additional significant changes to the Rule, including to the small water system compliance flexibility provision. Lead service line replacement is one of the four compliance options for small systems; a mandate to remove all lead lines, including at small systems, would eliminate that lead service line replacement as an option for taking a corrective action in response to elevated lead levels in compliance tap sampling.

16. EPA's review of the Rule led the agency to conclude that there are additional opportunities to better identify the communities most at risk of elevated drinking water lead levels and explore ways to compel actions to reduce lead exposure in addition to those compelled by a lead action level exceedance.

Specifically, EPA is considering potential revisions to the Rule to ensure that the higher tap sampling result is used for measuring compliance, including levels found in the service line or in plumbing fixtures inside homes.

17. EPA's review of the Rule also led the agency to consider potential revisions to reduce complexity from the lead action and trigger levels and ensure that the rule is easily understandable and triggers appropriate and feasible corrective actions. The agency is currently evaluating options to consolidate and potentially lower the Rule's action and trigger levels. Stakeholders participating in the virtual engagements identified the action level/trigger level concept as the central regulatory variable that drives system and state action to reduce elevated lead

levels in drinking water and many stakeholders commented that the action level should be lower to require more systems to take corrective action to protect public health from the adverse effects of lead. The agency is currently exploring options to address these concerns, including whether to eliminate the trigger level and lower the action level to compel action by water systems sooner to reduce the health risks in more communities. The agency is also evaluating whether the trigger level requirements of the Rule would still be necessary if a lead service line replacement mandate and a more aggressive lower action level are adopted.

18. The current compliance deadline for the Rule is October 16, 2024. EPA intends to propose, in the new rule, revisions to the compliance deadlines for components of the rule that are significantly revised. 86 Fed. Reg. at 71,580. For example, EPA intends to propose changes to the lead service line replacement plan and tap sampling requirements. *Id.* at 71,581. EPA also expects to propose to delay the October 16, 2024 deadline for submitting lead service line and tap sampling plans so that water systems can incorporate any potential revisions made through the new rulemaking. *Id.* At this time however, EPA does not expect to propose changes to the requirements for information to be submitted in the initial lead service line inventory, and its associated October 16, 2024 compliance date will remain unchanged. *Id.* at 71,580.

19. In addition to the analyses identified above, EPA must comply with the following SDWA requirements for proposing and promulgating a national primary drinking water regulation:

- a. request comments from the Science Advisory Board prior to proposal of a national primary drinking water regulation (42 U.S.C. § 300g-1(e));
- b. consult with the National Drinking Water Advisory Committee (42 U.S.C. § 300g-1(d));
- c. consult with the Secretary of the Health and Human Services (42 U.S.C. § 300g-1(d));
- d. prepare a Health Risk Reduction Cost Analysis (42 U.S.C. § 300g-12(b)(3)(C)), which requires EPA to publish and seek comment on an analysis of the health risk reduction benefits and costs likely to be experienced as a result of compliance with the treatment technique and alternative treatment techniques that are considered; and
- e. provide an opportunity for a public hearing prior to promulgation of a national primary drinking water regulation (42 U.S.C. § 300g-1(d)).

20. EPA must comply with additional requirements for a rulemaking pursuant to other statutes and Executive Orders. EPA must comply with:

- a. the Unfunded Mandates Reform Act and Executive Order 13132 (Federalism), which requires consultations to enable officials of state and local governments to provide meaningful and timely input for any proposal containing significant federal intergovernmental mandates;
- b. the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act which requires completion of a Small Business Advocacy Review Panel for regulations that have a significant economic impact on a substantial number of small entities;
- c. Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), which requires an analysis of disproportionately high and adverse human health impacts or environmental impacts on minority populations and low-income populations, identification of actions to address these impacts, and greater involvement of environmental justice populations in rule development;
- d. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), which requires consultation with tribal officials early in the process, prior to the promulgation of rules that impose substantial direct compliance costs on Indian tribal governments and that do not provide funds necessary to pay direct compliance costs;

- e. Executive Order 13045 (Protection of Children from Environmental Health and Safety Risks), which requires an evaluation of the effects of planned regulation on children and an explanation as to why the regulation is preferable to potentially effective and reasonably feasible alternatives; and
 - f. Executive Order 12866, which requires that significant regulatory actions be submitted for review to the Office of Information and Regulatory Affairs in the Office of Management and Budget for review prior to proposal and promulgation.
21. EPA also plans to host stakeholder meetings to explain the rulemaking process and discuss the available data. EPA will also engage stakeholders by accepting, reviewing, and responding to comments. Along with the consultations with state, local and tribal governments, and others described above, EPA will also consult with relevant environmental advocacy and justice groups, utilities, risk assessors, and relevant industry representatives as necessary.
22. With respect to the ongoing rulemaking to revise the Rule, EPA has made significant progress:
- a. EPA initiated consultation with the Science Advisory Board in September 2022 and expects to conclude the consultation in early January 2023.

- b. EPA initiated the Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act consultations in April 2022 and expects to conclude them in January 2023.
 - c. EPA held its first State co-regulator meeting on October 5, 2022 and held its second meeting on November 2, 2022.
 - d. EPA held an Unfunded Mandates Reform Act/Federalism consultation meeting on October 13, 2022.
 - e. EPA held two environmental justice consultation meetings pursuant to Executive Order 12898 on October 25, 2022 and November 1, 2022.
 - f. EPA held its first tribal consultation meeting on October 27, 2022 and held its second meeting on November 9, 2022.
 - g. EPA conducted its consultation with the National Drinking Water Advisory Committee on Nov. 30, 2022.
23. In September 2023, EPA expects to sign a proposed rule for publication in the *Federal Register*.
24. After the proposed rule is published and before taking final action on the proposal, EPA plans to provide an opportunity for a public hearing.
25. EPA intends to complete this rulemaking and take final action on the proposal as quickly as practicable but no later than October 16, 2024.

26. The foregoing expectations are based on circumstances currently known or assumed.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided by employees under my supervision.

Dated: December 08, 2022



Radhika Fox
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