

ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1019 (consolidated with Nos. 21-1020, 21-1076)

**IN THE 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 a Rule of the
United States Environmental Protection Agency

**INITIAL OPENING BRIEF OF PETITIONERS NEWBURGH
CLEAN WATER PROJECT, NAACP, SIERRA CLUB, UNITED
PARENTS AGAINST LEAD, AND NATURAL RESOURCES
DEFENSE COUNCIL**

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Dated: August 8, 2022

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners Newburgh Clean Water Project, NAACP, Sierra Club, United Parents Against Lead, and Natural Resources Defense Council certify as follows:

(A) Parties

The Petitioners are Newburgh Clean Water Project, NAACP, Sierra Club, and United Parents Against Lead (No. 21-1019); the Natural Resources Defense Council (No. 21-1020); and the State of New York, State of California, State of Illinois, State of Maryland, State of Minnesota, State of New Jersey, State of Oregon, Commonwealth of Pennsylvania, State of Wisconsin, and the District of Columbia (No. 21-1076). The Respondents are the United States Environmental Protection Agency and Michael S. Regan, Administrator of the United States Environmental Protection Agency. The Intervenor is the American Water Works Association.

(B) Ruling under review

The consolidated petitions for review challenge the Environmental Protection Agency's final rule titled "National Primary Drinking Water

Regulations: Lead and Copper Rule Revisions,” published at 86 Fed. Reg. 4198 (Jan. 15, 2021).

(C) Related cases

There are no other cases involving the same underlying agency rule pending review in this Court or any other.

/s/ Adeline S. Rolnick
Adeline S. Rolnick

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners Newburgh Clean Water Project, NAACP, Sierra Club, United Parents Against Lead, and Natural Resources Defense Council certify that each is a non-governmental corporation with no parent corporation and no publicly held company holding 10 percent or more of its stock.

Newburgh Clean Water Project is a grassroots community organization dedicated to ensuring that residents of Newburgh, New York have access to drinking water free from PFAS, lead, and other contaminants.

The NAACP is a civil rights organization whose mission is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons.

Sierra Club is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

United Parents Against Lead is a non-profit corporation committed to the protection of children from lead and other environmental hazards.

The Natural Resources Defense Council is a national nonprofit organization dedicated to improving human health and the quality of the human environment and to protecting the nation's endangered natural resources.

/s/ Adeline S. Rolnick
Adeline S. Rolnick

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GLOSSARY OF ABBREVIATIONS

Act	Safe Drinking Water Act
EPA	U.S. Environmental Protection Agency
ppb	parts per billion
µg/L	micrograms per liter

INTRODUCTION

Lead in drinking water is a serious threat to human health. Even low-level lead exposure impairs infants' and children's brain development, leading to attention disorders, impaired intellectual development, and other harms. Lead is also associated with cardiovascular disease and damaged kidney function in adults. The recent crisis in Flint, Michigan revealed the disaster that can result when pregnant women, infants, and children are exposed to high lead levels in tap water. There is no safe level of lead.

Lead primarily enters drinking water when water corrodes lead service lines—the pipes connecting a water main to a house. It is impossible to protect adequately against lead contamination without removing lead service lines. As long as lead lines remain in use, water systems must perennially treat their water to minimize its corrosive effects.

Under the Safe Drinking Water Act, the Environmental Protection Agency must protect the public from exposure to lead in drinking water. In 2021, EPA published long-overdue revisions to its decades-old standard for lead. In revising the standard, EPA violated the law,

squandered an opportunity to make much-needed improvements, and rolled back existing health protections. EPA's new rule fails to protect people's health.

EPA arbitrarily defied the Safe Drinking Water Act's mandate to set a health-based, enforceable limit on lead in tap water—called a maximum contaminant level—which Congress required unless it is not feasible to ascertain levels of lead in water. And the complex “treatment technique” EPA adopted instead of setting a health-based limit arbitrarily rejected feasible, health-protective, and widely supported improvements. First, EPA failed to mandate complete replacement of all lead service lines. Indeed, despite arguments from state regulators, health experts, water utilities, and EPA's own advisors that doing so is essential to protect health, EPA did not even consider or analyze the option. Second, EPA cut in half the rate at which water systems with high lead levels must replace their lead service lines, never analyzing whether it was feasible to maintain the current rate. Third, EPA refused to lower the level of lead contamination at which water systems must take the most protective measures to reduce health harm, disregarding extensive evidence that it was feasible to do so.

EPA's rule arbitrarily fails to prevent adverse health effects to the extent feasible, as required by the Safe Drinking Water Act. The Court should vacate and remand the challenged portions of the rule.

STATEMENT OF JURISDICTION

Petitioners seek review of EPA's final rule titled "National Primary Drinking Water Regulations: Lead and Copper Rule Revisions," 86 Fed. Reg. 4198 (Jan. 15, 2021). The Safe Drinking Water Act grants this Court jurisdiction to review the challenged rule. 42 U.S.C. § 300j-7(a). Petitioners timely filed the petitions for review in Case Nos. 21-1019 and 21-1020 on January 15, 2021, within 45 days of the date of the rule's promulgation. *Id.*; 86 Fed. Reg. at 4198 (JA).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in a separate addendum.

STATEMENT OF THE ISSUES PRESENTED

1. Whether EPA arbitrarily refused to set a maximum contaminant level for lead in drinking water, without justifying why it is infeasible to ascertain levels of lead in water.

2. Whether EPA arbitrarily failed to promulgate a treatment technique for lead in drinking water that prevents health harm to the extent feasible, by: (a) refusing to mandate complete replacement of lead service lines by all water systems, (b) slowing down the lead service line replacement rate for medium and large water systems that exceed a designated level of lead in the water, and (c) failing to lower the level of lead contamination at which water systems must take certain protective measures to reduce health harm.

STATEMENT OF THE CASE

I. Lead in drinking water threatens people's health

There is no safe level of lead in drinking water. 86 Fed. Reg. at 4259 (JA__). “Even low level lead exposure” causes devastating harm to children and others. *Id.* at 4205, 4231 (JA__). Lead exposure is especially dangerous for fetuses, formula-fed infants, and young children; it presents serious risks to their brains and nervous systems

and can cause learning disabilities, attention disorders, shorter stature, and impaired hearing. *Id.* at 4205-06, 4231, 4259 (JA__). Children’s bodies absorb more lead than adults’, and children’s brains are more sensitive to lead’s pernicious effects. *Id.* at 4205 (JA__). For adults, lead exposure may increase blood pressure and hypertension, impair kidney function, and cause death from cardiovascular diseases, including fatal heart attacks. JA__ [2017-0300-1768_at_D-2—D-7]. Lead exposure is also linked to developmental and reproductive harm, including delayed puberty and decreased fertility. JA__ [2017-0300-1768_at_D-8]. As EPA has summarized: “Lead is a highly toxic pollutant that can damage neurological, cardiovascular, immunological, developmental, and other major body systems.” 86 Fed. Reg. at 4259 (JA__).

The harm from lead exposure is not distributed equitably: minority and low-wealth populations are disproportionately exposed to lead in drinking water. *See* State Pet’rs’ Br. Statement § B. The Flint, Michigan drinking water crisis is a painful example of the toll lead-

contaminated drinking water can take on an entire community. JA__ [2017-0300-1124_at_1-4].

Lead service lines are “the greatest contributor of lead in drinking water.” 86 Fed. Reg. at 4226 (JA__). A lead service line typically has two sides: a portion on public property running from the water main to the property line, and a portion on private property running from the property line to the dwelling. JA__ [2017-0300-0010_at_14]. Service lines are sometimes owned entirely by water systems; depending on local law, the portion on private property may be owned by the individual homeowner. JA__ [2017-0300-0010_at_4]; 86 Fed. Reg. at 4215 (JA__). An estimated six to ten million homes in the United States receive tap water through lead service lines, providing water to at least 15 million people. 86 Fed. Reg. at 4199 (JA__); JA__ [2017-0300-0145_at_3]; JA__ [2017-0300-0074_at_9].

II. The Safe Drinking Water Act requires EPA to protect the public from lead in drinking water to the extent feasible

Under the Safe Drinking Water Act, EPA must protect the public from contaminants in drinking water, including lead. *City of Portland v. EPA*, 507 F.3d 706, 709 (D.C. Cir. 2007); 42 U.S.C. § 300g-1(b)(2); 48

Fed. Reg. 45,502, 45,511 (Oct. 5, 1983). To do so, EPA must first set a “maximum contaminant level goal,” the level of a contaminant “at which no known or anticipated adverse effects on the health of persons occur.” 42 U.S.C. §§ 300 g-1(b)(2)(A), (b)(4)(A). Then, EPA must set an enforceable health-based limit called a “maximum contaminant level.” *Id.* §§ 300g-1(b)(4)(B), 300f(3). This limit must be as close to the maximum contaminant level goal as feasible, unless certain statutory exceptions are met. *Id.* § 300g-1(b)(4)(B).

EPA may avoid setting this enforceable limit only if it is “not economically or technologically feasible to ascertain the level of the contaminant” in water. *Id.* §§ 300g-1(b)(7)(A); 300f(1)(C). If EPA does make that finding, it may establish a “treatment technique” instead, which is a prescribed practice or set of practices to control the amount of a contaminant. *Id.* § 300g-1(b)(7)(A); *e.g.*, 86 Fed. Reg. at 4207. Any treatment technique must “prevent known or anticipated adverse effects on the health of persons to the extent feasible.” 42 U.S.C. § 300g-1(b)(7).

A maximum contaminant level or treatment technique is “feasible” if it is achievable “with the use of the best technology,

treatment techniques and other means which the Administrator finds . . . are available (taking cost into consideration).” *Id.* § 300g-1(b)(4)(D). As interpreted by this Court and by EPA, “feasible” means “technically possible and affordable,” *City of Portland*, 507 F.3d at 712, “by large metropolitan or regional public water systems,” 86 Fed. Reg. at 4206 (JA__) (quoting legislative history).

III. EPA promulgates a complex rule without a health-based standard for lead

EPA first promulgated interim regulations for lead in drinking water in 1975, setting a maximum contaminant level of 50 parts per billion (ppb).¹ 40 Fed. Reg. 59,566, 59,570 (Dec. 24, 1975). Yet starting in 1991, EPA has declined to set a health-based maximum contaminant level for lead, instead promulgating a complex treatment technique. *See* 56 Fed. Reg. 26,460, 26,478 (June 7, 1991) (JA__).

EPA’s 1991 Lead and Copper Rule (“1991 Rule”) began by setting a maximum contaminant level goal for lead of zero, finding “no safe

¹ Parts per billion (ppb) is equal to micrograms per liter (µg/L). One ppb or one µg/L is equal to 0.001 milligrams per liter (mg/L). EPA’s regulations use all three units of measurement; this brief uses ppb.

threshold” for lead in drinking water.² *Id.* at 26,462, 26,467 (JA__)
(citation omitted). EPA then found that it was not, at that time, feasible
to set a maximum contaminant level for lead. *Id.* at 26,477 (JA__).

The treatment technique EPA promulgated instead does not place
a limit on the amount of lead permitted in tap water. Instead, it
requires water systems to take actions to reduce the levels of lead in
their drinking water after exceeding a lead “action level” of 15 ppb. *Id.*
Water systems conduct limited tap water sampling—required at no
more than 100 sites, even in the largest cities, *id.* at 26,556 (JA__)—and
compare the results to the action level. *Id.* at 26,490 (JA__). If ten
percent or more of the samples are above 15 ppb, the water system has
exceeded the action level. *Id.*

The action level was not a health-based standard, but rather
reflected the lead level EPA believed water systems could achieve at the
time using corrosion control, a water treatment technique intended to
reduce the amount of lead leaching from underground lead pipes and

² For decades, EPA has regulated lead and copper together in the same
rule, but only the lead-related provisions are relevant here.

household plumbing. *Id.* EPA expected this action level to spur “treatment among large numbers of systems nationwide.” *Id.* at 26,477 (JA__).

Under the 1991 Rule, a water system that exceeded the action level was required to take additional steps intended to lower lead levels and educate the public about risk. *Id.* at 26,490 (JA__). Specifically, a water system was required to install or optimize its corrosion control treatment, unless it had already done so. *Id.* at 26,550 (JA__). Then, if the system continued to exceed the action level, the 1991 Rule required those systems to survey and identify the lead service lines in its system and to replace those lines at a rate of 7 percent per year. *Id.* at 26,552 (JA__). A partial replacement (for example, removing the publicly owned portion of a lead line but leaving a privately owned portion intact) counted towards this rate. *Id.* at 26,553 (JA__). So did “test outs,” or sampling results showing lead concentrations at or below 15 ppb for a given lead line. *Id.* If a water system’s lead levels subsequently fell below the action level for one year, the water system was no longer required to replace lead service lines. *Id.* at 26,553, 26,556 (JA__).

IV. Lead service lines become the major source of lead in drinking water

Over the last thirty years, lead service lines have overtaken household plumbing as the most significant source of lead in drinking water. *Compare* 56 Fed. Reg. at 26,475 (JA__) (citing “household plumbing” as the source of “most” lead in drinking water in 1991), *with* 86 Fed. Reg. at 4226 (JA__) (lead service lines “are the greatest contributor of lead in drinking water”). Congress amended the Safe Drinking Water Act to virtually eliminate lead from household plumbing and fixtures. 42 U.S.C. § 300g-6. By 2008, lead service lines were responsible for most lead in drinking water. JA__ [2017-0300-0057_at_xvi]. More recent research has found that, where present, lead service lines may contribute nearly all lead present in tap water. JA__ [2017-0300-0096_at_13-14].

In 2015, EPA’s National Drinking Water Advisory Council—a panel of outside advisers with diverse perspectives convened to give EPA advice on revisions to the 1991 Rule, *see* 42 U.S.C. §§ 300g-1(d), 300j-5—unanimously recommended that EPA require all water systems to completely replace all lead service lines. JA__ [2017-0300-0062_at _6,

14]; JA__ [2017-0300-0126_at_2]. The following year, EPA announced that it was considering mandating complete lead service line replacement by all water systems. JA__ [2017-0300-0145_at_9-10]. In 2017, the American Water Works Association, the largest trade association of public water systems in the United States, endorsed the Advisory Council’s recommendation, calling for “the complete removal of lead service lines.” JA__ [2017-0300-0365].

The call for complete lead service line replacement has been joined by, among others, American Water (the private owner and operator of more than 300 drinking water systems in 46 states), the Association of State Drinking Water Administrators, and numerous community groups, scientists, and public health and environmental organizations. *See, e.g.*, JA__ [2017-0300-1139_at_i-ii, 1, 5, 15]; JA__ [2017-0300-1032_at_ii, 17, 18]; JA__ [2017-0300-1124_at_5]; JA__ [2017-0300-1209_at_1]; JA__ [2017-0300-1469_at_15].

V. EPA proposes the first major revisions to the Lead and Copper Rule in thirty years

Between 1995 and 2019, EPA set and then missed at least nine target deadlines to improve the 1991 Rule. *See Env’t Pet’rs’ Mot. to End*

Abeyance, 17-18, Doc. No. 1932814. EPA made no substantial updates to the 1991 Rule for nearly thirty years.

In November 2019, EPA proposed revisions to the Lead and Copper Rule. 84 Fed. Reg. 61,684 (Nov. 13, 2019) (JA__). Despite decades of new information about the health harms from lead exposure and the feasibility of reducing lead levels in drinking water, EPA proposed no major departures from the structure of the 1991 Rule. It did not propose to set a health-based maximum contaminant level for lead. It did not propose reducing the lead action level below 15 ppb. *Id.* at 61,685, 61,687 (JA__). And despite the recommendation of its Advisory Council and many others, EPA did not propose requiring all water systems to completely replace all lead service lines. *Id.* at 61,696-97 (JA__). Instead, EPA proposed *slowing* the annual rate at which water systems that exceed the action level must replace lead service lines, from seven percent to three percent. *Id.* at 61,688 (JA__). At the same time, EPA proposed tightening what counts as a lead service line replacement to exclude test-outs and partial replacements. *Id.* EPA also proposed creating a new “trigger level” of 10 ppb that, if exceeded, would require water systems to take certain additional steps, including

replacing lead service lines at a system-proposed “goal rate” with no minimum. *Id.* at 61,686, 61,698-99 (JA__).

EPA received thousands of comments on its proposal, many of which criticized the agency for its failure to make sorely needed changes “to better protect human health.” *See, e.g.*, JA__ [2017-0300-1390_at_1]. Multiple commenters urged EPA to revisit its decision not to set a maximum contaminant level for lead, explaining that setting one would streamline implementation and oversight and result in a more protective rule. JA__ [2017-0300-0988_at_1-2]; JA__ [2017-0300-1469_at_6-7].

Commenters also criticized EPA’s failure to propose a treatment technique that would “prevent known or anticipated adverse effects on the health of persons to the extent feasible.” 42 U.S.C. § 300g-1(b)(7)(A). First, commenters from across the spectrum—from water systems to state regulators—urged EPA to mandate complete replacement of all lead service lines, as EPA’s Advisory Council had recommended four years earlier. *See, e.g.*, JA__ [2017-0300-1139_at_ii, 1–2, 15]; JA__ [2017-0300-1032_at_ii, 13-14]; JA__ [2017-0300-1390_att._1_at_1]. Second, commenters explained that an action level of 15 ppb was no

longer as protective as feasible, given that water systems could now achieve significantly lower lead levels through corrosion control treatment than in 1991. *See, e.g.*, JA__ [2017-0300-1469_at_8-10], JA__ [2017-0300-1039_at_2]. Third, commenters also criticized EPA for proposing to slow the lead service line replacement rate for water systems above the action level, subjecting people to lead-contaminated water for years longer. *See, e.g.*, JA__ [2017-0300-1103_at_3]; JA__ [2017-0300-1039_at_2-3]; JA__ [2017-0300-1468_at_10-11].

VI. EPA's Revisions Rule fails to adequately protect public health

In January 2021, EPA promulgated the National Primary Drinking Water Regulations: Lead and Copper Rule Revisions (“Revisions Rule”), 86 Fed. Reg. 4198 (Jan. 15, 2021) (JA__). The Revisions Rule, like the proposal, included some minor improvements over the 1991 Rule, including requiring water systems to inventory their lead service lines, *id.* at 4203 (JA__), and strengthening some sampling, monitoring, and public education requirements, *id.* at 4202,

4204 (JA__). But EPA's Revisions Rule was mostly identical to the proposal.

EPA declined to set a maximum contaminant level for lead. *See id.* at 4206 (JA__). The agency refused to strengthen its treatment technique by lowering the action level or mandating that all water systems completely replace their lead service lines. *Id.* at 4216, 4208 (JA__). EPA also slowed down the lead service line replacement rate for systems that exceed the action level (while counting only replacements of entire lead service lines towards the replacement rate). *Id.* at 4203, 4216, 4293 (JA__).

VII. EPA reviewed the Revisions Rule and then let it take effect in December 2021

Petitioners Newburgh Clean Water Project, NAACP, Sierra Club, United Parents Against Lead, and Natural Resources Defense Council ("Community Petitioners") filed petitions for review to challenge the Revisions Rule, Doc. Nos. 1881638 (Case No. 21-1019), 1881661 (Case No. 21-1020), which were consolidated, Doc. No. 1881665. Ten states ("State Petitioners") filed another petition for review, Doc. No. 1888087 (Case No. 21-1076), that was also consolidated, Doc. No. 1888091.

American Water Works Association intervened as a respondent. Doc. Nos. 1885193, 1934258.

EPA then delayed the effective date of the Revisions Rule throughout most of 2021, in accordance with directives from the incoming political administration. 86 Fed. Reg. 31,939, 31,939-41 (June 16, 2021). The parties agreed to hold this case in abeyance while EPA decided whether to modify or withdraw the Revisions Rule. Doc. Nos. 1893782, 1906707. On December 17, 2021, EPA announced that it would let the Revisions Rule take effect, with a compliance date of October 16, 2024. 86 Fed. Reg. 71,574, 71,574 (Dec. 17, 2021). EPA acknowledged that “there are significant opportunities to further improve upon [the Revisions Rule] to achieve increased protection of communities from lead exposure through drinking water,” and that “there is a range of potential regulatory and non-regulatory actions” EPA could take “to further reduce drinking water lead exposure.” *Id.* at 71,577, 71,578.

EPA sought an indefinite further abeyance of the case while it explored a possible multi-year process to revise the rule again. Doc. No.

1932850. Petitioners opposed, Doc. No. 1934149, and the Court denied EPA's request, Doc. No. 1943142.

SUMMARY OF ARGUMENT

I. Congress directed EPA to set a maximum contaminant level for regulated contaminants unless “it is not economically or technologically feasible to ascertain the level of the contaminant” in water. 42 U.S.C. §§ 300g-1(b)(7)(A), (b)(4)(B); *id.* § 300f(1)(C). EPA arbitrarily refused to set a maximum contaminant level for lead by relying on a thirty-year old justification that has been mooted by changed circumstances. EPA's additional excuses are either internally inconsistent, contradicted by other parts of the Revisions Rule, or undermined by the agency's treatment of different contaminants under the Act.

II. The Safe Drinking Water Act requires any treatment technique for a drinking water contaminant to “prevent known or anticipated adverse effects on the health of persons to the extent feasible.” *Id.* § 300g-1(b)(7)(A). In promulgating its treatment technique for lead, EPA arbitrarily failed to analyze feasible, more health-protective measures. EPA refused to consider mandating complete lead service line replacement for all water systems. EPA slowed down the required

lead service line replacement rate for water systems that exceed the action level, without explaining why it could not retain the 1991 Rule's faster rate. And EPA refused to lower the action level at which water systems must take certain steps to limit people's lead exposure, despite abundant record evidence that a lower level is feasible. EPA relied on outdated data, ignored relevant record evidence, or simply offered no justification for these choices.³

STANDING

Petitioners have standing to sue on behalf of their members. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Petitioners are environmental, public health, and civil rights organizations that work to promote the health of all persons and eliminate exposure to lead and other environmental hazards. Trujillo Decl. ¶¶ 6-8; Isherwood Decl. ¶ 6; Shabazz Decl. ¶¶ 1, 4-6; McCarthy-

³ Community Petitioners support and incorporate by reference the additional arguments in State Petitioners' brief: (1) the Revisions Rule constitutes unlawful backsliding, in violation of 42 U.S.C. § 300g-1(b)(9), because it fails to "maintain, or provide for greater, protection of the health of persons" as the 1991 Rule; and (2) EPA arbitrarily concluded that the Revisions Rule will not cause disproportionate harm to minority and low-income populations.

Wallace Decl. ¶¶ 3-7; Hollo Decl. ¶¶ 3, 5. The interests Petitioners seek to protect are germane to that purpose. *Hunt*, 432 U.S. at 343. Neither adjudication of the claims nor the requested relief require the participation of Petitioners' individual members. *See id.* at 342-43. And Petitioners' members would have standing to sue on their own behalf, *see id.* at 343, because they suffer cognizable harms that are caused by the Revisions Rule and redressable by a favorable decision. *See Clean Wisc. v. EPA*, 964 F.3d 1145, 1156-57 (D.C. Cir. 2020).

Petitioners' members, their children, and their grandchildren are exposed to harmful levels of lead in drinking water. McCray Decl. ¶ 3; Pedraza Decl. ¶¶ 3-4, 6-7; Pari Decl. ¶¶ 3-5; Freese Decl. ¶¶ 4-5; Grewe Decl. ¶¶ 4, 6-8; Cofield Decl. ¶¶ 3-4; Hoffman Decl. ¶¶ 4, 11-12. They have detected unsafe lead levels in their homes, *e.g.*, Pedraza Decl. ¶¶ 3-4; Freese Decl. ¶ 5; Hoffman Decl. ¶ 11, or their water systems have reported unsafe lead levels system-wide, *e.g.*, McCray Decl. ¶ 3; Pari Decl. ¶ 4; Grewe Decl. ¶ 7; Anderson Decl. ¶¶ 8-9; Cofield Decl. ¶ 4; Lancaster Decl. ¶ 4. Petitioners' members are justifiably concerned about lead exposure to themselves and their families. *E.g.*, Pari Decl. ¶ 5; Pedraza Decl. ¶ 7; Grewe Decl. ¶ 6; Anderson Decl. ¶¶ 5-6; Hoffman

Decl. ¶¶ 11-12. Some pay to filter their water or buy bottled water to reduce the health harms. *E.g.*, Freese Decl. ¶¶ 6-7; McCray Decl. ¶¶ 4, 6; Shah Decl. ¶ 9; Anderson Decl. ¶ 7; Lancaster Decl. ¶ 6; Hoffman Decl. ¶ 8.

No amount of lead exposure is safe. 86 Fed. Reg. at 4259. Known exposure to a harmful pollutant for which there is no safe level is an injury for standing. *See Clean Wisc.*, 964 F.3d at 1156-58; *see also NRDC v. EPA*, 755 F.3d 1010, 1016-17 (D.C. Cir. 2014). Petitioners' members who pay to filter their water to reduce lead exposure are also harmed. *In re U.S. Office of Personnel Mgmt. Data Security Breach Litig.*, 928 F.3d 42, 59 (D.C. Cir. 2019) (mitigation costs incurred to prevent likely harm qualify as injury-in-fact); *Talbert v. Am. Water Works Co., Inc.*, 538 F. Supp. 3d 471, 482 (E.D. Pa. 2021) (buying water filters to avoid drinking contaminated water constitutes economic harm, which is a "classic form of injury-in-fact" (internal quotation omitted)).

These injuries are traceable to the Revisions Rule and would be redressed by an order setting aside the challenged provisions of the rule. The rule failed to set a maximum contaminant level for lead, which would be a health-based limit as close to zero as feasible. *See*

Argument § I, *infra*; 42 U.S.C. § 300g-1(b)(4)(B). The rule’s treatment technique arbitrarily fails to protect health to the extent feasible, by declining to mandate and instead slowing lead service line replacement, and by setting a weak action level. *See* Argument § II, *infra*. The Revisions Rule thus either perpetuates or increases Petitioners’ members’ exposure to lead. *See Clean Wisc.*, 964 F.3d at 1157.

This suit would redress that harm. If the Court vacates the challenged parts of the Revisions Rule and EPA promulgates a more protective rule on remand, Petitioners’ members would be less exposed to lead in their water. *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012) (harm caused by pollution is redressable where vacatur would require EPA to consider and respond to claim for more stringent standards).

STANDARD OF REVIEW

This Court sets aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “[T]he overarching question” is whether the agency’s “decisionmaking was reasoned, principled, and based upon the record.”

Env't Def. Fund v. FERC, 2 F.4th 953, 967-68 (D.C. Cir. 2021) (internal quotation omitted).

ARGUMENT

I. EPA arbitrarily refused to set a maximum contaminant level for lead

The Safe Drinking Water Act requires EPA to set a maximum contaminant level unless it is “not economically or technologically feasible to ascertain the level of the contaminant” in water. 42 U.S.C. §§ 300g-1(b)(7)(A), (b)(4)(B); *see also id.* § 300f(1)(C)(i). In the Revisions Rule, EPA refused to set a maximum contaminant level and instead established a treatment technique for lead. EPA’s rationale for doing so is arbitrary, internally inconsistent, and based on an outdated, decades-old rationale.

A. EPA’s previous justifications for refusing to set a maximum contaminant level no longer apply

This Court in 1994 affirmed EPA’s choice in the 1991 Rule to set a treatment technique and not a maximum contaminant level for lead. *American Water Works Ass’n v. EPA*, 40 F.3d 1266, 1270-71 (D.C. Cir. 1994). But the Court’s decision turned on two justifications that no longer apply.

First, at the time, the primary source of lead in drinking water was indoor plumbing, not drinking water infrastructure owned or controlled by water systems. *Id.* at 1271. Household plumbing fixtures could then contain up to eight percent lead. JA__ [2017-0300-0988_at_1]; 56 Fed. Reg. at 26,463 (JA__). The Court deferred to EPA's interpretation that it was not "feasible" to set a maximum contaminant level when water systems did not control the major sources of lead in the water. *American Water Works Ass'n*, 40 F.3d at 1271.

Since then, however, the Safe Drinking Water Act has been amended to nearly eliminate lead from plumbing and fixtures. *See* Pub. L. No. 104-182, § 118, 110 Stat. 1613, 1645-47 (1996) (codified as amended at 42 U.S.C. § 300g-6) (expanding previous restrictions on lead pipes, solder, and flux to include lead plumbing fittings and fixtures); Pub. L. No. 111-380, § 2, 124 Stat. 4131, 4131 (2011) (codified as amended at 42 U.S.C. § 300g-6(d)(1)(B)) (lowering the amount of allowable lead in plumbing to 0.25 percent).

As a result, lead service lines have overtaken household plumbing as the dominant source of contamination, as EPA concedes. 86 Fed. Reg. at 4226 (JA__); *see also* JA__ [2017-0300-1546_at_8-9]. This moots

EPA's prior rationale. According to a former EPA official involved in drafting the 1991 Rule: "Given the restrictions on lead in new plumbing, the Agency's rationale in 1991 for rejecting the option to set [a maximum contaminant level] at the tap no longer holds today." JA__ [2017-0300-0988_at_1].

Second, EPA argued in 1991 that requiring all water systems to meet a maximum contaminant level would encourage remedial techniques that reduced lead but *increased* levels of other contaminants, with harmful unintended consequences. *Am. Water Works Ass'n*, 40 F.3d at 1270-71. The Court agreed with EPA's argument that Congress did not contemplate that risk, and therefore "impliedly delegated" to EPA the discretion to impose a treatment technique instead. *Id.*

Congress has since amended the Safe Drinking Water Act to address that situation too, allowing EPA to set a higher maximum contaminant level than otherwise required if necessary to prevent a harmful increase in the concentration of other contaminants. 42 U.S.C. § 300g-1(b)(5). EPA's argument about unintended consequences no longer applies.

In the Revisions Rule, EPA’s sole justification for refusing to set a maximum contaminant level—offered in a single sentence—is that the Court upheld EPA’s similar choice in the 1991 Rule. 86 Fed. Reg. at 4206 (JA__). And in a separate document responding to comments, EPA incorporates wholesale the justification it offered 30 years ago: “EPA affirms that those reasons apply today just as they did in 1991 when EPA promulgated the original” rule. JA__ [2017-0300-1622_at_470]. But EPA’s prior reasons manifestly do not apply today just as they did in 1991.

It was arbitrary for EPA to ignore changed circumstances directly relevant to the agency’s decision. EPA was “confronted with evidence that . . . the factual premises underlying its prior judgment have eroded” and thus “must offer more to justify its decision to retain its regulations than mere conclusory statements.” *Env’t Health Tr. v. Fed. Comm’n Comm’n*, 9 F.4th 893, 903 (D.C. Cir. 2021); accord *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (ordering agency to justify continued adherence to a policy made obsolete by regulatory changes in the intervening years). EPA’s defense of its decision with a stale

rationale, incorporating its prior justifications without accounting for changed circumstances, was arbitrary.

B. EPA’s stated concern about water system “responsibility” is internally inconsistent and arbitrary

In response to comments on the Revisions Rule, EPA asserts that lead service lines are “not always” owned or controlled by the water system, and thus water systems are not “always responsible” for lead in drinking water. JA__ [2017-0300-1622_at_470]. EPA’s reasoning is muddled, but the agency appears to argue that this excuses it from setting a maximum contaminant level. JA__ [2017-0300-1622_at_470-71].

This excuse fails because EPA’s treatment technique under the Revisions Rule *already* holds water systems responsible for lead contamination from lead service lines, regardless of whether they are owned or controlled by the water system. EPA’s internally inconsistent reasoning is arbitrary. *General Chem. Corp. v. United States*, 817 F.2d 844, 846, 854 (D.C. Cir. 1987).

As EPA itself explains, “historically, the [Lead and Copper Rule] *has not been limited to system-owned portions* of the distribution

system.” 86 Fed. Reg. at 4212 (JA__) (emphasis added). The Revisions Rule imposes responsibility on water systems regardless of service line ownership in at least six ways. First, EPA defined “lead service line” to include lines “owned by the water system, owned by the property owner, or both.” 40 C.F.R. § 141.2. EPA adopted this definition “to ensure that the customer or private side of the service line *are included in rule requirements* such as inventory and replacement.” JA__ [2017-0300-1622_at_31] (emphasis added). Second, the rule’s corrosion control requirements apply equally to water systems with varying proportions of publicly and privately owned service lines. 40 C.F.R. § 141.81. Third, to determine lead levels in a water system, EPA prioritizes sampling from sites with lead service lines, whether publicly or privately owned. *Id.* § 141.86(a)(3). Fourth, for sampling at homes served by lead service lines, EPA requires collection of the fifth liter of water from the running tap, *id.* § 141.86(b)(3)(ii), which better reflects lead levels resulting from contact with service lines, including “customer-owned” lines, 86 Fed. Reg. at 4226 (JA__). Fifth, water systems that exceed the action level must replace the full lead service line, including any privately owned portion, to get credit towards their required replacement rate. 40 C.F.R.

§ 141.84(g)(3); 86 Fed. Reg. at 4200 (JA__). Sixth, EPA directs water systems to inventory all lead service lines, including private lines, because customer-owned service lines are always “connected to either a system-owned service line or system-owned water main and are therefore accessible to the system.” 86 Fed. Reg. at 4212 (JA__).

EPA does not explain why its “responsibility” rationale disqualifies a maximum contaminant level but not a treatment technique. EPA’s argument is thus arbitrary because it is “internally inconsistent and inadequately explained.” *General Chem. Corp.*, 817 F.2d at 846; *see also ANR Storage Co. v. FERC*, 904 F.3d 1020, 1027-28 (D.C. Cir. 2018).

C. Lead’s variability in drinking water does not preclude setting a maximum contaminant level

EPA’s final argument is that lead levels in water are variable, and the amount measured can depend on sample technique used, stagnation, physical disruptions to lead pipes, and other factors. JA__ [2017-0300-1622_at_470]. Yet for other purposes, EPA deems it feasible to ascertain lead levels in water despite lead’s variability. Indeed, EPA’s entire scheme under both the 1991 Rule and Revisions Rule depends on

measuring lead levels and taking prescribed action based on the level detected. *E.g.*, 86 Fed. Reg. at 4201 (JA__) (summarizing required steps based on exceedance of 10 ppb “trigger level” and 15 ppb “action level”); JA__ [2017-0300-1546_at_5]. EPA does not explain why it is feasible to ascertain lead levels to compel action under a treatment technique but not for a maximum contaminant level. This justification, too, is internally inconsistent and arbitrary. *ANR Storage*, 904 F.3d at 1027-28.

Moreover, EPA has set maximum contaminant levels for other similarly variable drinking water contaminants, like total trihalomethanes and haloacetic acids. 40 C.F.R. §§ 141.64(b)(2)(i), 141.601(b). These substances are disinfection byproducts that can vary within a single water supply and at a single location based on the season, water temperature, pH, residence time in the distribution system, and even the diameter of distribution pipes, among other factors. 71 Fed. Reg. 388, 394 (Jan. 4, 2006). Yet EPA accounted for this variability and still established maximum contaminant levels for these chemicals. 40 C.F.R. §§ 141.64(b)(2)(i), 141.601(b).

EPA does not explain why variability precludes a maximum contaminant level for lead, but not other contaminants. Just as for disinfection byproducts, EPA could design and prescribe sampling procedures that account for the variability of lead in water.⁴

It was arbitrary for EPA to treat lead differently than other variable contaminants, without explanation. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 434 (D.C. Cir. 2018) (EPA rule was arbitrary for treating two pollution sources differently despite “no logical basis for distinguishing between” them); *cf. Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir.

⁴ EPA also ignored evidence that regulatory agencies in other countries have set the equivalent of a maximum contaminant level for lead and devised adequate monitoring requirements to account for lead’s variability. *See* JA__ [2017-0300-1546_at_6]; JA__ [2017-0300-1445_at_2]. Canada, for example, recommends a maximum acceptable concentration for lead of 5 ppb. JA__ [2017-0300-1445_at_2] (citing Health Canada Guidelines). Several Canadian provinces have imposed limits of either 5 or 10 ppb. *See Regulation respecting the quality of drinking water 2021*, q-2, r. 40, s. 3 (Que.) (5 ppb lead limit); *Standards and guidelines for municipal waterworks, wastewater and storm drainage systems 2012*, 1.1 (Alta.) (adopting limits set forth in Health Canada Guidelines); *Ontario Drinking Water Quality Standards 2003*, O. Reg. 169/03 (10 ppb lead limit).

2005) (arbitrary to treat “similarly situated” entities differently without explanation).

* * *

Congress expressed a clear preference that EPA set maximum contaminant levels for regulated contaminants. Only infeasibility in measuring the level of the contaminant excuses the agency from doing so. EPA did not adequately justify its refusal to set a maximum contaminant level for lead.

II. EPA arbitrarily refused to promulgate a treatment technique that protects human health to the extent feasible

Assuming EPA validly promulgated a treatment technique instead of a maximum contaminant level, the treatment technique in the Revisions Rule arbitrarily fails to “prevent known or anticipated adverse effects on the health of persons to the extent feasible,” in violation of the Act. *See* 42 U.S.C. § 300g-1(b)(7)(A).

EPA failed to adopt feasible proposals to strengthen its treatment technique. The agency ignored relevant record evidence of feasibility, relied on outdated information, or simply offered no explanation at all.⁵

A. EPA arbitrarily failed to justify its refusal to mandate complete lead service line replacement for all water systems

In the Revisions Rule, EPA refused to mandate replacement of all lead service lines. It did so despite the endorsement of its own Advisory Council, water utility representatives, and a wide range of stakeholders, and despite substantial evidence that mandating replacement of all lead lines is more health-protective and feasible.

1. Ample record evidence shows that mandating replacement of all lead service lines is more protective and is feasible

In the decades leading up to the Revisions Rule, a clear consensus emerged: removing all lead service lines nationwide is a necessary part of any health-protective drinking water standard. EPA's National Drinking Water Advisory Council unanimously recommended that EPA

⁵ The Court should reach these arguments even if it rules for Community Petitioners on Argument § I, above, because EPA may again decline to set a maximum contaminant level on remand.

require complete lead service line replacement by all water systems. JA__ [2017-0300-0062_at_6, 14]; JA__ [2017-0300-0126_at_2]. The American Water Works Association endorsed this recommendation. JA__ [2017-0300-0365]. EPA itself announced, in 2016, that it was considering mandating complete lead service line replacement in a future revision to its lead rule. JA__ [2017-0300-0145_at_9-10]. And myriad commenters on the Proposed Rule—including pediatricians, health advocates, state regulators, and others—called for EPA to adopt this requirement. JA__ [2017-0300-1139_at_i-ii, 1, 5, 15]; JA__ [2017-0300-1032_at_2, 7, 17, 18]; JA__ [2017-0300-1124_at_5]; JA__ [2017-0300-1209_at_1]; JA__ [2017-0300-1469_at_15].

This consensus was supported by ample record evidence that it is both health-protective and feasible for EPA to mandate complete replacement of all lead service lines. There is no question that doing so would better protect people's health. JA__ [2017-0300-0126_at_2]. As long as lead lines remain in use, they present a threat to tap water quality. JA__ [2017-0300-0062_at_7]; JA__ [2017-0300-1445_at_4-5]. Corrosion control is complicated to implement and provides incomplete protection; it “often cannot control particulate lead release from lead

pipes.” JA__ [2017-0300-1012_at_5]. And regardless of corrosion control, changes in source water or the physical disturbance of lead pipes can cause lead to start leaching, with potentially devastating consequences when lead levels in drinking water spike. JA__ [2017-0300-1124_at_2]; 86 Fed. Reg. at 4214 (JA__).

The record is also replete with evidence demonstrating that complete replacement of all lead service lines is feasible, meaning technically possible and affordable by large public water systems. *See City of Portland*, 507 F.3d at 712; 86 Fed. Reg. at 4206 (JA__). Some large water systems have already replaced all lead service lines, including those in Madison, Wisconsin and Lansing, Michigan. JA__ [2017-0300-0145_at_9]. At least 38 other water systems nationwide, including 20 large systems serving more than 100,000 people, are currently pursuing voluntary lead service line replacement on “aggressive” schedules. JA__ [2017-0300-0699_at_tab_4]; *see also* 84 Fed Reg. at 61,698 (JA__); 86 Fed. Reg. at 4218 (JA__). As of 2018, Michigan requires *all* its water systems to completely replace all lead

service lines within 20 years, at the water system's expense. JA__ [2017-0300-1390_att. 1_at_1].⁶

As EPA has touted, water systems are not on their own when it comes to paying for lead service line replacement. EPA and states provide grants and low-interest water infrastructure loans through the federally funded Drinking Water State Revolving Fund. *See* 86 Fed. Reg. at 4276 (JA__); 42 U.S.C. § 300j-12; JA__ [2017-0300-0010_at_26-28]. Many water systems have used these funds for voluntary replacement of full lead service lines, including replacement of privately owned lines. JA__ [2017-0300-0010_at_19].

Water systems have also developed creative mechanisms to supplement federal and state funding. For example, systems have used nominal ratepayer increases to fund full lead service line replacement and subsidized the cost of replacing a privately owned line using state and municipal bonds. JA__ [2017-0300-0010_at_23-25, 29, 31-32].

Through these measures, among others, it is feasible for water systems

⁶ New Jersey and Illinois have since enacted laws requiring water systems to replace all lead service lines in those states too. *See* 415 Ill. Comp. Stat. 5/17.12(v); N.J. Stat. Ann. §§ 58:12A-40, 58:12A-44.

to fund complete lead service line replacement without placing a disproportionate burden on individuals who live in communities where homeowners own part of the service line and who may not be able to afford lead service line replacement.⁷

Reams of evidence thus showed that mandatory replacement of all lead service lines is protective, necessary, and feasible.

2. EPA arbitrarily failed to analyze mandating complete lead service line replacement

In the face of extensive record evidence pointing to both the health benefits and feasibility of mandating replacement of all lead service lines, EPA failed even to examine whether it was feasible. This was arbitrary. *Pub. Citizen v. Steed*, 733 F.2d 93, 103-05 (D.C. Cir. 1984)

⁷ As State Petitioners note, EPA failed to address why the Revisions Rule's lead service line replacement requirements would not perpetuate existing inequities in accessing needed funds to replace privately owned lead service lines. *See* State Pet'rs' Br. Argument § II.A. Record evidence shows the availability of equitable approaches. JA__ [2017-0300-0010_at_31-32].

(finding agency action arbitrary and capricious because of failure to “consider adequately” an important alternative).

Despite earlier saying that mandatory lead service line replacement was on the table, EPA dropped the option without a word in its proposed rule, refused to require it in the final rule, and explained its decision in a single sentence in a separate document. The proposed rule made no mention of considering mandatory, complete lead service line replacement. *See generally* 84 Fed. Reg. 61,684 (JA__). The final rule does not respond to the many comments calling for such a requirement. 86 Fed. Reg. at 4216 (JA__). EPA’s economic analysis and appendices for the final rule—more than a thousand pages long—do not mention or analyze a mandatory replacement scenario. *See* JA__ [2017-0300-1769_at_3-47–3-50, 5-175–5-176, 5-210–5-211]; JA__ [2017-0300-1768_at_B.16-B.17. And EPA never explored the “incentive[s] and creative funding mechanisms” that could prevent the inequities caused by a poorly designed lead service line replacement requirement. JA__ [2017-0300-0145_at_10]. Instead, in a separate response-to-comments document, EPA justifies its choice in one sentence with no supporting evidence: “EPA does not agree that [complete lead service line

replacement] is appropriate nor feasible for medium and large systems.”

JA__ [2017-0300-1622_at_191].

EPA’s cursory dismissal of the most important strategy for reducing lead exposure nationwide is quintessentially arbitrary. It is axiomatic that an “agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted); *see also El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. HHS*, 396 F.3d 1265, 1278 (D.C. Cir. 2005). EPA did not explain why it rejected its Advisory Council’s recommendation. It did not consider the possible cost of mandatory replacement or the resources available for it. And EPA did not reckon with or rebut any of the substantial record evidence showing that mandatory lead service line replacement is both more protective and is feasible. In other words, EPA did not analyze feasibility at all. This perfunctory treatment of a central issue was arbitrary.

B. EPA arbitrarily slowed the lead service line replacement rate for systems that exceed the action level from seven percent of lead lines per year to three percent

Under the 1991 Rule, water systems that continued to exceed the action level after installing corrosion control treatment were required to replace at least seven percent of lead service lines in their distribution system each year, until their lead levels dropped below the action level for one year. 56 Fed. Reg. at 26,509 (JA__). The record contained extensive evidence that retaining this replacement rate was feasible. Yet EPA disregarded this evidence and slowed the replacement rate by more than half. 86 Fed. Reg. at 4219 (JA__). EPA's failure to consider whether it was feasible to retain the seven percent rate alongside other changes to EPA's lead service line replacement requirements was arbitrary.

1. Record evidence shows that a seven percent replacement rate is more protective and feasible

Replacing more lead service lines more quickly protects health. If EPA required water systems that exceed the action level to replace seven percent of their lead service lines per year, those systems would replace twice as many lines than if EPA only required a three percent

rate. For a system that continues to exceed the action level, a seven percent rate cuts the time for replacement by more than half: from 33 years to just over 14. JA__ [2017-0300-1546_at_1].

An EPA-commissioned analysis in the record shows that retaining the seven percent rate was feasible. According to this analysis, most water systems conducting voluntary lead service line replacement did so at an average annual rate of *12 percent*. JA__ [2017-0300-0699_at_tab 4] (calculating, in table 1b, the average replacement rate for systems serving more than 10,000 people).⁸ Water systems that replaced full lead services lines at a rate far faster than three percent per year include Marlborough, Massachusetts (15%); Newark, New Jersey (17%), Louisville, Kentucky (23%), York, Pennsylvania (25%), Green Bay, Wisconsin (30%), Newton, Massachusetts (31%), Spokane, Washington (36%), and Galesburg, Illinois (53%). JA__ [2017-0300-0699_at_tab 2]; *see also* JA__ [2017-0300-0699_at_tab 1] (“Data are only

⁸ EPA included this analysis in the rulemaking docket in the form of an Excel spreadsheet. The spreadsheet is available on Regulations.gov at the following web address: <https://www.regulations.gov/document/EPA-HQ-OW-2017-0300-0699>.

for full [lead service line] replacements.”). Because feasible means “technically possible and affordable,” *City of Portland*, 507 F.3d at 712, this analysis offers persuasive evidence that water systems can replace at least seven percent of their service lines per year if required.

2. EPA arbitrarily ignored record evidence and failed to examine the feasibility of retaining a seven percent rate

EPA ignored this powerful evidence in the record. Even though the analysis cited above was commissioned by EPA and based on EPA data, *see* JA__ [2017-0300-0699_at_tab 1]—and even though it bears directly on replacement rate feasibility—EPA never discusses it in the proposed or final rule. That was arbitrary. *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 709-10 (D.C. Cir. 2014) (agency action is arbitrary where there is “contrary evidence” in the record and agency leaves “serious concerns unaddressed”); *Butte Cty. v. Hogan*, 613 F.3d 190, 194-95 (D.C. Cir. 2010) (agency action was arbitrary because it ignored “evidence contradicting its position”).

Instead of grappling with this evidence and considering whether retaining the seven percent rate was feasible, EPA defended its slowdown by claiming that *other* changes—specifically, prohibiting

water systems from counting partial replacements and test-outs towards the replacement rate—would lead to more service line replacement overall when compared to the 1991 Rule. 86 Fed. Reg. at 4216-17 (JA__); JA__ [2017-0300-1622_at_188-89]. But even if EPA had support for that conclusion—which it does not, *see* State Pet'rs' Br. Argument § I.B—that does not speak to whether the new regime is as protective as feasible, 42 U.S.C. § 300g-1(b)(7)(A), but only to the separate question of whether the Revisions Rule provides less protection than the 1991 Rule.

Preserving a seven percent replacement rate *and* disallowing partial replacements and test-outs from counting towards replacement totals would unquestionably be more health-protective. But EPA did not consider whether such a combination was feasible, 86 Fed. Reg. at 4216 (JA__); JA__ [2017-0300-1622_at_188-89], even though commenters asked it to, *see, e.g.*, JA__ [2017-0300-1468_at_10-11]; JA__ [2017-0300-1039_at_2-3]. EPA's failure to retain the seven percent rate was arbitrary, and EPA did not give any reason why reducing the rate to three percent was necessary.

C. EPA arbitrarily failed to lower the lead action level

The Revisions Rule requires water systems to take more stringent remedial actions only when they exceed the action level. 86 Fed. Reg. at 4284, 4293 (JA__). The rule retains the same 15 ppb action level as before. *Id.* at 4281 (JA__). In refusing to lower the action level, EPA arbitrarily relied on outdated, thirty-year old information that had concededly limited value even when EPA first analyzed it. EPA's additional rationales are unsupported and irrelevant.

1. Considerable record evidence shows that lowering the action level is more protective and is feasible

Even if nothing else in the rule changed, lowering the action level would be more health-protective. Because no amount of lead is safe, the American Academy of Pediatrics recommends that drinking water in schools never exceed 1 ppb of lead. JA__ [2017-0300-1734_at_11]. Since 1995, the Food and Drug Administration has prohibited bottled water from exceeding 5 ppb of lead. 60 Fed. Reg. 57,076, 57,126 (Nov. 13, 1995). Requiring lead reduction measures at lower lead levels would provide greater health benefits. JA__ [2017-0300-1039_at_2].

Record evidence shows it is feasible to lower the action level. EPA set the action level in 1991 at the number it believed water systems could achieve at the time using corrosion control. 56 Fed. Reg. at 26,490-91 (JA__). Now, EPA has decades of data showing that water systems using corrosion control may comfortably achieve lead levels below 15 ppb. 86 Fed. Reg. at 4200 (JA__) (citing a 90 percent decrease in number of systems exceeding the action level); *see also* JA__ [2017-0300-1039_at_2] (citing research showing that an action level of 10 ppb is realistic). Indeed, most medium and large water systems have already achieved lead levels below 5 ppb. JA__ [2017-0300-1546_at_6-7] (analyzing EPA data); *accord* JA__ [2017-0300-1622_at_467] (EPA acknowledgment that water systems have met these levels using corrosion control). Even EPA's own analysis of prior monitoring found that most water systems could have met a 10 ppb action level in the past, without changing treatment or taking other actions. JA__ [2017-0300-1769_at_9-5-9-8]. Because it is demonstrably possible and affordable to achieve systemwide lead levels well below 15 ppb, a lower action level is feasible. *City of Portland*, 507 F.3d at 712.

EPA’s new trigger level acknowledges the feasibility of requiring lead reduction measures at a lead level below 15 ppb. EPA set the trigger level at 10 ppb, finding it feasible for water systems that exceed that level to replace lead service lines at a “goal rate” approved by the state and, if applicable, take the first step toward installing corrosion control by completing a corrosion control study. 86 Fed. Reg at 4202-03 (JA__). As EPA itself explained in its proposed rule, “*meaningful reductions* in drinking water lead exposure could be achieved by requiring water systems to take a progressive set of certain actions to reduce lead levels at the tap” when they exceed the trigger level of 10 ppb. 84 Fed. Reg. at 61,691 (JA__) (emphasis added); *see also* JA__ [2017-0300-1469_at_9-10].

2. Despite evidence of feasibility, EPA arbitrarily refused to lower the action level

In the face of this evidence, EPA continued to rely on its thirty-year old justification for an action level of 15 ppb. EPA defended its decision by citing a 1991 assessment—based on data that EPA admits had “limited” value for “making broad-based estimates of treatment efficacy”—that this level represented what could readily be achieved at

the time through corrosion control treatment. 86 Fed. Reg at 4208 (JA__) (quoting 56 Fed. Reg. at 26,490). As the record shows, this is no longer true (if it ever was). Most water systems could readily meet an action level well below 15 ppb. JA__ [2017-0300-1769_at_9-5-9-8; JA__ [2017-0300-1546_at_6-7]; JA__ [2017-0300-1039_at_2]. EPA's 1991 assessment does not respond to or rebut this new evidence. EPA's disregard of thirty years of experience and recent data on what water systems can achieve in favor of its "limited" 1991 analysis is arbitrary. *See Butte Cty.*, 613 F.3d at 194-95; *Pub. Serv. Comm'n of State of N.Y. v. FERC*, 813 F.2d 448, 465 (D.C. Cir. 1987) (reliance on "obsolete data" is arbitrary).

To the extent EPA offered a fresh justification for failing to lower the action level, this too was arbitrary. In its response to comments on the Revisions Rule, EPA acknowledges that some water systems have achieved very low lead levels through corrosion control alone, but posits that "this may not be feasible for *all* water systems." JA__ [2017-0300-1622_at_467] (emphasis added). This response is irrelevant and unsupported. Nothing in the law requires EPA to find that *all* water systems could currently meet a new drinking water standard. To

determine feasibility under the Safe Drinking Water Act, EPA looks to what “large metropolitan or regional public water systems” can achieve, 86 Fed. Reg. at 4207 (JA__) (citing legislative history), and sets the standard there to drive progress, *see* 56 Fed. Reg. at 26,477 (JA__) (action level in 1991 was intended to spur “treatment among large numbers of systems nationwide”). EPA’s justification arbitrarily ignores recent data on what water systems can achieve.

EPA’s other defenses are similarly nonresponsive. EPA suggested that it did not need to lower the action level because changes to the Rule’s sampling procedures and the addition of a new trigger level would “result in more systems exceeding the action level” than the 1991 Rule and enable those systems to act more quickly once they did exceed the action level. 86 Fed. Reg. at 4208 (JA__). But the Safe Drinking Water Act requires EPA to ensure that the Revisions Rule provides at least as much health protection as the 1991 Rule, 42 U.S.C. § 300g-1(b)(9), *and* to craft a treatment technique that is as protective as

feasible, *id.* § 300g-1(b)(7)(A). EPA’s rationale ignores the latter requirement.

Finally, EPA’s new trigger level itself illustrates why it was arbitrary not to lower the action level. EPA requires *some* protective measures when lead levels exceed 10 ppb, but reserves more meaningful requirements for systems that exceed 15 ppb. 86 Fed. Reg. at 4201-03 (JA__). EPA never explains why those more protective measures—replacing lead service lines at a fixed rate for at least two years, completing the process of installing corrosion control treatment, and educating the public about risk, *id.* at 4202-04 (JA__)—are feasible for water systems that exceed 15 ppb but not for those that exceed 10. This differential treatment of “similarly situated” water systems without “adequate explanation” was arbitrary. *See Burlington N. & Santa Fe Ry. Co.*, 403 F.3d at 776.

* * *

Congress required that any treatment technique prevent adverse health effects to the extent feasible. 42 U.S.C. § 300g-1(b)(7)(A). EPA’s treatment technique fails to do so. EPA arbitrarily failed to assess the feasibility of more protective alternatives, ignored compelling record

evidence, and inadequately justified its failure to strengthen its drinking water standard for lead.

CONCLUSION

The Court should vacate the challenged aspects of the Revisions Rule and remand to EPA. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248 (D.C. Cir. 2007) (vacating rule “to the extent that the court has sustained challenges to it”). The Revisions Rule is arbitrary and unlawful.

Dated: August 8, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Court's order of May 23, 2022. It contains 8,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the count of Microsoft Word. Because State Petitioners are filing an opening brief of less than 9,000 words, the combined word count of the two briefs is less than 18,000 words.

I further certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

/s/ Adeline S. Rolnick
Adeline S. Rolnick

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, the Initial Opening Brief of Petitioners Newburgh Clean Water Project, NAACP, Sierra Club, United Parents Against Lead, and Natural Resources Defense Council has been served on all registered counsel through the Court's electronic filing system.

/s/ Adeline S. Rolnick

Adeline S. Rolnick

ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1019 (consolidated with Nos. 21-1020, 21-1076)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et
al.,

Respondents.

On Petition for Review of a Rule of the
United States Environmental Protection Agency

**STANDING ADDENDUM OF PETITIONERS NEWBURGH
CLEAN WATER PROJECT, NAACP, SIERRA CLUB,
UNITED PARENTS AGAINST LEAD, AND NATURAL
RESOURCES DEFENSE COUNCIL**

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DECLARATION OF HANNAH ANDERSON

SA-1

I, Hannah Anderson, declare and state as follows:

1. I am a resident of Newburgh, New York and am served by the Newburgh water system. I have lived in my current residence for 6 years with my partner.

2. I am a member of the Newburgh Clean Water Project (“NCWP”). I have followed NCWP’s advocacy for at least a year and recently became more involved. Their work and mission has increasingly become more relevant and felt more personal to me.

3. I have thought about Newburgh’s lead in drinking water issues for a while and I discuss these issues frequently with friends and coworkers—especially those with children. Newburgh has had ongoing issues with lead in drinking water since 2016 when the City’s water source changed, but I know there were problems with lead in drinking water before then too.

4. My home was built in the 1880s. I know that there is a lead service line connected to my home because I saw it when I first bought the house. Since I know lead service lines are a major source of lead in

drinking water, I plan to apply for a grant from the City to help cover the costs to get my lead service line replaced.

5. The likely presence of lead in my drinking water concerns me because I know that even low levels of lead exposure can cause harmful health effects.

6. My partner and I have thought about having kids and if we decide to, I am concerned about the possible lead exposure and health implications during pregnancy and when we have a child.

7. In the past 6 years that I've lived in this home I have purchased all my drinking water because of my concerns over the quality and safety of the tap water. I, my partner, and our cats only drink bottled water, as do all visitors to our home. Bottled water is crazy expensive. I'm probably paying around \$100 per month for our drinking water. The price increased dramatically in recent years and now also includes a delivery fee. If the lead service line to my home were replaced, I would more likely drink my tap water.

8. I am aware that in 2016, the City switched its water source from Washington Lake to the Catskill Aqueduct. I now know that between 2011 and 2017, Newburgh regularly tested between 5–10 ppb

of lead in its drinking water samples—levels technically below the lead action level of the federal Lead and Copper Rule, but still levels that pose risks to health. The action level seems very bureaucratic to me and not necessarily logical.

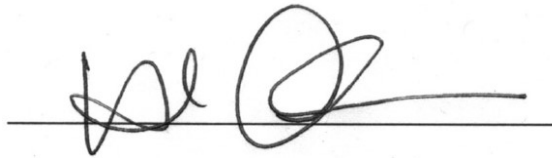
9. I also recently learned that in 2018, due to this switch in water source and the increased acidity of the Catskill Aqueduct's water, the breakdown of lead pipes accelerated, and Newburgh's lead levels spiked to as high as 21.3 ppb. This exceeded the 15 ppb action level and in response, the City of Newburgh injected caustic soda into the water and lead levels decreased.

10. I am aware that the City plans to switch back to Washington Lake water within the next few years and I'm worried that another switchover may cause lead levels to spike again. Further, switching back to Washington Lake water where Newburgh's lead levels were consistently 5–10 ppb, a range at which the water system does not have to take action.

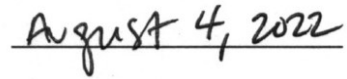
11. Along with the history of lead in Newburgh's drinking water, the lack of accountability unless a lead action level exceedance occurs, and the barriers to replacing lead service lines, I do not feel protected by

the 2021 revisions to the Lead & Copper Rule. But if EPA is required to reconsider complete replacement of lead service lines and lowering the lead action level, my concerns would be allayed.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'Hannah Anderson', written over a horizontal line.

Hannah Anderson

A handwritten date 'August 4, 2022' written in black ink over a horizontal line.

Date

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NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

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NATURAL RESOURCES DEFENSE
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DECLARATION OF JUAN M. COFIELD

SA-6

I, Juan M. Cofield, declare and state as follows:

1. My name is Juan M. Cofield and I am a resident of West Roxbury, Massachusetts. My wife and I have lived in our home for 23 years. I believe our house was built in 1898.

2. I have been an active member of the National Association for the Advancement of Colored People (“NAACP”) for more than 20 years and have been the President of the New England Area Conference of the NAACP for 19 years. The NAACP is the largest, oldest and arguably most highly regarded civil rights advocacy organization in the country. Its mission is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons.

3. We receive drinking water in our home from the Boston Water & Sewer Commission. For years I felt glad that I did not live in Michigan, where the Flint lead-in-drinking-water crisis took place. I know that being exposed to lead, even a small amount, is dangerous. And I know that lead pipes are often the cause of lead in drinking water.

4. But now I am very concerned about my water. We drink water from the tap in our home and do not have any water filters. I recently learned that water supplied by the Boston Water and Sewer Commission has had high levels of lead in its water the past few years: over 25 ppb in 2020 and over 17 ppb in 2021. This is clearly disturbing. I also suspect that the pipes on my property that transport water are made of lead because the house is so old, I haven't replaced the pipes in the 23 years I have lived here, and I do not believe that the previous owner changed the service lines.

5. I am now even more concerned for my wife and me as well as my neighbors because of recent changes to the federal laws governing drinking water. My understanding was that given the high levels of lead in my water system, the system used to be required to replace the lead service lines at a rate of 7% each year. But the new rule requires the water system to replace them at a much slower rate—only 3% each year. I'm disturbed because I'm uncomfortable that this rate may not bring the lead levels in the water down to a safe level any time soon. The water system should be required to replace the lines as quickly as possible to protect the health of me and my neighbors.

6. Given the harm associated with lead, no community should have to be exposed to high levels of lead in their drinking water before their lead service lines are replaced. Since EPA knows that lead service lines cause harm, they should have, and should now, require water systems to replace all lead service lines.

7. I know that there is no safe level of lead, so I support requiring water systems to replace all lead service as quickly as possible.

8. But a new rule should also not permit the water system to make an individual home owner pay to replace lead service lines on their property. Placing this cost on the homeowner, when the replacement is necessary for public health, causes me great concern. It's an expense that many NAACP members in the New England area that I oversee would not be able to afford. However, there is a lot of older housing and lead service lines in this area, and I'm worried that if water systems replace only those lead service lines on properties where homeowners can afford to pay for that service, many of our members will continue to be exposed to dangerous levels of lead.

I declare under penalty of perjury that, to the best of my knowledge, the

foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'J. M. Cofield', written over a horizontal line.

August 4, 2022

Juan M. Cofield

Date

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DECLARATION OF LISANNE FREESE

SA-11

I, Lisanne Freese, declare as follows:

1. My name is Lisanne Freese. I have personal knowledge of the matters stated herein.

2. I am a member of NRDC and have been for at least 20 years. In my childhood (and for work now) I spent a lot of time outdoors and have always cared about the health of the environment. As I matured, I noticed how little corporations and agencies cared for the environment and that is why I joined NRDC.

3. I was born and raised in Chicago and have lived in my current home since 2014. Our drinking water comes from the City of Chicago.

4. Lead in drinking water can cause serious and permanent health harms. Chicago has the most lead pipes of any city, some dating back to the 1800s. No level of lead is safe and water tested by the city shows high levels of lead in more than a third of the homes tested. (I read this in a June 21, 2022 news story by Chicago reporter Monica Eng.)

5. I believe our house was built in 1968, has a galvanized steel private service line, but am uncertain what our public service line

consists of. Because of this we tested our water with a kit provided by the city in 2019. Test results showed our lead levels were above 4ppb. It's not safe to drink water with any amount of lead, and my health is at risk from being exposed to these lead levels. I know lead levels can vary in water, and the fact that our drinking water tested above 4ppb makes me concerned that at other times the level of lead could be significantly higher.

6. We use a ZeroWater pitcher filter to remove lead from our drinking water and we use it daily. Replacement filters are expensive, but it is our only option to be confident we're drinking lead-free water. Given the known lead contamination in my drinking water, I'm forced to either pay for filters to reduce my risk or expose myself to harm.

7. If there were better rules for lead in drinking water, they would directly benefit me. With a more protective standard in place, Chicago would need to do more to reduce levels of lead in water citywide. I would be less exposed to harmful levels of lead, and would not need to pay to filter my water.

8. I would appreciate being notified more often about the level of lead in my water by the City of Chicago and also when sewer repair

and/or pipe replacement is going on in our area. Currently, Chicago's water report comes out once per year. If there were a strict limit for lead in drinking water, Chicago would have to inform me when it was above that limit. This transparency would be valuable to me and would let me know when I need to take extra steps to protect my health.

I declare under penalty of perjury that the foregoing is true and correct.



Lisanne Freese

____ June 25, 2022 ____

Date

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DECLARATION OF FRANCENE GREWE

SA-15

I, Francene Grewe, declare and state as follows:

1. I am a resident of Portland, Oregon.
2. I am a member of the Sierra Club, which I joined over twenty years ago.
3. I have lived at my residence in Portland for almost ten years, and the Raleigh Water District serves my home with water. My home was built in the 1950s.
4. I often care for my six-year-old grandson at my home in Portland; I watch him a few days each week after school for several hours, and he will often stay overnight. My grandson, my husband, and I all drink the tap water at our home. I do not filter the tap water at my home.
5. It is important to me that my family and I have safe drinking water. Safe drinking water is a long-standing concern for me; I've toured the local Bull Run watershed and looked into water sanitation in Portland. There is a lot of clear cutting in my area, and the water tastes different in the areas with clear cutting, which is a concern for me.

6. I know that there is no safe level of lead, and that any level of lead my grandson, my husband, and I are exposed to presents a risk to our health.

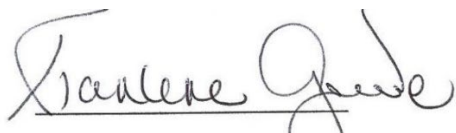
7. I am aware that Raleigh Water District is considered a “small water system” under the federal Lead and Copper Rule. I did not previously know that high levels of lead had been found in my water system; however, I recently learned that Raleigh Water District had a “lead action level exceedance” of 21 ppb in Fall 2021.

8. The changes to the small systems requirement in the Revisions Rule are frightening. Small water systems used to have to take several mandatory steps to abate lead if they exceeded the lead action level, but now the water system can pick a one treatment option out of the multiple ones that used to be required. The changes leave my family and I exposed to lead at our home where we get all of our water. 21 ppb is such a big exceedance, especially since no level of lead is safe. Small water systems should have to protect consumers just as much as large systems do. It is scary that the Revisions Rule would take a step backwards.

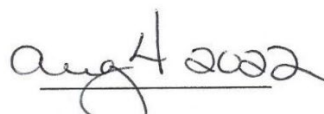
9. I am also concerned for my neighbors. Many families with young children have moved into the neighborhood recently, and I'm fairly sure that they don't know their children are likely being exposed to high levels of lead in their drinking water. It seems so wrong that the water system is not required to remediate lead exposure on an individual level. Even if my home or one of my neighbors' homes tests with a high level of lead, the water system doesn't have to do anything about it because the revisions to the Lead and Copper Rule kept a treatment technique rather than instituting a maximum contaminant level, which would provide protection and recourse to individual consumers.

10. My family, my community and I need the Lead and Copper Rule to protect individuals and to require small water systems not to regress on protecting public health.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.



Francene Grewe



Date

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and 21-1076)

DECLARATION OF NATHANIEL A. HOFFMAN

I, Nathaniel A. Hoffman, declare and state as follows:

1. I am a resident of Milwaukee, Wisconsin.
2. I have been a member of the Sierra Club for 35 years.
3. My wife and I have lived in our current home for 40 years.
4. I have four grown children and 20 grandchildren who range in age from under 1 year old to 17. My grown children and my grandchildren regularly visit our home.

5. I started to have concerns about lead in drinking water within a few years after moving into our home. I read that exposure to any level of lead, especially for children, can have significant health impacts.

6. My drinking water supplier is Milwaukee Water Works/City of Milwaukee. I know that lead pipes are common in Milwaukee, and I assume my home has them.

7. Once I became concerned about lead at our home, I had the water tested. The results came back showing lead in the water from the tap. For a few years after that, my wife and I followed guidance issued at that time and let the faucet run for a certain period of time before drinking water from it. However, based on information I have read

recently, I am concerned that we did not run it for long enough back then to rid it of the lead.

8. Within a few years, I installed a filter, but only in the main sink in the kitchen. Over the years, I have had to spend time and money to maintain the filter and have upgraded the filter a few times. Most recently I installed a reverse osmosis filter, which cost approximately \$350. I spend between \$75 and \$100 each year maintaining the filter.

9. I know that historically there has been worrisome lead levels in the drinking water delivered by Milwaukee Water Works. Since 1993, there has been only one year where the lead levels from community sampling under the Lead and Copper Rule was below 5 ppb (2002). From later in 2002 to the present, the lead levels have ranged between 5 and 10 ppb.

10. Even though lead levels between 5 and 10 ppb are unsafe, it is my understanding that the Lead and Copper Rule does not require the water system to take certain steps, such as removal of lead service lines, to lower them, because those community levels are not above the rule's "action level" of 15 ppb.

11. I recently had lead levels tested from one of the outlets in my house other than the kitchen sink that has a filter. The lead level was 16 ppb.

12. This is worrisome, because while my wife and I usually take drinking water from the kitchen, we do not always. And any of my grandchildren could drink water from any outlet when visiting.

13. Even though that lead level is very high, and higher than the Lead and Copper Rule action level, it is my understanding that Milwaukee Water Works is not required to take certain steps to remediate the lead in my home, such as checking for and replacing lead service lines. It is also my understanding that if the Lead and Copper Rule had a “maximum contaminant level,” then the water system likely would be required to remediate the lead levels at my home.

14. Thus, I would be much safer if the Lead and Copper Rule had a maximum contaminant level. And it would also save me the time, effort, and money I spend on filters and filter maintenance.

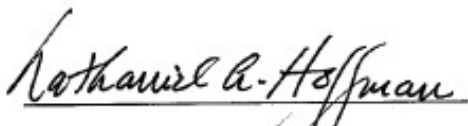
15. Even if the Lead and Copper Rule did not have a maximum contaminant level, I would also be safer if the action level were lowered from 15 ppb to as low and safe a level as possible. If that were done,

then the water system likely would be required to start remediating the water throughout the system, likely including by replacing lead service lines.

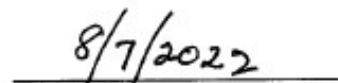
16. I live in a close-knit community and I am worried about my neighbors' exposure to lead in drinking water. Some do not have the money to afford a filter, and some wouldn't take the time and effort to install and maintain one.

17. I do not think I and others in my community should have to choose between installing and maintaining a filter or having lead-contaminated water. I believe the water system should be required to make sure the water they deliver to my home, and my neighbors' homes, is safe to drink.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.



Nathaniel A. Hoffman



Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

Petitioners,

NATURAL RESOURCES DEFENSE
COUNCIL,

Petitioner, and

STATE OF NEW YORK, STATE OF
CALIFORNIA, STATE OF ILLINOIS,
STATE OF MARYLAND, STATE OF
MINNESOTA, STATE OF NEW JERSEY,
STATE OF OREGON, COMMONWEALTH
OF PENNSYLVANIA, STATE OF
WISCONSIN, and THE DISTRICT OF
COLUMBIA,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and MICHAEL S.
REGAN, Administrator, U.S. Environmental
Protection Agency,

Respondents.

Case No. 21-1019
(consolidated with
Case Nos. 21-1020
and 21-1076)

DECLARATION OF TAMSIN HOLLO

SA-24

I, Tamsin Hollo, declare and state as follows:

1. I am a Steering Committee Member of Newburgh Clean Water Project. Newburgh Clean Water Project is a grassroots community organization dedicated to ensuring that residents of Newburgh, New York have access to drinking water free from PFAS, lead, and other contaminants.

2. I am familiar with Newburgh Clean Water Project's organization, policies and practices.

3. Established in 2016, Newburgh Clean Water Project is made up of Newburgh residents who have been affected by water contamination such as PFAS and lead and are concerned about the health of the local community and clean water security.

4. Newburgh Clean Water Project has a five-person steering committee that runs the organization. The organization engages with many more community members in meetings, on social media, and at in person events.

5. Newburgh Clean Water Project's mission is to advocate for Newburgh's long-term access to clean drinking water, comprehensive

health resources for those who've been affected by contaminated water, and the restoration of the local watershed.

6. While Newburgh Clean Water Project was formed in response to PFAS issues in Newburgh, members' comments drove our decision to get involved in the lead crisis. We often hear first-hand stories about lead exposure and receive questions about lead in drinking water. We therefore began acting on lead in drinking water in 2020.

7. Newburgh has a lot of lead service lines because the housing stock was mainly built before lead service lines were banned. Lead leaches from these lines and gets into drinking water. I first realized Newburgh's lead-in-drinking-water problem four years ago and spent thousands of dollars to have my lead service lines replaced four years ago. A substantial portion of Newburgh residents are low-wealth homeowners and renters who cannot afford to replace their lead service lines. And due to the expense, landlords are hesitant to test water because the results may indicate that they should replace the service lines.

8. Lead levels in Newburgh's water have fluctuated over the last few years due to changes in source water and changed corrosion control. Newburgh's water has had lead levels as high as 21 ppb.

9. Constant recalibration of corrosion control techniques is not sufficient to protect Newburgh residents from lead exposure. Newburgh Clean Water Project therefore advocates for complete replacement of all of the City's lead service lines to protect public health and for them to be replaced without requiring individual consumers to pay for that replacement.

10. The City of Newburgh has been replacing some lead service lines, but it is dependent on grant money to replace them. The City currently has a waiting list of people whose lines cannot yet be replaced because the City does not have the money to replace them.

11. Some of Newburgh Clean Water Project's members purchase bottled water rather than drinking tap water because they are afraid of lead exposure. This is an expense they should not have to bear.

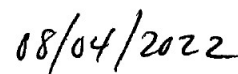
12. I am aware that in 2021, EPA revised the Lead and Copper Rule. The new rule fails to adequately protect Newburgh Clean Water Project's members and me. EPA should have set a health-based

maximum contaminant level for lead, so that even when our community has lead levels of 9 ppb, which it regularly had for quite a few years, the water system would need to remediate homes with dangerous lead levels. But it did not. In the alternative, EPA should have required the complete replacement of all lead service lines in the new rule, but it did not. At the very least, EPA should have lowered the lead action level to a level that is health-protective and maintained the replacement rate for lead service lines to the rate under the prior rule. If the court invalidates the provisions of the new Lead and Copper Rule at issue in this lawsuit, the harm that these aspects of the new rule pose to me and the other members of Newburgh Clean Water Project will no longer be present.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.



Tamsin Hollo



Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

Petitioners,

NATURAL RESOURCES DEFENSE
COUNCIL,

Petitioner, and

STATE OF NEW YORK, STATE OF
CALIFORNIA, STATE OF ILLINOIS,
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Case No. 21-1019
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DECLARATION OF AARON ISHERWOOD

SA-29

I, Aaron Isherwood, declare and state as follows:

1. I am the Philip S. Berry Managing Attorney at the Sierra Club Environmental Law Program. In this role I supervise Sierra Club litigation and help develop legal strategies to advance the Sierra Club's organizational priorities. I have worked as an attorney for the Sierra Club since 1999.

2. I am familiar with the Sierra Club's policies, practices, membership, and programs. I have particular expertise and knowledge concerning the Environmental Law Program and environmental litigation docket of the Sierra Club for the entire United States in federal and state courts.

3. The Sierra Club is a 501(c)(4) non-profit organization founded in 1892 and headquartered at 2101 Webster Street, Suite 1300, Oakland, California. As a Managing Attorney, I work out of the Sierra Club's Oakland headquarters, which is also where the Sierra Club's Executive Director and senior leadership are based.

4. The Sierra Club is a national nonprofit organization with approximately 800,000 members. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth;

practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and, using all lawful means to carry out these objectives.

5. The Sierra Club's members pay annual dues that help to finance the programs and activities of the organization. Members also have voting rights to elect Sierra Club's Board of Directors.

6. Among other things, the Sierra Club has dedicated itself to protecting public health and its members from toxic contaminants, including in drinking water. The Sierra Club's mission includes protecting its members' health and their ability to breathe, eat, drink, live in their homes, and enjoy being outdoors without experiencing exposure to lead consumption.

7. There is no safe level of lead. EPA itself acknowledges that lead is a major public health issue.

8. The Sierra Club also has many members located in lead-affected communities. The Sierra Club has many members who live, work, and recreate in neighborhoods served by water systems with lead-contaminated water.

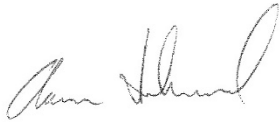
9. The Trump Administration's revisions to the Lead and Copper Rule fail to protect the Sierra Club's members against the risk of harmful lead exposure from drinking water. EPA did not take several necessary steps that it could and should have to better protect Sierra Club members and other people from exposure to lead in drinking water. Such steps include implementing a maximum contaminant level for lead, mandating removal of lead service lines, lowering the lead action level, and ensuring that consumers served by small water systems get the same protections as those served by larger systems and at least as strong as before the Lead and Copper Rule was revised. These failures are arbitrary and not in accordance with the best science, much of which EPA itself has acknowledged.

10. As a result, under the Trump Administration's Rule, the Sierra Club's members cannot feel free to drink water in their own homes without fear of compromising their health from lead exposure. EPA's failure to take the necessary steps outlined above causes the Sierra Club's members harm and puts them at risk.

11. The Sierra Club's members are concretely injured by EPA's arbitrary revisions and/or failure to make the revisions mentioned

above. A court order directing EPA to vacate the challenged provisions of the Trump Administration Lead and Cooper Rule revision and remand to EPA to promulgate the most protective standard possible would redress the injuries suffered by the Sierra Club and its members.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.



Aaron Isherwood

8/3/2022

Date

Philip S. Berry Managing Attorney
Sierra Club
2101 Webster St., Suite 1300
Oakland, CA 94612

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

Petitioners,

NATURAL RESOURCES DEFENSE
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STATE OF NEW YORK, STATE OF
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DECLARATION OF KEITH LANCASTER

I, Keith Lancaster, declare and state as follows:

1. I am a resident of Johnston, Rhode Island. My significant other and I live together in our home.

2. I have been an active member of the National Association for the Advancement of Colored People (“NAACP”) for approximately three years. The NAACP is a civil rights organization whose mission is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons. I have led several ad hoc committees during my tenure.

3. I have concerns about lead and other contaminants in drinking water. I know that lead at any level can be harmful to my health. And I also know that the lead-in-drinking water crisis in Flint, Michigan was not an isolated incident.

4. My drinking water supplier is Providence Water/the City of Providence Public Water System. This water system serves some of its water through lead pipes. I understand that in approximately the past 1.5 years, drinking water lead levels for the Lead and Copper Rule in

my water system have ranged from 5.7 to 10.6 ppb. In the several years before that, the lead levels were often higher, several times measuring 16 or 17 ppb, and one time as high as 22 ppb.

5. I believe the house I live in was built in the early 1900s. I am aware that the pipes that bring water from the main to houses are often made of lead in older houses like mine.

6. We use filters on our drinking water faucets. I know, however, that filters are not foolproof. I am nervous that if they are not working correctly, that I might be exposed to lead levels in my drinking water as high as those levels noted above—10 to 22 ppb. And maintaining the filters are an expense. My choice is between possibly being exposed to contaminants in my drinking water such as lead, or paying money to make sure the drinking water in my home is safe. I am also concerned about lead exposure from drinking water for my neighbors who may not have filters on their faucets.

7. I understand that most contaminants in drinking water are regulated by what is called a maximum contaminant level—that is, water systems are required to make sure that a contaminant does not

exceed a certain level in drinking water. I also understand that that is not how lead in drinking water is regulated.

8. I believe the changes made in the 2021 revisions to the Lead and Copper Rule, and the necessary changes that were not made, were negligent and irresponsible. If a maximum contaminant level had been set for lead, it is likely that the water system would be required to take actions to ensure that my home and others had lead levels got lower than they have been. I also know that if the water system failed to do so, it would be a legal violation and I would have a right to sue it to ensure that effective steps—such as replacing lead pipes—were taken to get lead levels in my drinking water down. I understand that under the revisions to the Lead and Copper Rule, the water system does not need to ensure that lead levels are lowered to a certain amount and I cannot sue if the levels are not lowered sufficiently.

9. And beyond the lack of a maximum contaminant level, I am harmed by other aspects of the revisions to the Lead and Copper Rule. For example, there has not been, and will not be, a violation of the Lead and Copper rule in the future if lead levels in our system stay in the range they have been for the past 1.5 years, because fewer than 10% of

sites sampled for lead in the system had lead levels over 15 ppb. And because fewer than 10% of sites exceeded 15 ppb, the water system would not be required to take further action to lower the lead in drinking water served to me and my neighbors. This is not right. Because lead in drinking water presents risks at any level, the Lead and Copper Rule should require water systems to take action even when lead levels are lower than 15 ppb. Based on the current lead levels in my water system, I will suffer harm from the failure in the revisions to lower the “lead action level” of the Lead and Copper Rule.

10. If the lead levels go back to higher than 15 ppb, and the water system is required to take action, my community will still suffer harm as a result of the revisions to the Lead and Copper Rule. I know the best way to protect people like me and others in my community from lead in drinking water is to replace all the lead pipes that deliver water with pipes of another material. But I understand that the revisions slowed down the rate of required replacement for systems exceeding lead levels of 15 ppb and higher from 7% annually to 3% annually. This change increases the danger to everyone in my community and makes no sense.

11. Indeed, because there have been dangerous levels of lead in the water system that serves my home, and lead pipes are a major cause of lead in drinking water, water systems should be required to replace all lead pipes in the system regardless of what future lead testing shows. The failure of the revisions to the Lead and Copper Rule to require the full replacement of all lead pipes in water systems also increases the risk of harm from lead in drinking water to me and my community.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.



Keith Lancaster

8/4/2022

Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

Petitioners,

NATURAL RESOURCES DEFENSE
COUNCIL,

Petitioner, and

STATE OF NEW YORK, STATE OF
CALIFORNIA, STATE OF ILLINOIS,
STATE OF MARYLAND, STATE OF
MINNESOTA, STATE OF NEW JERSEY,
STATE OF OREGON, COMMONWEALTH
OF PENNSYLVANIA, STATE OF
WISCONSIN, and THE DISTRICT OF
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v.

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Respondents.

Case No. 21-1019
(consolidated with
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and 21-1076)

DECLARATION OF JANETTE MCCARTHY-WALLACE

I, Janette McCarthy-Wallace, declare and state as follows:

1. I am the General Counsel of the NAACP, a role in which I have served for approximately 1 year. Before I was the General Counsel, I served as Interim General Counsel for 1 year. Prior to this role, I also served as the Deputy General Counsel of the NAACP for 3 years. In sum, I have worked at NAACP in the Office of the General Counsel for almost 5 years. I am familiar with the NAACP's policies, practices, membership, and programs.

2. The NAACP is a non-profit membership organization headquartered in Baltimore, Maryland.

3. The NAACP is the nation's oldest, largest, and most widely recognized grassroots-based civil rights organization in the United States. The principal objective of the NAACP and its state conferences is to ensure the political, educational, social, and economic rights of all persons and to eliminate racial discrimination.

4. The NAACP has more than 2 million members and supporters throughout the United States. The NAACP frequently engages in advocacy for civil rights in their communities, fighting to end racial discrimination, ensure civil rights are protected in the criminal

justice system, and protect the rights of all people to educational access.

5. Among other things, the NAACP has dedicated itself to advocacy relating to environmental and climate justice. NAACP is committed to ending environmental injustices and the proliferation of climate change, which systemically impact Black communities and other communities of color, as well as low-income communities.

6. One example of these efforts is the NAACP's recent advocacy relating to the lead contamination of the water in Flint, Michigan, including the development of a 20-point plan detailing community priorities in response to the lead contamination.

7. NAACP has also been a leader in advocacy efforts relating to water contamination in Newark, New Jersey, Shreveport, LA, Washington, D.C., and other localities around the nation. NAACP is committed to continuing this advocacy, as well as advocacy relating to toxic spills, both of which disproportionately affect Black Americans.

8. NAACP also engages in education campaigns, including developing Toolkits and other educational materials relating to climate injustices.

9. Lead is a dangerous neurotoxin and exposure to it presents

the risk of harm to children and adults at even low levels. The 2021 revisions to the Lead and Copper Rule harm the NAACP's members by taking steps that increase the risk of harm, and failing to take necessary steps to prevent the environmental injustice of exposure to lead from drinking water.

10. Failure to protect people against lead exposure from drinking water is particularly harmful to the NAACP members, who advocate for ending systematic injustices to Black communities and other communities of color, as well as low-income communities. Lead is disproportionately harmful to the very communities the NAACP represents. Therefore, the NAACP members are concretely injured by the provisions in EPA's new Lead and Copper Rule that fail to effectively reduce exposure to lead in drinking water in line with science and capability. A court order invalidating the challenged parts of the new rule would redress the injuries suffered by the NAACP and its members.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Janette M. Wallace

8/4/2022

Janette McCarthy-Wallace
General Counsel
NAACP
4805 Mount Hope Drive
Baltimore, MD 21215

Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

Petitioners,

NATURAL RESOURCES DEFENSE
COUNCIL,

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STATE OF NEW YORK, STATE OF
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Respondents.

Case No. 21-1019
(consolidated with
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and 21-1076)

DECLARATION OF CANDY MCCRAY

SA-45

I, Candy McCray, declare as follows:

1. My name is Candy McCray. I have personal knowledge of the matters stated herein.

2. I am a member of NRDC and have been for at least 10 years. I have been a longtime advocate for environmental issues and try my best to make everyday choices that are environmentally friendly. I joined NRDC because organizations like NRDC give me hope for the future.

3. I live in the city of Elgin, Illinois and have been living in my current house for over 18 years. My 12-year-old son lives with me. Last year Elgin exceeded the EPA's action level for lead, and at the 90th percentile our lead levels are 22.5ppb. That lead level is dangerously high and threatens serious and permanent health harms to me and my family. No amount of lead is safe to drink. In other years, Elgin's lead level has also been high; often it is just barely below the action level of 15ppb. That amount of exposure is not safe either.

4. Lead is dangerous to all age groups, but it particularly harms children. I had a drinking water filtration system installed in my home in response to the city's high lead levels, in order to protect myself

and my son. I am very worried about the harm lead can have on us, especially my son, who has ADHD. Because of the serious and irreversible health effects caused by lead in drinking water, my choice is either to expose my family to lead or pay more money to have healthy drinking water. We wanted to reduce our exposure to lead as much as possible.

5. My house was built in 1941 and has a private lead service line. Currently, Elgin is replacing public lead service lines, but this process has been slowed down and does not automatically include the replacement of private lines.

6. The cost to replace our private lead line on our own was too expensive, so we decided to install a whole-house filtration system to reduce our lead exposure instead. Although cheaper, this also came at a large expense. The filtration system itself was \$1,500 and the cost of installation ended up being around \$3,000. In addition to this expensive initial cost there is also a continuing cost to maintain the filtration system.

7. More protective rules for lead in drinking water would directly benefit me and my family, reducing the harm we suffer from

exposure to lead in our tap water and letting us stop paying extra money to filter our water. A better standard would require my city to act more quickly, remove lead service lines, and reduce lead levels to significantly lower than they are now.

I declare under penalty of perjury that the foregoing is true and correct.



Candy McCray

07/26/2022

Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

Petitioners,

NATURAL RESOURCES DEFENSE
COUNCIL,

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STATE OF NEW YORK, STATE OF
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(consolidated with
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and 21-1076)

DECLARATION OF DIANNE PARI

SA-49

I, Dianne Pari, declare as follows:

1. My name is Dianne Pari. I have personal knowledge of the matters stated herein.

2. I am a member of NRDC and have been for at least ten years. The reason why I have been a member for so long is because I feel strongly about the health of our environment. Years ago, I was in search of an organization I could join that was reputable and protected all aspects of our environment. NRDC stood out to me as an effective protector of land, oceans, air, water, and people's health.

3. I have lived in New York City my entire life and have been living at my current apartment in Beechhurst, Queens for seven years. I have always loved the taste of NYC tap water. I love NYC tap water so much that in the years I was a teacher on Long Island I would bring the tap water with me. In addition to this preference, I always trusted that my water is clean and healthy. Because of this I never considered filtering my water.

4. I am now concerned about lead contamination in my tap water. New York City's reported lead level is 12 parts per billion. I know that there is no safe level of lead in drinking water. My apartment

building has an unknown service line according to NYC lead service line data. Because of this unknown, and given that NYC's lead level is 12ppb, I am now exposing myself to an increased health risk from the threat of lead contamination because I am not filtering my tap water.

5. I wish that the city notified me of any level of lead in my drinking water. If I was notified, I would have filtered my water years ago and would not have knowingly exposed myself to lead. Even if I missed the taste of the unfiltered tap water, the negative effects of lead worry me.

I declare under penalty of perjury that the foregoing is true and correct.



Dianne Pari

__7/25/2022__
Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

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DECLARATION OF MARCELINA PEDRAZA

SA-52

I, Marcelina Pedraza, declare as follows:

1. My name is Marcelina Pedraza. I have personal knowledge of the matters stated herein.
2. I am a member of NRDC, and I live on the Southeast Side of Chicago. I work as a union electrician. I am also on the board of Southeast Environmental Task Force in Chicago, and I am very concerned about how my community is affected by many environmental issues.
3. I have lived in my current house for about three years, and I am served by the Chicago Water System. In February 2020, soon after buying this house, I learned that I had a private lead service line, so I used the city's water testing kit to check the lead levels in my house. This test found lead levels of 21 ppb. After sending the test back to the city they gave me instructions on how to try to reduce my exposure to lead. The letter explained that I should use a lead filtering pitcher and that I should let the water run for at least five minutes before using it for cooking or drinking. No amount of lead in water is safe.

4. My water was again tested in 2021, the levels of lead were still high at the three-minute mark, and the city gave me the same advice as before. The only other option to reduce my exposure to lead would be to replace the lead line.

5. I would love to get my lead line replaced but it would cost me over \$15,000 out of pocket. Chicago has funding for some lead service line replacement, but I do not qualify for financial support from the city to replace mine. Replacement should be available to everyone especially when there are few options to reduce my exposure to lead.

6. Despite these continuing high levels of lead in my home, I still drink tap water. Bottled water is expensive and creates so much plastic waste. I sometimes use the lead filtering pitcher, but the replacement filters are expensive. I shouldn't have to pay more for safe water. But my choice is either to expose myself to lead or pay more to avoid it.

7. My 11-year-old daughter sometimes drinks from the pitcher but often drinks unfiltered tap water. I am very concerned about her exposure to lead because she is still growing and her brain's still

developing. Kids exposed to lead in drinking water can suffer permanent harm.

8. I don't trust the current standard for lead, and it would be ideal if there wasn't any amount of lead in the water. I live in an already overburdened area, pollution wise, and elevated lead levels just add to the mix. I think there needs to be a quicker response to these elevated lead levels, and the standard should be lower than it is now.

I declare under penalty of perjury that the foregoing is true and correct.



Marcelina Pedraza



Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
NAACP, SIERRA CLUB, and UNITED
PARENTS AGAINST LEAD,

Petitioners,

NATURAL RESOURCES DEFENSE
COUNCIL,

Petitioner, and

STATE OF NEW YORK, STATE OF
CALIFORNIA, STATE OF ILLINOIS,
STATE OF MARYLAND, STATE OF
MINNESOTA, STATE OF NEW JERSEY,
STATE OF OREGON, COMMONWEALTH
OF PENNSYLVANIA, STATE OF
WISCONSIN, and THE DISTRICT OF
COLUMBIA,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and MICHAEL S.
REGAN, Administrator, U.S. Environmental
Protection Agency,

Respondents.

Case No. 21-1019
(consolidated with
Case Nos. 21-1020
and 21-1076)

DECLARATION OF ZAKIA RAFIQA SHABAZZ

SA-56

I, Zakia Rafiq Shabazz, declare and state as follows:

1. I am the National Director of United Parents Against Lead National, Inc. (“UPAL”) and founder of the Virginia chapter. UPAL is a networking organization of and for parents of lead poisoned children dedicated to ending the continuing threat of lead poisoning through education, advocacy, and resource referral.

2. I am familiar with UPAL’s organization, policies, and practices.

3. UPAL is a national 501(c)(3) nonprofit organization based in Richmond, Virginia.

4. Established in 1996, UPAL was formed by parents of lead poisoned children as a national networking organization connecting parents of lead poisoned children. Our network also connects families with other lead-poisoning prevention advocacy groups.

5. UPAL’s mission is to provide education and information that will empower parents to make informed decisions. I founded the Virginia chapter after my son was diagnosed with lead poisoning in early 1996. Since then, I have headed the Virginia chapter, and became the National Director in 2001.

6. Based out of Richmond, Virginia, UPAL operates nationally by reaching out to parents with children who have been, or could potentially be, exposed to harmful levels of lead and connecting them with local, state, and national resources, agencies, and organizations. UPAL also advocates for families through press releases to various media outlets.

7. There is no safe level of lead; even low levels of lead exposure can harm children's cognitive function. EPA itself acknowledges that lead is a major public health issue that presents serious risks to the brain and nervous system of children. The presence of lead in drinking water is a central concern of UPAL families. Many of UPAL's members live in neighborhoods where the water supply has unsafe levels of lead in the water used for basic needs including drinking, washing clothes, and bathing.

8. Children are harmed by lead exposure from multiple sources. UPAL's members are concerned about exposure to lead from those various sources and the aggregate impacts of lead exposure. It is an outrage that children are still getting poisoned by lead today. It is also an outrage that lead poisoning only gets widespread publicity when

thousands of children are poisoned, as occurred in Flint, Michigan. In actuality, every day children across the country are getting poisoned by lead in their homes and in their environments as a result of a number of different exposure pathways, including lead in drinking water. UPAL seeks to bring attention to the stories of these families and an end to childrenism. Childrenism, a term coined by UPAL in 2014 after the city of Petersburg, VA failed to implement a \$1.1 million HUD grant that resulted in several lead poisoned children. It refers to systematic discrimination against children, gross dereliction of one's responsibility to children, practical opposition to the safety and wellness of children, willful disregard and failure to protect children in your charge.

9. UPAL promotes proactive steps that prevent children's exposure to lead. Parents need to know if there is risk of lead exposure in their drinking water. For example, UPAL advocates for full lead service line replacement and recently organized an educational webinar for our members about the risks lead service lines pose to children.

10. Richmond is home to many houses built after 1950 which often have lead service lines for drinking water. In fact, in 2016 the city director of public utilities estimated that there were about 14,000 lead

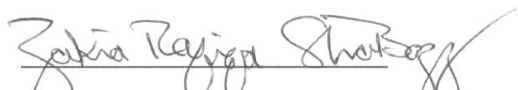
services lines still in use in Richmond. My community in Richmond currently does not have to have their lead service lines replaced because Richmond water is testing below the threshold of when the city must take steps towards further remediation under the federal Lead and Copper Rule. But because there are so many lead service lines, people in the Richmond community, including me, are still at risk of exposure and harm.

11. The 2021 revisions to the Lead and Copper Rule fail to sufficiently protect against lead exposure and will cause unnecessary lead exposure to UPAL's members and children across the country. Despite acknowledging that lead service lines are a great threat and the largest contributor of lead in drinking water, EPA did not take steps in line with the goal of removing the threat from them. It did not require full lead service line replacement, regardless of lead levels. Doing so would have alleviated the current harm those pipes pose in delivering leaded drinking water. We should not have to wait for children to drink a ton of lead-contaminated water before eliminating the source that we know is causing harm.

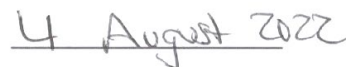
12. Instead of bolstering protection against lead exposure, EPA's new rule left a high action level of 15 ppb of lead in drinking water, even though there is no safe level of lead. This causes UPAL and the families it represents—who are already lead poisoned—concrete harm. Parents will not know if the drinking water in their home is truly lead-safe. This frustrates the efforts of UPAL and hinders our organizational ability to empower parents to protect their children from lead-poisoning.

13. EPA's new rule needs to be changed. EPA needs to adopt a more protective lead in drinking water rule, so children do not continue to be detrimentally exposed. In order to meaningfully address the harm suffered by UPAL and its members, the court should not allow the invalid aspects of the 2021 new rule to remain in place. It should direct EPA to put in place the most protective rule possible.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.



Zakia Rafiqah Shabazz



Date

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NEWBURGH CLEAN WATER PROJECT,
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REGAN, Administrator, U.S. Environmental
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Respondents.

Case No. 21-1019
(consolidated with
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DECLARATION OF MONICA SHAH

SA-62

I, Monica Shah, declare and state as follows:

1. I am a resident of Bartlett, Illinois.
2. I am a member of the Sierra Club, which I joined in 1993.
3. I have lived at my residence in Bartlett for about ten years, and the Village of Bartlett serves my home with water.
4. I live with my husband and our three children, ages 20, 17, and 11. My children often have friends over, and they grew up in this house. My children, my husband, and I all drink the tap water at our home. I filter the tap water at my home and have since June 2013 because the water was hard and I knew it might not be the safest to drink. Our filtration system filters lead, among other contaminants.
5. It is important to me that my family and I have safe drinking water. A safe and healthy environment is one of my top priorities.
6. I know that there is no safe level of lead, and that any level of lead my children, my husband, and I are exposed to presents a risk to our health.
7. I am aware that my water system has fluctuated around the 15 ppb lead action level of the Lead and Copper Rule, the level at which

water systems must take certain remedial actions like replacing the lead pipes that transport the water. I did not previously know that high levels of lead had been found in my water system; however, I recently learned that my water system had a “lead action level exceedance” of 16 ppb in 2019 and had a lead level of 14.5 ppb—barely below the action level—in 2021.

8. I understand that changes were made to the Lead and Copper Rule in 2021, including the rate at which a water system must replace lead pipes after an action level exceedance. This reduction of the replacement rate is dangerous. Medium and large water systems that exceeded the lead action level we previously required to replace all lead service lines at a rate of 7%, which would have completed replacement in 14 years. Now they only have to replace lead service lines at a rate of 3%, which would mean that replacing all the lines in a water system such as mine would take almost double the time. All lead service lines should be removed as soon as possible.

9. Because my water system hovers around the lead action level, the change forces my family and I to continue filtering our water and keeps our community exposed to lead for a longer period of time. In

addition to the expensive initial cost of installing the filtration system, there is also a continuing cost to maintain it.

10. EPA should have considered setting a maximum contaminant level for lead so that individual families can be protected. I am concerned about my community. Five of the sites my water system tested in 2021 tested above 15 ppb, yet the water system doesn't have to take any action to help those people because the lead level was only 14.5 ppb. This is unfair and leaves people vulnerable to lead exposure. If any home has lead in its water, then I think something should have to be done about it. And action should be focused on people and areas who need the most help, but the new rule doesn't require that kind of targeting.

11. Since EPA did not create a maximum contaminant level, it should have lowered the lead action level. It is nonsensical that in 2019 my water system was required to take corrective actions, but two years later, the system is not required to, even though the lead levels have only decreased by 1.5 ppb and are still distressingly high. If lead can be detected at levels lower than 15 ppb, then the lead action level should be lower than 15 ppb in order to protect public health.

12. My family, my community and I need the Lead and Copper Rule to protect individuals and to require water systems not to regress on protecting public health.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Monica Shah

Monica Shah

8-3-2022

Date

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEWBURGH CLEAN WATER PROJECT,
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STATE OF NEW YORK, STATE OF
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DECLARATION OF GINA TRUJILLO

SA-67

I, Gina Trujillo, declare as follows:

1. My name is Gina Trujillo. I have personal knowledge of the matters stated herein.

2. I am the Director of Membership for the Natural Resources Defense Council (NRDC). I have been employed at NRDC for over twenty-five years and have held my current position since January 2015. My duties as Director of Membership include supervising the maintenance and updating of NRDC's membership database, which is a listing of people who are members of NRDC; and supervising the preparation of materials that describe NRDC and its mission for members and prospective members.

3. NRDC is a membership organization incorporated under the laws of New York. It is recognized as a not-for-profit corporation under section 501(c)(3) of the United States Internal Revenue Code.

4. NRDC currently has hundreds of thousands of members nationwide, including members in all fifty states and the District of Columbia. NRDC has members who live in places where lead has been detected in drinking water and who receive their drinking water through lead service lines.

5. When an individual becomes a member of NRDC, they authorize NRDC to take legal action on their behalf to promote the member's environmental interests, including their interests in protecting public health from toxic chemicals in water.

6. NRDC's mission statement declares that the organization "works to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends." This mission includes protecting its members from exposure to harmful chemicals that endanger their or their families' health.

7. For over three decades, NRDC staff members have worked to protect the public from lead in drinking water, including by advocating for EPA to promulgate health-protective regulations.

8. Ensuring that federal agencies like EPA comply with their statutory obligations to protect human health, including by protecting NRDC members from exposure to harmful substances in drinking water, is central to NRDC's purpose.

I declare under penalty of perjury that the foregoing is true and correct.

Gina Trujillo

Gina Trujillo

8/3/22

Date

ORAL ARGUMENT NOT SCHEDULED
Case No. 21-1019
(consolidated with Nos. 21-1020, 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 ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

INITIAL OPENING BRIEF OF STATE PETITIONERS

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Dated: August 8, 2022

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties

Petitioners

The following parties appear in these cases as petitioners:

In case no. 21-1019, filed January 15, 2021, Newburgh Clean Water Project, NAACP, Sierra Club, and United Parents Against Lead.

In case no. 21-1020, filed January 15, 2021, Natural Resources Defense Council.

In case no. 21-1076, filed March 1, 2021, the State of New York, State of California, State of Illinois, State of Maryland, State of Minnesota, State of New Jersey, State of Oregon, Commonwealth of Pennsylvania, State of Wisconsin, and the District of Columbia.

Respondents

The United States Environmental Protection Agency (“EPA”) and Michael S. Regan, EPA Administrator, are respondents in these consolidated cases.

Intervenors

American Water Works Association has intervened for respondents.

B. Ruling Under Review

State Petitioners seek review of the following final action by EPA: A rule entitled “National Primary Drinking Water Regulations: Lead and Copper Rule Revisions,” published at 86 Fed. Reg. 4,198 (Jan. 15, 2021).

C. Related Cases

The rule at issue has not been previously reviewed in this or any other court.

/s/ Sarah K. Kam

Sarah K. Kam

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*Authorities upon which the State Petitioners chiefly rely are marked with asterisks.

GLOSSARY

Community Petitioners	Newburgh Clean Water Project, NAACP, Sierra Club, United Parents Against Lead, and Natural Resources Defense Council.
EPA	U.S. Environmental Protection Agency
Executive Order 12,898	Executive Order 12,898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,” 59 Fed. Reg. 7,629 (Feb. 16, 1994)
JA	Joint Appendix
Lead and Copper Rule (or 1991 Rule)	“Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper,” 56 Fed. Reg. 26,460 (June 7, 1991)
Rule	“National Primary Drinking Water Regulations: Lead and Copper Rule Revisions,” 86 Fed. Reg. 4,198 (Jan. 15, 2021)
State Petitioners	New York, California, Illinois, Maryland, Minnesota, New Jersey, Oregon, Pennsylvania, Wisconsin, and the District of Columbia

PRELIMINARY STATEMENT

Lead pipes that connect homes and other buildings to the public water distribution system present substantial and well-known health risks to the individuals who drink the water that travels through those lead service lines. Lead that leaches from pipes into drinking water can cause brain and nervous-system damage in fetuses and children, and can cause cancer and other harms in adults. Minority and low-income populations¹ face disproportionate exposure to lead in drinking water because they are more likely to live in the approximately 6.3 to 9.3 million homes with lead service lines.

The Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* (“Act”), requires the Environmental Protection Agency to establish regulations to protect America’s drinking water from the health hazards of lead contamination. EPA must update these regulations at least every six years to ensure protection from lead to the greatest extent feasible. To preclude EPA’s updates from “backsliding,” the Act requires that each

¹ This brief uses the terms “minority and low-income populations” to refer to communities of color and those lacking in financial resources, respectively, because Executive Order 12,898 uses those terms.

revision maintain or provide greater health protection than the prior regulation. 42 U.S.C. § 300g-1(b)(9).

In 1991, EPA promulgated the “Lead and Copper Rule” (“1991 Rule”) to control lead in drinking water by, among other things, requiring annual replacement of 7% of a water system’s lead service lines when that system’s water contains too much lead. 56 Fed. Reg. 26,460, 26,552 (June 7, 1991). Replacing lead service lines is necessary to protect human health because other controls, such as treating pipes to prevent corrosion, do not adequately reduce the risks of lead leaching into drinking water. In 2021, EPA’s “Lead and Copper Rule Revisions,” 86 Fed. Reg. 4,198 (Jan. 15, 2021) (“Rule”), revised the lead drinking water regulations.

Here, State Petitioners challenge the Rule as unlawful and arbitrary and capricious in violation of the Act and Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* The Rule violates the Act’s anti-backsliding provision. First, the Rule eliminates the prior rule’s requirement that small water systems annually replace 7% of their total lead service lines if the water in their systems contains too much lead. Second, for larger water systems, the Rule reduces the mandatory rate at which those systems must replace their lead service lines from 7% to

3% per year. These revisions unlawfully reduce the critical health protections that were provided by the 1991 Rule, in contravention of the Act's anti-backsliding mandate.

EPA also failed under the APA to adequately explain how the Rule will not cause disproportionate harms on minority and low-income populations, as required to do under Executive Order 12,898. In light of the undisputed evidence in the record that minority and low-income populations often cannot afford to replace the privately-owned portions of lead service lines and often reside in rental housing where the landlord refuses to pay for such replacement, EPA's conclusion was arbitrary and capricious.

JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction under section 1448(a)(1) of the Act, 42 U.S.C. § 300j-7(a)(1), and section 10 of the APA, 5 U.S.C. §§ 701-706, to review any challenge to EPA's promulgation of national primary drinking water regulations. Here, State Petitioners challenge the Rule, which revised the regulations for lead in drinking water. State Petitioners filed a timely petition for review. *See* 42 U.S.C. § 300j-7(a).

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions and legislative history excerpts are contained in the Addendum at the end of this brief.

ISSUES PRESENTED

1. Whether EPA acted arbitrarily, capriciously, or not in accordance with law, including in violation of the Safe Drinking Water Act and APA, where the Rule “backslides” by reducing the health protections provided by the 1991 Rule’s lead service line replacement requirements.

2. Whether EPA acted arbitrarily, capriciously, or not in accordance with law, in violation of the APA, in concluding that the Rule does not have disproportionately high and adverse health effects on minority or low-income populations.

STATEMENT OF THE CASE

A. The Safe Drinking Water Act Requires EPA to Establish Regulations that Protect Public Health from Drinking Water Contaminants

In 1974, Congress recognized the substantial threat that unsafe drinking water poses to America’s residents and passed the Act to limit exposures to harmful contaminants in drinking water. Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660; H.R. Rep. 93-1185

at 1 (1974) (Act's purpose is "to assure that the water supply systems serving the public meet minimum national standards for protection of public health"). The Act requires that EPA, among other things, establish maximum contaminant level goals and primary drinking water regulations for contaminants that "may have any adverse effect on the health of persons" and that are known or anticipated to occur in public water systems. 42 U.S.C. § 300f.

Congress mandated that EPA review these drinking water standards at least every six years and strengthen them as necessary to ensure protection of public health to the greatest extent feasible. *Id.* § 300g-1(b)(9). Each revision to drinking water regulations must be at least as protective as the former regulation. *Id.* This "anti-backsliding" provision provides that "each revision [of a national primary drinking water regulation] shall maintain, or provide for greater, protection of the health of persons." *Id.*

To establish maximum contaminant level goals and primary drinking water regulations, EPA first must identify contaminants that pose a threat to public health. Next, EPA must determine a maximum contaminant level goal for each such contaminant, which is "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); *see id.* § 300g-1(a)(3).

For most contaminants that threaten public health, EPA must establish a maximum contaminant level, an enforceable standard that is the maximum permissible level that is “as close to the maximum contaminant level goal as is feasible.” 42 U.S.C. § 300g-1(b)(4)(B). “[T]he purpose of the [maximum contaminant level] is to protect the public, as much as feasible, from the adverse health effects of drinking contaminated water.” *City of Waukesha v. EPA*, 320 F.3d 228, 243 (D.C. Cir. 2003). “Feasible” means “feasible with the use of the best technology, treatment techniques and other means which . . . are available (taking cost into consideration).” 42 U.S.C. § 300g-1(b)(4)(D).

If EPA finds that it is “not economically or technologically feasible” to determine the level of the contaminant in water, it may instead promulgate a treatment-based rule. *Id.* § 300g-1(b)(7)(A). In such instance, EPA must adopt treatment techniques that will “prevent known or anticipated adverse effects on the health of persons to the extent feasible.” *Id.* “A treatment technique is an enforceable procedure

or level of technological performance which public water systems must follow to ensure control of a contaminant.”² The Act uses the same definition of “feasible” for treatment techniques as it does for maximum contaminant levels. 42 U.S.C. § 300g-1(b)(4)(D). Nothing in the Act “allows EPA to choose a treatment technique other than the most stringent feasible.” *City of Portland, Or. v. EPA*, 507 F.3d 706, 712 (D.C. Cir. 2007).

Lead was commonly used in plumbing until 1986, when Congress amended the Act to limit the use of lead pipes, solder, and flux in public water systems or plumbing in facilities providing drinking water. *See* 86 Fed. Reg. at 4,199; 42 U.S.C. § 300g-6(a)(1). The 1986 amendments also required EPA to develop maximum contaminant level goals and national primary drinking water regulations for controlling lead in drinking water. 56 Fed. Reg. at 26,463.

B. The Serious Health Effects of Lead

Lead in drinking water is a public health issue of paramount importance. 86 Fed. Reg. 14,063, 14,064 (Mar. 12, 2021). Lead can enter

² EPA, *How EPA Regulates Drinking Water Contaminants*, <https://www.epa.gov/sdwa/how-epa-regulates-drinking-water-contaminants>.

drinking water by leaching from lead service lines and other plumbing materials made of lead.³ *Id.* at 4,199, 4,227. No amount of lead is safe for consumption. *Id.* at 4,208. Even low levels of lead in blood pose serious health risks for children and adults. *Id.* at 4,199.

The serious adverse effects of lead on children and adults are well known. *Id.* at 4,205. 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, renal, reproductive, immunological, and neurological effects in adults, as well as cancer. *Id.* at 4,206.

Drinking water is a significant source of lead exposure today. EPA estimates that drinking water can make up at least 20% of a person's total exposure to lead. *Id.* at 4,205, 14,064. "Infants who consume mostly formula mixed with tap water can, depending on the level of lead in the

³ In general, pipes that run from the water main to the curb are owned by the water system, while pipes that run from the curb to the home are typically owned by the private landowner. 86 Fed. Reg. at 4,200.

water system and other sources of lead in the home, receive 40% to 60% of their lead exposure from drinking water.” *Id.* at 4,205.

Lead service lines are the primary cause of lead in drinking water. *Id.* at 71,575. There are approximately 6.3 to 9.3 million homes nationwide served by lead service lines. *Id.* at 4,199. Millions of children also face exposure to lead in drinking water at schools and childcare facilities. (JA___);⁴ (JA___).⁵

Minority and low-income populations are more likely to live in older housing with lead service lines and are disproportionately exposed to the risks of lead in drinking water delivered by community water systems.⁶ (JA___);⁷ 86 Fed. Reg. 71,574, 71,575 (Dec. 17, 2021). For example, in Detroit, children in minority and low-income households disproportionately live in the oldest housing units. (JA___).⁸ This disparate exposure may be exacerbated because these households often

⁴ GAO Report on Lead Testing of School Drinking Water, EPA-HQ-OW-2017-0300-1806 at 7-8.

⁵ Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at 3-80.

⁶ A “community water system” is a “public water system that (A) serves at least 15 service connections used by year-round residents of the area served by the system; or (B) regularly serves at least 25 year-round residents.” 86 Fed. Reg. at 4,205.

⁷ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 19.

⁸ *Id.* at 10.

have fewer resources to pay to remove or remediate the privately-owned portions of lead service lines and often live in rental housing where the landowner refuses to pay for replacement. 86 Fed. Reg. 31,939, 31,942 (June 16, 2021), 71,575; (JA___);⁹ (JA___).¹⁰

Due to various disparities, including the quality of housing, community economic status, and access to medical care, minority and low-income populations are also disproportionately affected by lead from other sources. (JA___);¹¹ 86 Fed. Reg. at 71,575. For example, children in these populations more frequently live near lead-emitting industries and in areas with lead-contaminated soils. (JA___).¹² Additionally, non-Hispanic black people are more than twice as likely as non-Hispanic whites to live in housing with deteriorating lead-based paint. *Id.*

C. The 1991 Lead and Copper Rule

In 1991, EPA promulgated the Lead and Copper Rule, which established maximum contaminant level goals and drinking water regulations for controlling lead and copper. 56 Fed. Reg. at 26,460. The

⁹ EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

¹⁰ Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

¹¹ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 7.

¹² *Id.*

1991 Rule established a maximum contaminant level goal of zero for lead—*i.e.*, the goal was to have no lead in drinking water. *Id.* at 26,467. EPA reasoned that no amount of lead was safe; that a substantial portion of young children, who are most susceptible to the dangers of lead, already had unacceptable levels of lead in their blood; and that there was evidence that lead can cause cancer. *Id.* at 26,467.

EPA determined at that time that it was not feasible to ascertain the level of lead in drinking water and therefore did not establish a maximum contaminant level for lead. Instead, EPA promulgated a treatment-technique rule. *See* 42 U.S.C. § 300g-1(b)(7)(A). EPA's treatment-technique requirements included lead service line replacement, corrosion control treatment to minimize the corrosion of lead pipes, source water treatment, and public education about the dangers of lead in water. 56 Fed. Reg. at 26,460.

EPA found that corrosion control—which insulates the interior of lead pipes—is often insufficient to reduce lead levels in drinking water long term, and that replacement of lead service lines thus remains critical to reducing exposure to lead-contaminated water. As EPA explained, corrosion control protections can degrade over time and their

effectiveness can vary based on the age of lead pipes and other factors. *Id.* at 26,505. Thus, although “corrosion control will reduce the leaching of lead from lead service lines in many cases, . . . high lead levels will persist in some cases and service lines will need to be replaced.” *Id.* at 26,507.

Accordingly, EPA required public water systems (regardless of size) to replace lead service lines. EPA required systems to replace lead service lines if the lead in the drinking water exceeded an “action level” set at 15 micrograms of lead per Liter ($\mu\text{g/L}$) after corrosion control treatment. Such systems were required to annually replace at least 7% of total lead service lines in their distribution system after the lead action level was first exceeded. 56 Fed. Reg. at 26,507; 86 Fed. Reg. at 4,203. EPA forecasted that the 1991 Rule would result in the replacement of 2.7 to 4.5 million lead service lines out of an estimated 10.3 million lead service lines nationally, or roughly 26% to 43% of the total number of lead service lines over a 15-year period. (JA___).¹³

EPA rejected a longer schedule for replacement because it would not “be appropriate to allow systems to replace lines as part of normal

¹³ Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at C-1.

maintenance since this could take as long as 50 years before all the problem lead lines are replaced in some systems.” 56 Fed. Reg. at 26,507. EPA found it “necessary to accelerate the rate at which systems would otherwise replace lead service lines in order to ensure that public health will be adequately protected.” *Id.*

D. The Rule

In January 2021, EPA promulgated the Rule challenged here, as part of the Act’s required periodic review process. 86 Fed. Reg. at 4,206. The Rule included revisions to the following areas: lead service line replacement, corrosion control treatment, tap water sampling for lead, consumer awareness, and public education. *Id.* at 4,201.

As to lead service line replacement, the Rule’s changes failed to maintain or increase the preexisting protections against lead contamination. First, the Rule eliminated the requirement that small water systems—which represent 91% of community water systems (JA___)¹⁴—conduct mandatory lead service line replacement. 86 Fed. Reg. at 4,204. Instead, the Rule allows small systems that exceed the action level to choose between corrosion control treatment, point-of-use

¹⁴ Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 19.

devices to filter tap water, or lead service line replacement, subject to state agency approval. *Id.*¹⁵

Second, for larger community water systems that exceed the action level of 15 µg/L and must conduct lead service line replacement, EPA reduced the mandatory minimum replacement rate from 7% of the system's lines per year to 3% per year. 86 Fed. Reg. at 4,203. Under the 1991 Rule, with the mandatory 7% replacement rate, EPA required lead service lines to be replaced within 15 years. 56 Fed. Reg. at 26,508. The Rule, by contrast, "is intended to eliminate [lead service lines] within approximately 33 years of exceeding the action level." 84 Fed. Reg. 61,684, 61,699 (Nov. 13, 2019).

Although EPA has stated that replacing 100% of lead service lines "is an urgently needed action to protect all Americans from the most significant source of lead in drinking water systems," 86 Fed. Reg. at 71,574, under the Rule, most systems would be required to replace only a small portion of the lead service lines in their distribution systems, *id.* at 71,578. EPA projected that only 339,000 to 555,000 lead service lines

¹⁵ A fourth compliance option, replacing lead-bearing plumbing, is available to small water systems with no lead service lines. *See* 86 Fed. Reg. at 4,221; 40 C.F.R. § 141.93(a)(4).

(out of 6.3 to 9.3 million lead service lines nationally) would be replaced over the 35-year period of analysis for the rulemaking. (JA___);¹⁶ 86 Fed. Reg. at 71,578. EPA estimated that the Rule would thus result in replacement of only about 5% of lead service lines nationally over a 35-year period. *Id.* at 71,577.

E. EPA’s Environmental Justice Analysis for the Rule

EPA conducted an environmental justice analysis of the Rule pursuant to Executive Order 12,898. EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” (JA___).¹⁷ EPA further defines “fair treatment” to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.” *Id.*

¹⁶ Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at Exhibit C.1.

¹⁷ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 1.

EPA’s environmental justice analysis found that the Rule’s lead service line replacement revisions would not address the disproportionately high risks of lead exposure that low-income populations face from the cost of replacing the privately-owned portions of lead service lines—which can be thousands of dollars. (JA___);¹⁸ (JA___).¹⁹ EPA did not consider the additional lead-exposure risks that minority and low-income populations face from living in rental housing, where landlords are less likely than home-owning residents to pay the substantial cost to replace privately-owned lead service lines. *See* (JA___);²⁰ (JA___).²¹

Despite these environmental justice concerns, EPA concluded that the Rule does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or indigenous peoples. 86 Fed. Reg. at 4,276.

¹⁸ EPA estimates that full lead service line replacement “can be expensive at an average cost of \$4,700, ranging from \$1,200 to \$12,300 per line replaced.” (JA___); EPA Strategies to Achieve Full Lead Service Line Replacement, EPA-HQ-OW-2017-0300-0010 at 4.

¹⁹ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at Exhibit ES-1.

²⁰ EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

²¹ Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

F. This Proceeding

In January and March 2021, Community Petitioners and State Petitioners, respectively, filed petitions challenging the Rule. This Court consolidated the proceedings.

In March 2021, EPA delayed the Rule's effective date from March 16, 2021 to June 17, 2021, 86 Fed. Reg. 14,003 (Mar. 12, 2021), and simultaneously proposed to further delay the effective date and compliance date for nine months. *Id.* at 14,063-64. In June 2021, EPA further delayed the Rule's effective date to December 16, 2021, and delayed its compliance date to October 16, 2024. *Id.* at 31,939-40.

In December 2021, EPA announced that it would let the Rule take effect as scheduled on December 16, 2021. *Id.* at 71,574. EPA also found that “there are significant opportunities to further improve upon [the Rule] to achieve increased protection of communities from lead exposure through drinking water.” *Id.* at 71,577.

Community and State Petitioners had agreed to hold the consolidated cases in abeyance while EPA decided whether to revise or rescind the Rule. After the Rule took effect, Petitioners requested that the Court terminate the abeyance and enter case management deadlines.

In May 2022, the Court entered an order establishing a briefing format and schedule.

STANDARD OF REVIEW

Under the APA, a “reviewing court shall . . . hold unlawful and set aside” an agency action found to be contrary to law or arbitrary and capricious. 5 U.S.C. § 706(2)(A). A rule is arbitrary and capricious if the agency fails to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quotations and citation omitted). A petitioner may challenge an agency’s environmental justice analysis as arbitrary and capricious under the APA. See *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021); *Cmtys Against Runway Expansion v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).

To interpret statutory provisions, a court applies traditional tools of statutory construction to discern whether Congress has spoken directly to the question at issue. *Merck & Co., Inc. v. United States Dep't of Health & Human Servs.*, 962 F.3d 531, 535 (D.C. Cir. 2020). If “Congress

has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *New York v. EPA*, 443 F.3d 880, 884 (D.C. Cir. 2006) (citation and quotation marks omitted).

SUMMARY OF ARGUMENT

I. The Safe Drinking Water Act’s anti-backsliding provision, 42 U.S.C. § 300g-1(b)(9), requires that each revision to the Lead and Copper Rule “maintain, or provide greater, health protection of persons.” Lead service line replacement is essential to protecting public health from lead in drinking water. Accordingly, EPA’s revisions to preexisting lead service line replacement requirements may not reduce the health protections that those requirements provided.

But the Rule’s lead service line replacement provisions unlawfully allow backsliding in two ways. First, the Rule eliminates the 1991 Rule’s mandate that small water systems replace their lead service lines when the water in their systems exceeds the lead action level. Small systems may now choose options that mitigate—but do not remove—the threat. Even small systems that choose replacement are no longer required—as

under the 1991 Rule—to use corrosion control treatment until line replacement occurs.

Second, for larger water systems that exceed the lead action level, the Rule reduces the annual mandatory minimum rate of lead service line replacement from 7% to 3% of the system's total lead service lines. EPA's assertion that the anti-backsliding analysis should be based on the implementation of the Rule as a whole contravenes the plain language of the anti-backsliding provision, which requires "each" revision to maintain or enhance health protections. *See* 42 U.S.C. § 300g-1(b)(9). Moreover, EPA's argument that the Rule's lead service line replacement provision itself is more protective is incorrect because it is based on unfounded assumptions about the degree of mandatory replacements larger systems will conduct under the respective rules.

Each of these revisions prolong human exposure to lead in drinking water compared to the 1991 Rule, and thus do not maintain or provide greater health protection—in violation of the anti-backsliding provision.

II. In violation of the APA, EPA failed to support its conclusion that the Rule will not disproportionately harm minority and low-income populations within the meaning of Executive Order 12,898. Replacement

of privately-owned portions of lead service lines under the Rule generally will be available only where the homeowner pays thousands of dollars to replace that portion of the line. But minority and low-income populations, who face greater lead exposure, are less likely to be able to pay for the replacement of privately-owned service lines and more likely to live in rental housing where the landlord refuses to pay for replacement of privately-owned service lines. EPA failed to explain how the Rule's lead service line replacement provision will not exacerbate these disparate impacts. And EPA failed to address viable alternatives that it could have used to address the disproportionate lead exposure that minority and low-income populations suffer.

STANDING

State Petitioners have Article III standing to challenge the Rule. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Rule will cause at least two types of injuries to State Petitioners, each of which is traceable to the Rule and would be redressed by vacatur of the challenged aspects of the Rule.

A. Proprietary Injury

First, the Rule will likely cause State Petitioners direct injuries to their proprietary interests. It is well established that States suffer an

injury sufficient to establish standing when they expend resources “to mitigate and recover from harms that could have been prevented” absent the challenged regulatory action. *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018) (“[T]here is no difficulty in recognizing [a state’s] standing to protect proprietary interests[.]” (quotation and citation omitted)).

Here, State Petitioners will bear increased costs to address the harms caused by lead in drinking water. As discussed in the Declaration of Jodi Feld, EPA’s failure to make the Rule sufficiently protective will result in State Petitioners incurring financial costs to address harms from our residents’ continued exposure to lead in drinking water. These include increased costs for medical treatment (Medicaid) and special education programming for children who suffer from high lead levels. *See* Feld Decl., ¶¶ 16-32. In addition, states and local governments incur costs when they are forced to respond to crises caused by lead contamination in drinking water from lead service lines. *Id.*, ¶¶ 33-35. Vacating the challenged provisions would reinstate the 1991 Rule’s more protective lead service line provisions, which would in turn decrease lead exposure harms and these attendant costs.

B. Injury to Quasi-Sovereign Interests

Second, EPA's decision to weaken the Lead and Copper Rule will also result in concrete harms to the health and safety of our residents who drink water delivered by lead service lines. There are estimated to be hundreds of thousands of lead service lines in our States from which lead can leach into the drinking water supply. *See* 86 Fed. Reg. at 4,199. Given that no amount of lead is safe for consumption, lead in drinking water will likely harm the health and safety of our residents. 86 Fed. Reg. at 4,208. Vacating the challenged provisions of the Rule would reinstate the more protective provisions of the 1991 Rule, decreasing lead exposure harms. State Petitioners have standing to assert their quasi-sovereign interests in protecting their residents and their environments from such harms. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 519-21 (2007); *Hanford Challenge v. Moniz*, 218 F. Supp.3d 1171, 1182 (E.D. Wash. 2016).

ARGUMENT

I. EPA VIOLATED THE ANTI-BACKSLIDING PROVISION OF THE SAFE DRINKING WATER ACT

A. The Rule's Lead Service Line Replacement Regulations Violate the Statute's Anti-Backsliding Provision.

Under the Act's anti-backsliding provision, “[a]ny revision of a national primary drinking water regulation shall be promulgated in accordance with this section, except that each revision shall maintain, or provide greater, protection of the health of persons.” 42 U.S.C. § 300g-1(b)(9). This provision prohibits EPA from rolling back any of its preexisting regulatory protections for primary drinking water. *See City of Waukesha*, 320 F.3d at 232. Here, EPA violated the anti-backsliding provision by instituting revisions to the lead service line replacement requirements that substantially reduce the health protections provided by the 1991 Rule's lead service line replacement requirements.

1. The Elimination of a Lead Replacement Requirement for Small Water Systems Fails to Maintain or Improve Health Protections.

EPA violated the statute's anti-backsliding provision by effectively eliminating mandatory lead service line replacement for small public drinking water supply systems. Under the 1991 Rule, water systems

serving fewer than 10,000 customers were required to replace at least 7% of the total number of their lead service lines each year if their water exceeded an action level of 15 µg/L. 56 Fed. Reg. at 26,552 (former 40 C.F.R. § 141.84(b) (1991)). But the Rule eliminated this replacement requirement by adding a “small system flexibility” provision, 40 C.F.R. § 141.93. Now, small water systems can choose not to replace *any* of their lead service lines even if their water continues to contain amounts of lead that exceed EPA’s action level. 86 Fed. Reg. at 4,204. Reducing the annual replacement rate from 7% to 0% plainly does not maintain or enhance the health protections that were provided by the previous rule’s mandatory lead service line replacement requirement.

Rather than maintain or enhance the 1991 Rule’s mandatory replacement requirement, the Rule allows small water systems that exceed the action level to instead choose other approaches, including corrosion control treatment or point-of-use devices (filters). 40 C.F.R. § 141.93(a)(2), (3). But EPA did not demonstrate that these choices are adequate substitutes for lead service line replacement. To the contrary, corrosion control treatment and point-of-use devices do not permanently remove the risk of lead entering the drinking water supply. And despite

indicating that replacements would still occur, EPA offered no evidence that small water systems would voluntarily choose to replace lead service lines—let alone that they would do so at the same annual rate that was required under the 1991 Rule. Indeed, EPA’s revisions are intended to provide small water systems with “flexibility” *not* to conduct lead service line replacement. 86 Fed. Reg. at 4,270. Although small water system compliance choices are subject to state agency approval, the extent of state discretion is unclear in the Rule and, in any event, is not the equivalent of federally-mandated lead service line replacement for purposes of the backsliding analysis.

Furthermore, the Rule is less protective even if a small water system voluntarily elects to conduct lead service line replacement. Under the 1991 Rule, a water system that continued to exceed the action level was *required* to maintain corrosion control treatment while conducting lead service line replacement. 56 Fed. Reg. at 26,478. But now the small water system can forgo corrosion control despite continuing to exceed the action level—while taking up to 15 years to replace its lead service lines, 86 Fed. Reg. at 4,308. This lack of corrosion control could cause lead levels to increase dramatically during the many years it takes for lead service

lines to be replaced. (JA___).²² By turning mandates from the 1991 Rule into a suite of options for small water systems in the Rule, EPA violated the Act's anti-backsliding provision.

2. The Reduction of the Mandatory Replacement Rate from 7% to 3% Also Violates the Anti-Backsliding Provision.

EPA further violated the statute's anti-backsliding provision by reducing the mandatory lead service line replacement rate that applies to larger community water systems. Under the 1991 Rule, larger systems that exceeded the action level of 15 µg/L were required to replace 7% of the lead service lines in their systems each year. 56 Fed. Reg. at 26,507. But the Rule reduces that annual rate from 7% to 3%. *See* 86 Fed. Reg. at 4,203; 40 C.F.R. § 141.84(g). This reduction unlawfully decreases the health protections provided because the lower mandatory replacement rate means that systems can replace fewer lead service lines each year—thereby allowing more lead pipes to remain in place and endanger human health. Indeed, EPA acknowledged in the proposed rule that the 3% replacement rate for water systems required to conduct lead service line replacement would extend the time for replacement from 15 years under

²² American Water Comment, EPA-HQ-OW-2017-0300-1139 at 19.

the 1991 Rule to “approximately 33 years of exceeding the action level.” 84 Fed. Reg. at 61,699; *see* 56 Fed. Reg. at 26,508.

The improper backsliding effect of the Rule’s lower replacement rate is also demonstrated by the stark contrast between the number of lead service lines predicted to be removed under the 1991 Rule and the number of lines predicted to be removed under the Rule. EPA estimated that under the 1991 Rule, water systems would replace approximately 2.7 to 4.5 million lead service lines out of an estimated total of 10.3 million lead service lines during a 15-year period. (JA___).²³ That reduction represented a roughly 26 to 43% decrease in the total number of lead service lines nationally. By contrast, under the Rule, EPA projects that systems will replace approximately 339,000 to 555,000 lead service lines out of an estimated total of 6.3 to 9.3 million lead service lines—only about 5% of the total number of lead service lines nationally—over a 35-year period. (JA___).²⁴ The lead service line replacement revisions

²³ 1991 Regulatory Impact Analysis, EPA-HQ-OW-2017-0300-0193 at 4-30. The total number of lead service lines (10.3 million) was calculated by multiplying the number of systems with lead pipes by the number of connections per system, and then adding the product for each system size category. *Id.* at 4-28, Exhibits 4-5 and 4-6.

²⁴ Economic Analysis, EPA-HQ-OW-2017-0300-1768 at C-1.

violate the anti-backsliding provision by prolonging human exposure to lead in drinking water compared to the 1991 Rule.

B. EPA Has Not Demonstrated that the Rule's Lead Service Line Replacement Revisions Maintain or Provide for Greater Protection of Public Health.

There is no merit to EPA's assertion that the Rule's lead service line replacement requirements comport with the Act's anti-backsliding provision. According to EPA, the backsliding analysis for a treatment technique rule, as opposed to a maximum contaminant level, should be based on an assessment of the health protections that result from the rule "as a whole, rather than a comparison of the numerical benchmarks within the treatment technique rule." *See* 86 Fed. Reg. at 4,216. The agency contends that, in any event, the Rule "results in a greater rate of removal" of lead service lines. *Id.* Both arguments are erroneous.

First, the anti-backsliding provision precludes EPA from using other parts of the Rule to justify the revisions that plainly reduce health protections for drinking water. EPA attempts to argue against backsliding concerning the 7% to 3% mandatory reduction for larger systems by, for example, pointing to the Rule's public education provisions concerning lead risks. *See* 86 Fed. Reg. at 4,217; *see also*

(JA___).²⁵ But under the plain language of the Act, the anti-backsliding provision applies to *each separate revision* contained in the Rule, including each revision to the lead service line replacement requirements. 42 U.S.C. § 300g-1(b)(9). Indeed, EPA acknowledges that removal of lead service lines is essential to protecting public health from the dangers of lead in drinking water, and the replacement requirements thus cannot be eliminated or reduced without running afoul of the anti-backsliding provision. *See* 56 Fed. Reg. 26,507; (JA___);²⁶ (JA___).²⁷

The anti-backsliding provision’s standalone application to the lead service line replacement requirements is clear from the Act’s ordinary meaning, which applies the anti-backsliding rule to “*each* revision.” 42 U.S.C. § 300g-1(b)(9). The term “each” means that every individual item in a group—here, every revision within the Rule—is to be regarded or treated separately. *See* “Each,” Oxford English Dictionary, <https://www.oed.com/view/Entry/58924> (“each” is “[u]sed to give the same

²⁵ Response to Comments, EPA-HQ-OW-2017-0300-1622 at 204 (citing the Rule’s lead service line inventory, tap water sampling, and public notification provisions in response to argument that small system flexibility regulation was backsliding).

²⁶ EPA Strategies to Achieve Full Lead Service Line Replacement, EPA-HQ-OW-2017-0300-0010 at 4.

²⁷ Natural Resources Defense Council Comment Letter, EPA-HQ-OW-2017-0300-1546 at 11.

sense in relation to individual members of an identifiable set”). Moreover, the anti-backsliding provision’s application to “[a]ny revision” further connotes a broad meaning that includes every revision contained in the Rule. *See New York*, 443 F.3d at 884-85 (“read naturally, the word ‘any’ has an expansive meaning, that is ‘one or some indiscriminately of whatever kind’” (additional quotations and citation omitted)). And nothing in the statute’s anti-backsliding provision differentiates between maximum contaminant levels and treatment techniques, let alone suggests that the anti-backsliding analysis for treatment-technique rules is based on the “whole rule” rather than each revision.

Interpreting the Act’s anti-backsliding mandate to require that each revision maintain or enhance health protections accords with this Court’s precedent construing anti-backsliding provisions in other environmental statutes. For example, in *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006), the Court determined that EPA’s revocation of control requirements implementing its previous ozone standard violated the Clean Air Act’s anti-backsliding provision, 42 U.S.C. § 7502(e). Although it was undisputed that the new 8-hour ozone standard was more protective overall than the previous 1-hour

standard, the Court concluded that EPA could not repeal the previous standard's control requirements (such as mandatory penalties for failing to attain the previous 1-hour standard) given the anti-backsliding language requiring "controls which are not less stringent" than under the prior rule. *See id.* at 900-05. *South Coast's* strict approach to protecting public health by prohibiting backsliding should similarly apply here, particularly given the expansive wording in the Act's anti-backsliding mandate discussed above. *See also NRDC v. EPA*, 643 F.3d 311, 322 (D.C. Cir. 2011) (Clean Air Act anti-backsliding is "one-way ratchet" that requires attainment of controls "EPA has subsequently replaced").

The practical implications of EPA's "whole rule" theory further demonstrate that it conflicts with the anti-backsliding mandate. Under EPA's view, it may reduce the concrete and permanent health protections that result from lead service line replacement so long as it simultaneously enhances some other part of the Lead and Copper Rule, such as requirements regarding public education, corrosion control, or additional water monitoring—even when such other requirements provide only temporary or aspirational protections against lead leaching into drinking water. It is not plausible that Congress intended to allow

EPA to weaken a critical health-protecting component of a primary drinking water regulation by pointing to other changes.

Second, when compared to the 1991 Rule’s lead service line replacement requirements, the Rule’s replacement provisions violate the anti-backsliding mandate. As discussed above, Point I.A.2, *supra*, the Rule lengthens the time period for replacement and reduces the number of lines replaced compared to the 1991 Rule. EPA’s arguments to the contrary are wrong.

For example, EPA overstates the number of lead service lines that will be replaced under the Rule. Although EPA estimates that the Rule will result in the replacement of 339,000 to 555,000 lead service lines nationwide, a majority of those replacements—46% to 59% of the total number of lines—are based on EPA’s unfounded assumptions about *voluntary* replacements. (JA___).²⁸ Specifically, EPA assumes that 105,838 to 138,923 lead service lines, or 25% to 31% of the total number of lines EPA estimates will be replaced under the Rule, will be replaced under a “goal-based” program for medium and larger water systems that

²⁸ Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at C-1.

exceed a trigger level of 10 µg/L. (JA___).²⁹ Under this program, water systems exceeding a trigger level can comply with the Rule by setting their own aspirational goals for lead service line replacement with state approval. 86 Fed. Reg. at 4,200. There is no support for EPA’s assumption that these goal-based plans will lead to these levels of lead service line replacements given that systems are not required to meet any mandatory minimum lead service line replacement rate under their plans. *Id.*

EPA’s estimate of the number of replacements that will occur under the Rule is further overstated because it includes an assumption that 94,815 to 114,279 lead service lines (21% to 28% of the total lines EPA estimates will be replaced under the Rule), will come from “customer initiated” replacements. *Id.* The Rule provides that if a customer replaces the customer-owned portion of a lead service line, the water system must replace the water system-owned portion. 86 Fed. Reg. at 4,253. But EPA offers no support for its conclusion that approximately one quarter of customers will initiate replacement of their own lead service lines. In fact, and as discussed further in the next section, Point

²⁹ Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at C-1.

II.A, *infra*, EPA concludes that low-income populations, who are more likely to live in homes with lead service lines, may be less likely to undertake voluntary lead service line replacement due to limited access to information and inability to afford lead service line replacement. (JA___).³⁰

EPA's contention that the Rule will maintain or enhance health protections compared to the 1991 Rule is further undermined by EPA's understatement of the number of lead service lines that were required to be replaced under the 1991 Rule. EPA now assumes that the 1991 Rule's 7% replacement rate would have resulted in only 8,770 to 126,292 lead service lines being replaced over 35 years. (JA___).³¹ Contrary to that assumption, EPA previously estimated that the 1991 Rule would result in the replacement of approximately 2.7 to 4.5 million lead service lines. EPA does not provide any explanation for how it derived its drastically reduced estimate of only 8,770 to 126,292 lead service lines for purposes of the Rule. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) ("Agencies always bear the 'affirmative burden' of

³⁰ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 15.

³¹ *Id.* at C-1.

‘examin[ing] a key assumption’ when ‘promulgating and explaining a non-arbitrary, non-capricious rule.’” (citation omitted)).

EPA also overstates the health benefits that result from the Rule closing loopholes that existed in the 1991 Rule’s lead service replacement requirements. EPA notes that the Rule no longer allows water systems to comply with lead service replacement requirements by undertaking partial replacement of their lead service lines or by submitting lead test results below the action level.³² See 86 Fed. Reg. at 4,216-17. According to EPA, because these loopholes resulted in few water systems conducting lead service line replacement, closing those loopholes makes the Rule more health protective than the 1991 Rule. *Id.* at 4,216-17.

But EPA fails to grapple with the fact that water systems’ failure to achieve the 7% lead service line replacement rate was not necessarily caused by these loopholes but was instead likely driven by widespread violations of the 1991 Rule. A report published by the Natural Resources Defense Council, which analyzed data obtained from EPA’s Safe

³² “Partial lead service line replacement” means “replacement of any portion of a lead service line or galvanized service line requiring replacement . . . that leaves in service any length of lead service line or galvanized service line requiring replacement upon completion of the work.” 86 Fed. Reg. at 4,281. Partial lead service line replacements are permitted under certain circumstances but do not count towards the mandatory or goal-based lead service line replacement rate. *Id.*

Drinking Water Information System database, found that 5,363 community water systems across the United States had a total of 8,093 violations of the 1991 Rule in 2015 alone. (JA___).³³ These violations include failures to properly monitor, report, or treat water contaminated with lead. *Id.* Of the 5,363 community water systems with violations in 2015, 233 systems reported 303 health-based violations that affected nearly 600,000 people. *Id.* And 1,110 of the community water systems—serving approximately 3.9 million people across the country—had water lead levels exceeding EPA’s 15 µg/L action level. *Id.* There is no reason to believe that there would not be similar violations under the new Rule. Thus, EPA’s closing of certain loopholes does not justify the Rule’s significant reduction in the percentage of lead service lines that must be replaced.

Finally, in addition to the anti-backsliding provision, the Act provides that a treatment technique approach must protect the public from exposure to lead in drinking water to the maximum extent feasible. 42 U.S.C. § 300g-1(b)(7)(A). State Petitioners incorporate by reference the Community Petitioners’ arguments in their opening brief, which

³³ Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 3.

demonstrate that the Rule arbitrarily fails to prevent adverse health effects to the extent feasible, as required by the Act.

II. EPA ACTED ARBITRARILY AND CAPRICIOUSLY IN CONCLUDING THAT THE RULE WILL NOT DISPROPORTIONATELY HARM MINORITY AND LOW-INCOME POPULATIONS.

Under Executive Order 12,898, EPA must advance environmental justice by both “identifying” and “addressing” disproportionately high and adverse health or environmental effects of its programs, policies, and activities on minority and low-income populations. 59 Fed. Reg. at 7,629; 86 Fed. Reg. at 4,276. Here, EPA failed to adequately identify *or* address the disproportionate harms the Rule will impose on minority and low-income populations. EPA’s conclusion that the Rule does not have such disproportionate effects was arbitrary and capricious. *See Vecinos*, 6 F.4th at 1330 (agency’s failure to reasonably explain in its environmental justice analysis how pipeline project would not adversely affect communities outside two-mile radius of project was arbitrary and capricious).

A. EPA Failed to Provide a Rational Explanation for Its Conclusion.

First, EPA failed to adequately identify the disproportionate effects that the Rule imposes on minority and low-income individuals who face

greater lead exposure, but may not be able to afford replacement of a privately-owned lead service line, or live in rental housing where the landlord refuses to pay for such replacement. EPA has acknowledged that lead service line replacements are integral to protecting the public from lead in drinking water. *See, e.g.*, 56 Fed. Reg. at 26,507; (JA___).³⁴ But EPA’s environmental justice analysis does not grapple with the fact that lead service line replacement of privately-owned lead service lines is generally available only to homeowners who pay, or renters whose landlords pay, thousands of dollars to replace the privately-owned portion of the lead service line.

For example, EPA recognizes in passing that the Rule’s reliance on “household-level changes that depend on ability-to-pay will leave low-income households with disproportionately higher health risk” because lead service line replacement may not be affordable for low-income households. 86 Fed. Reg. at 4,276; (JA___).³⁵ But EPA never evaluated the nature or extent of this anticipated disparity in the Rule’s health

³⁴ EPA Strategies to Achieve Full Lead Service Line Replacement, EPA-HQ-OW-2017-0300-0010 at 4.

³⁵ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 14, Exhibit ES-1, Exhibit 4-1.

effects on these populations. *See Vecinos*, 6 F.4th at 1330-31 (“[w]hen conducting an environmental justice analysis, an agency’s delineation of the area potentially affected by the project must be ‘reasonable and adequately explained,’ and include ‘a rational connection between the facts found and the decision made’” (citations omitted)).

Indeed, EPA failed to determine the number of minority and low-income households that may be unable to afford lead service line replacements under the Rule. Nor did EPA estimate the number of minority and low-income individuals who are renters and whose landlords are likely to refuse to pay for lead service line replacements, even though EPA was made aware of and previously acknowledged the significance of these issues. *See* (JA___);³⁶ (JA___);³⁷ (JA___).³⁸ And EPA failed to quantify the adverse health effects on minority and low-income households from their disproportionate inability to afford or access lead service line replacement, taking into consideration their pre-existing disparities in lead exposure.

³⁶ Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 11-13.

³⁷ EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

³⁸ Lead and Copper Rule Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

Second, EPA failed to adequately address—by considering measures to minimize, mitigate, or avoid—the disproportionate effects that the Rule imposes on minority and low-income individuals who may not be able to afford lead service line replacement, or who live in rental housing where the landlord refuses to pay for lead service line replacement. (JA___);³⁹ (JA___);⁴⁰ (JA___);⁴¹ (JA___).⁴² The importance of mitigation measures has been widely recognized by other agencies. *See, e.g.,* FEMA, *Executive Order 12,898: Environmental Justice*, <https://www.fema.gov/fact-sheet/executive-order-12898-environmental-justice> (“If FEMA determines that the proposed project could cause disproportionately high and adverse effects for low-income or minority populations, FEMA must consider measures to minimize, mitigate, or avoid those impacts.”); U.S. Dep’t of Transp., *Environmental Justice Strategy*, <https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy> (Executive

³⁹ Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 11-13.

⁴⁰ Environmental Defense Fund Comment Letter, EPA-HQ-OW-2017-0300-1084 at 18-21.

⁴¹ EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

⁴² Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

Order 12,898 requires the department “[t]o avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations”); Council on Environmental Quality, *Environmental Justice: Guidance under the National Environmental Policy Act*, at 16 (1997), https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf (“Throughout the process of public participation, agencies should elicit the views of the affected populations on measures to mitigate a disproportionately high and adverse human health or environmental effect” on minority and low-income populations and “should carefully consider community views in developing and implementing mitigation strategies.”). Indeed EPA recognized that addressing these disproportionate effects was critical to the success of a revised Lead and Copper Rule. (JA___);⁴³ (JA___);⁴⁴(JA___).⁴⁵

⁴³ Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 11-13.

⁴⁴ EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

⁴⁵ Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

EPA's assertion that any disparate impacts on minority and low-income populations will be addressed by other elements of the Rule (such as corrosion control treatment and point of use filters) is not supported by the rulemaking record. *See* Point I.B, *supra*. Leaving lead service lines in place creates risk that lead can leach from pipes in the future. (JA___).⁴⁶ Corrosion control treatment and point of use filters do not eliminate the risk of lead in drinking water and are only a stopgap to lead service line replacement. *Id.* Moreover, EPA's assertion is undermined by its recognition that blood lead levels "will remain slightly higher for customers who have partial or full [lead service lines] compared to customers who do not have a [lead service line]." *Id.*

EPA's assertion that federal and state programs may be used to fund lead service line replacement programs, including the cost of lead service line replacement for customer-owned portion of lead service lines, also fails to satisfy its responsibility to address the disparities that minority and low-income populations face in accessing lead service line replacement. *See* 86 Fed. Reg. at 4,276. EPA has not adequately explained how these programs will minimize, mitigate, or avoid the

⁴⁶ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 19.

disparate impacts on minority and low-income populations who cannot afford lead service line replacement or live in rental housing where the landlord refuses to replace lead service lines. Indeed, EPA failed to explain how minority and low-income populations will be able to access these funding programs, including whether these populations have the experience and capacity to develop competitive funding applications (JA___),⁴⁷ and whether these programs are available to renters.

Furthermore, EPA's addition of a requirement for water systems to describe in their lead service line replacement plan how they intend to accommodate customers that want lead service line replacement but are unable to pay for it does not fulfill EPA's affirmative obligation under Executive Order 12,898 to take measures to address the disproportionate effects that the Rule imposes on minority and low-income individuals. (JA___).⁴⁸ This provision is aspirational. There is no assurance that water systems will in fact accommodate customers who are unable to pay for replacement.

⁴⁷ Green & Healthy Homes Initiative Comment Letter, EPA-HQ-OW-2017-0300-1400 at 6-7.

⁴⁸ Response to Comments, EPA-HQ-OW-2017-0300-1622 at 463.

B. EPA Failed to Consider Viable Alternatives to Address the Rule's Disproportionate Effects on Minority and Low-Income Populations.

EPA also acted arbitrarily and capriciously by not providing a reasonable explanation for its failure to consider viable alternatives that would address the Rule's disproportionately high and adverse effects on minority and low-income populations. *State Farm*, 463 U.S. at 43; *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (agency must consider and explain its rejection of reasonably available alternatives). For example, EPA could have secured the "meaningful involvement" of potentially affected minority or low-income populations—involvement that the agency has stated is a key aspect of EPA's environmental justice definition. (JA___).⁴⁹ But EPA held no public meetings about the Rule between its proposal and promulgation. Nor did EPA meet during this period with populations that are disproportionately harmed by lead exposure.

EPA further failed to explain why the Rule does not prioritize lead service line replacement in neighborhoods at higher risk of lead poisoning. The Lead and Copper Rule Working Group to the National

⁴⁹ Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 1.

Drinking Water Advisory Council, for example, advised that “making environmental justice a priority can be achieved through . . . setting priorities for which neighborhoods are targeted first for [lead service line replacement] to ensure equal treatment of low income neighborhoods.” (JA___).⁵⁰ In addition, the Government Accountability Office determined that EPA could develop guidance about methods for identifying high-risk locations, and thus help public water systems test water samples from locations at greater risk of having lead service lines and identify areas with vulnerable populations. U.S. Government Accountability Office, *EPA Could Use Available Data to Better Identify Neighborhoods at Risk of Lead Exposure* (Dec. 2020), <https://www.gao.gov/products/gao-21-78>. EPA’s failure to address these methods for focusing lead service line replacement efforts on populations disproportionately affected by lead in drinking water was arbitrary and capricious. *See Public Citizen v. Steed*, 733 F.2d 93, 103-05 (D.C. Cir. 1983) (finding agency’s suspension of

⁵⁰ Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18. The National Drinking Water Advisory Council unanimously endorsed the working group’s report in full. (JA___); National Drinking Water Advisory Council Letter to EPA, EPA-HQ-OW-2017-0300-0126 at 2.

program arbitrary and capricious where it failed to explain why available alternatives in the record were not pursued to address the problem).

EPA also could have required community water systems to demonstrate that their implementation of the Rule will not result in significant disproportionate impacts on minority and low-income residents. (JA___).⁵¹ For example, EPA could have required community water systems to prioritize minority and low-income populations for lead service line replacement or to offer incentives for property owners in those neighborhoods to replace the consumer-owned lead service lines. *Id.*

Finally, EPA could have improved access to the federal and state funding programs for minority and low-income populations, such as by helping these populations build their capacity to better compete for and access water infrastructure funding. Or EPA could have evaluated additional mechanisms to equitably fund lead service line replacement, including the use of ratepayer funds. *Id.* EPA's failure even to consider

⁵¹ Environmental Defense Fund Comment Letter, EPA-HQ-OW-2017-0300-1084 at 20.

these reasonable alternatives was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

CONCLUSION

For the reasons set forth above, the Petition should be granted, the challenged aspects of the Rule should be vacated, and the Rule should be remanded to the agency to revise its environmental justice analysis and promulgate a rule consistent with law.

Dated: New York, New York
August 8, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Sarah K. Kam, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing schedule order dated May 23, 2022. According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 8,983 words. Because Community Petitioners are filing an opening brief of less than 9,000 words, the combined word amount of the two briefs is less than 18,000 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

/s/ Sarah K. Kam

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CERTIFICATE OF SERVICE

I certify that on August 8, 2022, the foregoing Initial Opening Brief of State Petitioners was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

/s/ Sarah K. Kam

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