U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

February 5, 2024

VIA ELECTRONIC SUBMISSION

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

Re: National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI), Docket No. EPA-HQ-OW-2022-0801.

Dear Administrator Regan:

On December 6, 2023, the U.S. Environmental Protection Agency (EPA) published a proposed rule entitled National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI).[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

The Office of Advocacy is concerned about the costs the proposed rule will impose on both small water systems and other small entities. Additionally, the rule does not allow small entities enough time to comply with its requirements. Finally, the costs of the rule may be passed on to ratepayers, including those from disadvantaged communities who will be least able to absorb the increased financial burden.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

[1] 88 Fed. Reg. 84878 (Dec. 6, 2023).

The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[4] Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.[5] The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.[6] If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.[7] The agency must provide a statement of factual basis that adequately supports its certification.[8]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[9] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[10]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[11]

B. The Proposed Rule

The proposed rule revises the National Primary Drinking Water Regulation (NPDWR) for lead and copper under the Safe Drinking Water Act (SDWA). Specifically, it requires water systems to replace lead service lines (LSL) within 10 years, remove the lead trigger level, reduce the lead action level to 0.010 mg/L, and strengthen tap sampling procedures. The proposed rule also addresses the following areas: corrosion control treatment, public education and consumer awareness, requirements for small systems, and sampling in schools and childcare facilities. Additionally, the EPA aims to address potential disproportionate impacts of lead in drinking water in communities through proposed lead service line replacement and public education.

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[2] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[3] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[4] 5 U.S.C. § 603.
[5] *Id.* § 609.
[6] *Id.*
[7] *Id.* § 605(b).
[8] *Id.*
[9] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[10] *Id.*
[11] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

The EPA convened a Small Business Advocacy Review (SBAR) Panel to obtain advice and recommendations from small entity representatives (SERs) that would be subject to the rule's requirements.[12]

II. Advocacy's Small Business Concerns

Advocacy held a roundtable to discuss the proposed rule on January 9, 2024, with presentations from the EPA and the American Water Works Association (AWWA). Additionally, Advocacy attended the EPA's January 16, 2024, virtual public hearing on the proposed LCRI. The proposed rule will impact small entities, including small water systems, as well as those who are served by them. Under the RFA, the EPA is required to minimize the impact of the LCRI on small entities.[13] TheEPA states the LCRI as written will have annual costs of more than one percent of revenue for between 81.4 and 82.8 percent of small community water systems (CWS).[14]

Additionally, small water systems face several challenges, as outlined by the Association of State Drinking Water Administrators (ASDWA), which will impact their ability to comply with the LCRI. These challenges include:

- A lack of capable full-time operators and reliance on volunteer board members from the community that have a limited understanding of how to run the water system and meet health-based standards and requirements.
- The inability to pay back loans, as small systems are often challenged by the lack of political support to take on loans. Small systems also often lack debt capacity to qualify for loans.
- Population decline and competing demands for basic community needs that rank higher than paying rates for drinking water.[15]

Advocacy is concerned about the lack of available federal funding for small water systems to comply with the proposed LCRI requirements. If sufficient federal funding is not available, the LCRI's costs could be passed down to disadvantaged communities and small entities who depend on the impacted small water systems. Advocacy is further concerned that the LCRI's proposed timeline of ten years for the replacement of all LSLs is unachievable for small water systems. Additionally, small entities have identified compliance issues with the LCRI, particularly in terms of gaining access to private homes and obtaining reliable water samples from the public.

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[12] U.S. ENV'T PROT. AGENCY, PANEL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PLANNED PROPOSED RULE LEAD AND COPPER RULE IMPROVEMENTS (LCRI) NATIONAL PRIMARY DRINKING WATER REGULATION 29 (May 31, 2023), https://www.epa.gov/system/files/documents/2023-12/lcri-sbar-panel-report-final-508.pdf.

[13] 5 U.S.C. § 603.

[14] 88 Fed. Reg. 85041 (Dec. 6, 2023).

[15] Association of State Drinking Water Administrators White Paper on "State Drinking Water Program Challenges and Best Practices: Small and Disadvantaged Water System Funding and Assistance" August 2022, p. 3-4. Available at: ASDWA-White-Paper-Small-and-Disadvantaged-Water-System-Funding-and-Assistance-FINAL-080822.pdf.

A. Small water systems lack the required funding to comply with the LCRI.

The EPA included both a low-cost and a high-cost scenario for total monetized annual costs to small systems. Under the low-cost scenario, the costs were between $490 and $554 million annually while the high-cost scenario showed costs between $666 and $757 million annually.[16] In consultations with small entities as well as during testimony at the EPA's January 16 virtual public hearing, concerns were expressed that actual costs of the rule may be greater than the EPA's estimates.

1. Federal funding sources cited by EPA will not be sufficient to cover the LCRI's costs.

The EPA has pointed to various sources of federal funding to help cover the cost of the proposed LCRI, including the Drinking Water State Revolving Fund (DWSRF), as well as the Bipartisan Infrastructure Law (BIL)/Infrastructure Investment and Jobs Act (IIJA).[17] However, at the January 9, 2024, Advocacy LCRI roundtable, concerns were expressed that these sources of funding would not be enough to cover the proposal's compliance costs. Similar concerns were echoed by small entity representatives during the SBAR panel process as well as at the EPA's January 16, 2024, virtual public hearing.

Specifically, the American Public Works Association (APWA) noted that existing federal funding sources are "insufficient" to meet the cost of the proposed LCRI. They cited factors such as inflation, rising cost projections, permitting delays, and added expenses from revised Davis-Bacon and Buy America regulations.[18] During the SBAR process, small entity representatives explained that if the EPA's replacement estimate of 10 million lead service lines is correct "and the average cost of replacement is $5,000 then replacing all lead service lines in the nation would total $50 billion-more than three times the IIJA funds allocated for lead service line identification and replacement."[19] An estimate of $12,000 per line was also quoted in the final SBAR report.[20] Additionally, at the EPA's January 16, 2024, virtual public hearing, numerous public sector representatives voiced concern about the availability of necessary funding to comply with the LCRI.

2. Small entities will encounter obstacles to accessing the federal funds which are available for LCRI compliance.

In addition to concerns about the overall amount of federal funding to assist with LCRI compliance, Advocacy is also concerned with the ability of small water systems to access these

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[16] 88 Fed. Reg. 85,041 (Dec. 6, 2023).
[17] Id. at 84,903-84,904.
[18] *See* Am. Pub. Works Ass'n, Comment Letter on Proposed Rule for National Primary Drinking Water Regulations for Lead and Copper Improvements (LCRI) (Jan. 9, 2024), https://www.regulations.gov/comment/EPA-HQ-OW-2022-0801-0735.
[19] *See* Am. Water Works Ass'n, *Comments to SBAR Panel National Primary Drinking Water Regulations for Lead and Copper Improvements (LCRI)*, B-13, https://downloads.regulations.gov/EPA-HQ-OW-2022-0801-0045/attachment_3.pdf (last visited Feb. 1, 2024).
[20] U.S. ENV'T PROT. AGENCY, PANEL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PLANNED PROPOSED RULE LEAD AND COPPER RULE IMPROVEMENTS (LCRI) NATIONAL PRIMARY DRINKING WATER REGULATION 28 (May 31, 2023), https://www.epa.gov/system/files/documents/2023-12/lcri-sbar-panel-report-final-508.pdf.

funds. Small water systems do not have large staffs and often do not have personnel dedicated to grant applications or federal funding issues. Hiring someone to help in these areas is an additional expense which small systems often are unable to afford. As one SER noted during the SBAR panel, small systems needing funding often "have only 2 employees, one inside city hall and one outside city hall."[21]

EPA also points to DWSRF to help water systems implement the LCRI.[22] ASDWA has asserted that small systems often times cannot access these funds: "[t]he total amount of the DWSRF used by the smallest public water systems (PWSs) serving populations of less than 10,001 over the past 25 years is significantly less in percentages and dollars than the amount used by PWSs serving larger populations. In addition, more than 80% of the PWSs in the U.S. serve populations of less than 501 people and have used less than 4% of the total DWSRF assistance over the past 25 years."[23] Thus, the majority of DWSRF funds have traditionally not been reaching small systems and cannot be relied upon for assisting with LCRI compliance.

3. The federal funds cited by the EPA are needed not only for LCRI compliance, but also for compliance with multiple upcoming EPA regulations impacting small water systems.

Many of the funding sources cited by the EPA are not exclusively for LCRI compliance, but for water infrastructure needs in general including maintenance, capital costs, and compliance with existing regulatory requirements. At the same time the EPA is promulgating the LCRI, the agency is also working multiple other regulations which will have financial impacts on these same water systems. These include drinking water standards for per-and polyfluoroalkyl substances in drinking water (PFAS)[24] and designation of PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[25]

Small systems will be impacted by both proposed regulations. They will need to monitor and comply with upcoming PFAS drinking water standards and could be exposed to liability if PFAS is designated as a hazardous substance under CERCLA. To fulfill their obligations under these regulations, small systems will need to utilize the same funding sources EPA is directing them towards for LCRI compliance. Advocacy is concerned the funds will not be enough to help small systems comply with just the LCRI. When these other forthcoming regulations are considered, small systems will face even greater financial obligations.

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[21] *See* Kan. Rural Water Ass'n, *Comments to SBAR Panel National Primary Drinking Water Regulations for Lead and Copper Improvements (LCRI)*, B-5, https://downloads.regulations.gov/EPA-HQ-OW-2022-0801-0045/attachment_3.pdf (last visited Feb. 1, 2024).
[22] 88 Fed. Reg. 84,903-04 (Dec. 6, 2023).
[23] Ass'n of State Drinking Water Adm'r, *State Drinking Water Program Challenges and Best Practices: Small and Disadvantaged Water System Funding and Assistance*, 6 (Aug. 2022), https://www.asdwa.org/wp-content/uploads/2022/08/ASDWA-White-Paper-Small-and-Disadvantaged-Water-System-Funding-and-Assistance-FINAL-080822.pdf.
[24] 88 Fed. Reg. 18,638 (Mar. 29, 2023).
[25] 87 Fed. Reg. 54,415 (Sept. 6, 2022).

4. When small systems do not have adequate funds to meet regulatory obligations, costs will be passed on to the communities they serve.

A recurring theme at the EPA's January 16, 2024, virtual public hearing was a desire by many parties to have water systems pay for expenses associated with the LCRI and not pass those increased costs to individual ratepayers. However, representatives from the state and local levels testified that this was simply not possible. If water systems, regardless of their size, do not have the money to comply with the LCRI, the burden will have to be passed on to the communities in which they operate. During its environmental justice analysis, the EPA properly focused on the exposure of disadvantaged communities to lead in drinking water. The agency did not, however, consider the ability of these disadvantaged communities, many of whom are served by small water systems, to absorb the expense they will have to endure to comply with the LCRI.

The Illinois Municipal League illustrated this problem, noting "[c]urrent funding sources for CWS rely largely on loans that will have to be repaid in some form. In order to ensure CWS are able to afford the cost of replacing lead service lines, direct grants must be provided as the primary funding source. Inadequate funding coupled with the accelerated timeline in the proposed LCRI will force CWS to pass the costs of lead service line replacement to local residents."[26]

This burden will be exacerbated in areas served by small water systems. Small water systems generally serve areas with fewer people spread over a larger distance. Individuals in these areas will face larger rate increases to pay for LCRI compliance because there will be fewer ratepayers on which to spread the impact. As noted by the National Conference of State Legislators, "[b]ecause small systems have comparably fewer ratepayers, rates for some small, disadvantaged communities often exceed levels considered affordable."[27]

Advocacy recommends the EPA revise its cost estimates for the LCRI to account for the aforementioned concerns voiced by small water systems and others impacted by this regulation. Additionally, the agency should further analyze the availability of funding to small entities in light not only of the LCRI's requirements but also those of forthcoming regulations which will require small systems to draw on the same funding sources. The EPA should also revise its environmental justice analysis to include the impacts of any rate increases cause by the proposed LCRI on disadvantaged communities.

B. The LCRI's 10-year replacement deadline is not realistic for small water systems.

The LCRI requires "100% lead pipe replacement within 10 years."[28] This timeline will be very difficult for small systems to meet. The state of Illinois, which is already implementing an aggressive program to replace LSLs, stated during the EPA's January 16 virtual public hearing,

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[26] *See* Ill. Mun. League, Comment Letter on Proposed Rule on National Primary Drinking Water Regulations for Lead and Copper Improvements (LCRI), 2 (Dec. 15, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2022-0801-0719.

[27] *See* Nat'l Conf. of State Legislatures, *State Policy Options for Small and Rural Wayer Systems* (Nov. 23, 2022), https://www.ncsl.org/environment-and-natural-resources/state-policy-options-for-small-and-rural-water-systems.

[28] See U.S. ENV'L PROT. AGENCY, FACT SHEET: EPA'S PROPOSED LEAD AND COPPER RULE IMPROVEMENTS 1, (Nov. 2023), https://www.epa.gov/system/files/documents/2023-11/lcri-fact-sheet-for-the-public_final.pdf.

that the LCRI's 10-year deadline is "impossible." The Illinois Municipal League further described the LCRI's timeline as "unrealistic and not feasible, not to mention likely impossible given the lack of skilled labor to complete the necessary work within such a short timeframe."[29]

The LCRI's timeline unrealistic and counter-productive to existing LSL replacement efforts. The State of Illinois has already begun a program to replace LSLs with realistic deadlines of 2042 at the earliest and 2077 at the latest.[30] As explained by the Illinois Municipal League: "[t]he 10-year timeline in the proposed LCRI will only exacerbate funding shortfall issues CWS face in Illinois as they begin the process of lead service line replacement… Inadequate funding coupled with the accelerated timeline in the proposed LCRI will force CWS to pass the costs of lead service line replacement to local residents. As a result, the proposed LCRI would have a severely negative impact on every community in Illinois and every taxpayer."[31]

Under the RFA, the EPA is required to examine whether alternative timetables or requirements would be appropriate to help small systems comply with the LCRI.[32] If states with existing LSL replacement programs are not able to meet the LCRI's deadlines, small systems cannot be expected to fare any better. Advocacy recommends EPA revise and extend the deadlines in the LCRI to allow small systems more time to comply with its requirements.

C. Small systems will experience compliance issues when implementing the LCRI.

In addition to funding and timing issues, small systems have voiced concern to Advocacy on multiple other aspects of LCRI compliance. Small entities were particularly concerned with replacing LSLs on private property. Specifically, difficulties were anticipated in gaining access to private residences to complete LSL replacements. This is especially true in rural areas where one small system can serve homes spread out over a large geographic area.

Small entities also expressed concern with the LCRI's change in sampling procedures from first-liter sampling to first-and-fifth liter sampling. During the SBAR panel, one of the participants described existing difficulties in obtaining compliance with present first-liter requirements. Adding a fifth liter requirement will make public compliance more complex and expensive as well as lead to less reliable results from individuals who are confused by the new process.

Advocacy recommends the EPA work with small entities to ensure they have access to both the resources and personnel necessary to overcome compliance issues with new LCRI requirements.

III. Conclusion

Advocacy is concerned with the availability of funding necessary to meet the LCRI's compliance and that the proposed rule's 10-year timeline will be impossible for small systems to meet. Advocacy is additionally concerned with the ability of small entities to comply with multiple aspects of the LCRI. Advocacy recommends that reasonable alternatives be designed to lessen

[29] *See* Illinois Mun. League, *supra* note 24, at 2.
[30] *Id.* at 1.
[31] *Id.* at 2.
[32] 5 U.S.C. § 603.

the impact on small entities with particular attention to the needs of small water systems, both from a financial and a compliance point of view.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or by email at nick.goldstein@sba.gov.

Sincerely,

/s/
Major L. Clark, III
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/s/
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Copy to: The Honorable Richard L. Revesz, Administrator
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