

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

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NEWBURGH CLEAN WATER PROJECT, et al.,  
*Petitioners,*

v.

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

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**DECLARATION OF RADHIKA FOX**

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

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

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

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

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

5. On January 20, 2021, President Biden issued the "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." (86 Fed. Reg. 7,037, Jan. 25, 2021) ("Executive Order 13990"). Section 1 of Executive Order 13990 states that it is "the policy of the Administration to listen to the science, to improve public health and protect our environment, to ensure access to clean air and water, . . . and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." Executive Order 13990 directed the heads of all Federal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: December 08, 2022



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Radhika Fox  
Assistant Administrator  
Office of Water  
U.S. Environmental Protection Agency