



**COMMENTS REGARDING FEDERALISM CONSULTATION
IN ANTICIPATION OF
PROPOSED RULE TO REVISE EXISTING 1991 LEAD AND COPPER
DOCKET NO. EPA-HQ-OW-2018-007
U. S. ENVIRONMENTAL PROTECTION AGENCY**

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Submitted by

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Introduction

U. S. EPA (EPA or Agency) has announced its plans to revise the 1991 Lead and Copper Rule (LCR) under the Safe Drinking Water Act. The EPA's plan to revise the 1991 Lead and Copper Rule (LCR) makes eminent good sense to protect public health.

These comments respond to the solicitation for comment regarding the Federalism issues, Unfunded Mandates Reform Act (UMRA), and Executive Order 13132¹ entitled "Federalism." That Executive Order is clear about regulatory impacts and costs on local government should be seriously considered when any agency proposes or revises regulations. The Executive Order also mandates early recognition of state and local government impacts and costs as well as outreach to those entities² before a rule is proposed. EPA's outreach meeting and solicitation of comments is to be commended for its outreach. However, it is not clear that, based upon the December 14, 2017 invitation letter (and solicitation for comments by March 8, 2018), that EPA has contemplated outreach to all appropriate state and local governmental organizations.

Logistics/Planning for City Government Affects Unfunded Mandate Costs

A proposed rule addressing local private and public water systems that provide drinking water to 300 million homes is inherently wide reaching and might have indirect impacts on many planned maintenance obligations under other regulations or industry standards. Further, a final rule could have negative implications on the city's tax base and even home values. These comments attempt to "cross walk" many local governmental obligations for repair and maintenance under several regulatory agencies. EPA should consider these issues in its proposed rule expected in late 2018. Without realizing the depth and scope of many other similar regulations for local government (city and county or other special jurisdictional districts), EPA cannot adequately assess Unfunded Mandates, costs to the taxpayers and consumers of drinking water provided by municipal and private water systems. *These comments attempt to address local government-owned water utility concerns—though they do not attempt to treat public water systems differently than private water systems or utilities.*

In addition, these comments request consideration under President Trump's Executive Order 13897 (pertaining to infrastructure projects) and 13771 (to address reducing regulatory costs). These comments focus primarily on lead issues. Commenter defers to American Water Works Association (AWWA) on copper corrosion issues and human health protection issues.

This rule should be considered a major rule by Office of Management and Budget (OMB) because of the direct impact on human health and the capital and continuing operational costs to municipal and county governments. Regulatory costs on cities must be offset by higher tax revenue. Raising tax revenue often requires special municipal governance approval from city council (with votes) and some cities restrict the frequency of raising debt or raising tax revenue within a calendar year under a city charter—not simply according to custom. Compliance under a revised Lead and Copper Rule for municipal or county agencies should take into account when agencies receive tax revenue from property and home owners

¹ Issued August 10, 1999 under President William Clinton to further the policies expressed in the Unfunded Mandates Reform Act (UMRA) of 1995.

² National Conference of State Legislatures, Council of State Governments, International City/County Management Association, National Association of Towns and Townships, County Executives of America, Environmental Council of States, Association of State Drinking Water Administrators, American Water Works Association, American Public Works Association, National School Board Association, and the American Association of School Administrators, and Western Governors Association.

as most private property tax revenue is not always received by the first quarter. For cities that want to use cash this implementation issue should be considered. Some smaller towns and cities may need to both work around seasons (avoiding harsh weather conditions) and when access to or use of cranes, bucket trucks and maintenance crews is optimal if the city government is responsible for ultimate replacement of the service lines. For some regions of the country subsurface work can be conducted 10 or 11 months of the year. For some northern tier states either frozen ground temperatures or use of city government bucket trucks and city manpower is limited to seven months of the year.

EPA and OMB should consider the Lead and Copper Rule (LCR) will be a major and significant rule since it has the potential to affect, according to EPA, approximately 68,000 drinking water systems serving 300 million Americans³. If EPA does not manage the rulemaking correctly people could be affected by lead or copper contamination in drinking water **OR** find that the rule inadvertently had an effect on the home's value. Home investments are the most significant financial assets that most Americans have. In the context of the call for comments directing Federalism issues, EPA should consider that a misdirected implementation of a revised rule. A poorly designed rule could indirectly affect tax revenue if property values decline as a result of human health risks that are not corrected or unsubstantiated fears from negligible or non-existent risks.

Why EPA's Rule Could Have Broader Implications

The current U. S. municipal bond market is approximately \$3.8 trillion in debt.⁴ While fewer Americans (approximately 2% of investors) directly hold municipal bonds, taxpayers benefit from the strength of the investment system. For many local and state governments, the cost to finance debt has spiked on some levels in the last year. For example, fixed-income experts expect a major drop in municipal bond issuance in 2019. The January 2018 debt issuance fell by 26% from January 2017 due to changes in the 2017 Tax Cuts and Jobs Act⁵. Corporate debt might be more preferable to municipal debt/bonds driving up the cost of bonds. EPA and OMB should contemplate the larger municipal debt and bond consequences in final rules if cities may incur sampling and remediation/line replacement costs for abandoned properties. This does not mean that the human health standards are not of primary concern but it might mean that the staging or sequencing of municipal actions should recognize that some cities may have more economic consequences than others.

Background and Expertise of Comment Submitter

Theresa Pugh Consulting, LLC is a regulatory consulting firm primarily for energy sector and for affiliated public (municipal) water utilities. These comments reflect 17 years of working for public power/water combination utilities or water utility organizations owned by municipal government and related impacts of a rule with rating agencies⁶. Due to the brief time remaining before the March 8 comment period

³ EPA, January 8, 2018 Lead and Copper Rule Revisions, Office of Ground Water and Drinking Water, Federalism Consultation Meeting slides, slide 3.

⁴ www.municipalbonds.com

⁵ CNBC News on municipal bonds and treasuries <https://www.cnbc.com/2018/02/22/muni-bonds-face-steep-decline-challenging-trump-infrastructure-plan.html>

⁶ Moody's, Fitch and Standard and Poor's are the three rating agencies that evaluate municipal debt offerings with scoring based upon a number of factors including credit-worthiness and ability to repay debt. Some municipal agencies combine debt and others offer separate bond instruments for individual utilities such as electric, water or natural gas. Municipal bonds may be general obligation bonds (GO) or revenue bonds for specific projects (ex. school systems, bridge construction, or highway tolls). Maturity date of existing bonds may also limit additional debt offerings or ability of smaller towns with declining

closure, the comments do not reflect any specific municipal water agencies but do reflect knowledge of what those city departments will face in terms of other maintenance, repair, and capital expenditures for a number of upcoming 2018-2025 Federal Agency regulations at U. S. EPA and Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) affecting municipal natural gas pipelines serving gas and electric utilities. Often these municipal utilities locate electric, gas, cable and drinking water in same Right of Way locations. Even if a city's obligations under the final rule are nominal, the EPA rule should recognize that cities need to coordinate their maintenance obligations.

Request: If EPA holds a Small Entity Representative (SER) meeting or Advanced Notice of Proposed Rulemaking related briefings and discussions, this comment submitter would like to be considered as a participant. EPA's outreach requires expertise on human health expertise in revisions to the lead and copper rule. In prior capacity, the commenter participated in eight EPA-U. S. Small Business Administration (SBA) Small Entity Representative (SER) panels from 2001-2014 including the Clean Water Act 316(b) cooling water intake regulation and others.

In addition to the revision of the standard, EPA should seek deployment or implementation advice as to the timing of the regulation. For community-owned drinking water systems, electric power generation owned by municipal agencies ("public power") and natural gas pipelines owned by municipal power or public gas agencies—all requiring significant repairs, maintenance and capital outlays. Often, for communities of 50,000 or less, those city street shutdowns or repairs are organized by one central task force made up of multiple agencies including zoning, traffic, police, fire, telecommunications (cable, phone), street light management, and electric generation because often the trucks and other equipment might be loaned by the electric power generation entity. Even if the monitoring of residential taps is conducted by the homeowner or contractor to the city, the city government may find many requests for "Miss Dig" type requests for subsurface identification of the water service lines and adjacent natural gas lines (if there is a municipal gas agency) before the homeowner (or plumber) should initiate repairs and replacement of the service lines. For small communities of 30,000 the city might have only a few dozen employees in these departments. For cities that have many public schools that do not have separate school districts who have all maintenance and capital expenditure authority, the city government will need to manage the school drinking water testing. For obvious reasons implementation in the rule should recognize protection of children's health from lead or copper but the city and school districts must also weigh the public safety demands if any service lines must be conducted on school property to keep heavy equipment away from children during the school year.

Recommendations:

1. Commenter recommends and endorses the policy, human health protection, implementation considerations in the comments submitted separately by the American Water Works Association (AWWA).⁷
2. **Future requests for Federalism comments should be placed in the Federal Register rather than to rely solely on the letter to professional societies or trade associations.** There are potentially affected parties that did not receive the letter from EPA.

tax revenue to undertake major maintenance projects that were not anticipated when budget was set by city council. Ratings often reflect whether a city's population is increasing or decreasing or whether there is economic diversity in manufacturing, hospitals community colleges or other job 'anchors' and availability skilled workforce.

⁷ Theresa Pugh Consulting, LLC is an affiliate member of AWWA.

3. **Public and private water systems should develop inventories of lead service lines.** Implementation deadlines or “milestone” deadlines should consider when annexation has been undertaken and a city may acquire smaller communities that have little or no paperwork on older residences or rural areas with inadequate data on pipeline materials.
4. **Development of plans for complete removal of all lead service lines should recognize the shared responsibilities**—homeowners, city governments, school systems, and other parties. Municipal, township or rural water systems must be allowed adequate time to develop plans for removal given size, proximity to contractors, extreme weather events in northern tier states where travel by contractors to rural, smaller towns can be significant.
5. **Implementation of tap testing and service line replacements for locations owned/operated by municipal or township should allow coordination with other required repair deadlines unless there is an acute human health risk.** For many cities, Right of Way may contain service lines as well as other public utility or private utility infrastructure. This should be considered and avoid “cookie cutter” implementation deadlines. Permit writer should be allowed to provide for implementation deadlines to tear up streets and property surrounding school systems, county or city hospitals, community colleges, jails, or other government owned affected areas. These should include (but not be restricted to) methane leak repair deadlines under EPA’s Clean Air Act Section OOOOa (NSPS for new natural gas pipelines owned/operated by municipal electric utilities or municipal natural gas utilities that commenced construction after September 18, 2015 or any existing source natural gas pipelines (and compressor stations) affected by subsequent EPA methane leak detection and repair regulations. In addition, where cities have accepted FEMA storm response actions (and funding) for hardening of water, gas, or electric utilities the EPA deadline on compliance should recognize that the deadlines may need to be altered. In some cases, power plants would need to remove infrastructure and replace with steel poles and other actions that may be in the same neighborhood where LCR changes must also be undertaken. Perhaps unless where lead or copper has been detected in acute human health exposure concern, the city government should have some reasonable leeway (to be determined by permit writer) to undertake service line replacements.
6. **Corrosion process control in water systems should meet all human health concerns.**
7. Future annexation or expansion of municipal/county jurisdiction should mean the rule allows for reasonable date(s) for coordination of data for inventory updates, lookback at legacy pipeline materials (if available) before repair compliance with replacement should be met.
8. Before municipal governments must undertake any new tap monitoring or sampling to identify where homeowners (or government agency) should replace service line, EPA should make certain the **best testing methods** are used to rule out false positives, masked positives, or incorrect readings.
9. **Public disclosure about results of testing is important but the results could have unexpected outcomes on homeowner’s most precious financial commodity.** EPA needs to recognize the delicate dance of informing the public about communities that have found lead in service line problems. These comments are not encouraging failure to inform the public. But EPA should recognize that for **vast majority of Americans, their homes are their largest investment.** EPA (and state agencies) should be cautious in **inadvertently causing loss of property values if real estate market might misunderstand the detection of copper or lead in neighborhoods.** Home sales reflect true economic markets. Home price sales can quickly be adversely affected by stigmatization of neighborhoods or because individual homes may test positively for lead or copper. It is very important that EPA, OMB and the

states recognize that human health protection is critical—but EPA should not accidentally create a cause of economic stigmatization of properties, neighborhoods that have lead or copper pipes. EPA (and states) should recognize that after the economic downturn of 2008-2009, home appraisals⁸ are based upon home sales within immediate last six-month, lot size, square footage, number of rooms, and sale of comparable homes with quality of materials (brick, vinyl siding, finished basements, attic, central heating, high quality roofs, etc.). Unfortunately, the new appraisal rules appear to have a bias downward versus ten years ago. Perhaps this bias is wise from a home mortgage purchase process—avoiding distortions in making homeowners have a false sense that all homes are more valuable than they actually are. But in this new process, a fixable, perhaps temporary repair of service line due to lead (or copper elsewhere) could hurt the value of a home. But any EPA rule should recognize that inadvertent determinations about home values can affect both consumer's home sales and a municipal government's tax base. Changes in tax base can also affect the ability for a city government to obtain tax-exempt financing through the municipal bond market. While human health protection is critical, **HOW** the public comes to understand the relative risks of lead or copper in service line pipes, and how to remediate has long-term consequences. One does not have to look very far to see where similar environmental events have caused a collapse in real estate values adjacent to locations with hazardous waste, Superfund sites, brownfield sites, factory closures, etc. Elderly and uneducated homeowners might be persuaded by charlatans to sell their homes at greatly reduced prices if the homeowner is misled to believe the home has no value because lead or copper has been detected. EPA's rulemaking process should make efforts to seek comment from state consumer affairs offices and to send advisories about the final rule to those agencies.

10. **Many states have sampled recently in response to public outrage over 2014 events in Flint, MI.** Where states have undertaken recent sampling, and where that sampling is generally in accordance with EPA's methods, learning from their implementation results should be used in outreach and education. Rule shouldn't arbitrarily require second testing if not truly needed.
11. **EPA's final rule should not make replacing all lead service lines in a specific timeframe.** Communities should start as quickly as possible but this cannot mean all communities act concurrently. Time must be allowed for issuing bids, hiring contractors, aligning city departments for coordinated work, and to work around weather events (freeze off weather conditions, rains, flooding, extreme heat, etc.).
12. **EPA's rule should not be a cookie cutter approach to implementation of home tap testing.** Rental homes, apartment buildings, and community dorms (especially when those are offsite from campus) may take more time to sample. As AWWA points out in its comments, 35% of all Americans rent their homes. Renters often move more frequently than home owners. Rental housing owners should be allowed to make these transformations in a reasonable manner. AWWA's points that the timing for testing for rental property service

⁸ Article on stigmatized housing <https://www.usatoday.com/story/money/personalfinance/2015/06/10/24-7-wall-st-hidden-things-home-prices/71002294/> and Article on changes to home appraisals https://www.philadelphiafed.org/-/media/research-and-data/publications/business-review/2010/q1/brq110_home-worth-appraisal-bias.pdf?la=en ; U. S. News and World Reports <https://loans.usnews.com/factors-that-influence-your-homes-resale-value> or Home Appraiser's forum on radon https://inspectapedia.com/hazmat/Radon_Impact_on_Property_Value.php and on mold see <http://sacramentoappraisalblog.com/2012/07/12/how-do-appraisers-deal-with-mold-situations/>

lines might be coordinated with timing of replacement water heaters by owner. Typically, water heaters (often called “hot water heaters”) corrode and need to be replaced approximately every 8-12 years⁹ EPA’s proposed rule should specifically call out the issues related to rental homes and rental apartment buildings to determine if those owners have recommendations to handle their regulatory responsibilities to protect the renters’ health while not incurring extreme costs.

To better protect consumers, perhaps EPA’s rule should consider that notices about rental properties should disclosure results of tap sampling results in a similar way to disclosure on square footage, central heat, washer/dryer, proximity to public transportation, or school district. Similarly, home sales should disclose recent sampling results with easy to understand frame of reference on relative risk. Many states already require disclosure about lead in paint, asbestos or radon during sale or rental process. If states already require and cover these disclosures, EPA should not add secondary disclosure.

13. **Public education is key.** AWWA’s comments on pitchers and filters are very useful and reflect practical experience from their members. If EPA’s rule involves the use of filters and pitcher filters, this should include the extensive use of public education via paper flyers, bill inserts, YouTube videos, and other methods such as the use of social media. The public needs to understand the distinction between detection of lead or copper and elevated levels that warrant faster action due to human health risks.
14. **As pointed out in AWWA’s comments, estimates of \$4,700 per individual service line is unrealistic.** While Flint, Michigan’s experience may not be indicative of all cities, EPA should consider their recent experience. Flint’s administrative costs alone ran \$760 per service line. Cost estimates in AWWA’s comments merit serious consideration. AWWA’s Figure 1 suggests that the average cost might be \$6,700 per line based upon 14 community water systems.
15. **EPA rulemaking process should both engage public health experts to advise on ways to better explain what detection means and ensure the public health experts explain the results of filter tests.**
16. **EPA’s rule should not mandate U. S. made products for testing, response, or services used in service line replacement.** Although some might prefer the use of U. S. made goods to respond to the EPA rulemaking, the EPA rule should not mandate U.S. manufactured goods or testing devices. For some parts of the country, such as northern states along the U. S.-Canadian border, importation of Canadian (or other country) replacement service line equipment or devices may be faster, cheaper, and equally safe for those private and public parties. EPA rulemakings should not be used to make statements on trade. Many municipal governments have purchasing incentives for U. S. made or North American made goods. But EPA regulations should not set or revise trade policy in public health regulations. As long as an imported product or service meets the standards EPA should be agnostic as to the country of origin.
17. **EPA’s final rule should give some leeway for coordinating the city’s requirements on city-owned properties with other repair regulations** as required by U. S. Department of Transportation (DOT), Pipeline and Hazardous Materials Safety Administration, U. S. EPA, Federal Emergency Management Administration (FEMA) or others. Many of these agencies have many new regulations affecting municipal or county Right of Way property or of ‘hardening’ of the electric and water utilities following FEMA disaster designations. These

⁹ DOE, 2010 Water Heater Market Profile, U. S. Department of Energy, September, 2010.

'hardening' upgrades are capital extensive and manpower extensive work. In some cases, FEMA appears to be pushing investor owned and public power (municipal) utilities to take power lines to underground system. If an electric utility that co-manages water utility anticipates major "undergrounding" changes on the electric side, the utility should be able to coordinate the new LCR obligations to minimize disruptions. This leeway for coordination of the LCR rule responsibilities should be allowed unless there is a true acute public health risk.

18. Recognition by U. S. EPA and OMB that the proposed rule would be a major and significant rule easily costing (directly and indirectly) in excess of \$100 million as the rule has the potential impact on 300 million homes. Accordingly, EPA and OMB should do all that they can to see that rule can be implemented by cities and counties in a manner to protect public health and minimize regulatory costs. These twin goals are not mutually exclusive. For some communities, the city will have to determine who is responsible for schools, public hospitals, community centers, abandoned private properties, legacy properties that have not been brought up to date, and for properties where low income are affected if leak or copper detection proves to be a risk for acute human health problems. In those instances, cities should be allowed to design deployment of monitoring, testing and response accordingly. Where there is no owner available or financially able to take corrective action, EPA may want to explore in the rulemaking the use of brownfields funding or take appropriate actions with the State Revolving Fund Program (SRF).

19. EPA's FY19 and FY 19 budgets, funding for infrastructure loans, and State Revolving Fund Program funding should reflect additional regulatory burdens to states and jurisdictions of the states.

The proposed U. S. Federal Year 2019 Budget appears to cut EPA's funding to states from current \$8.05 billion to a reduced \$6.1 billion—although there is a wise increase to the State Revolving Fund (SRF) program under the Office of Water. Environmental Commissioners of the States (ECOS) wrote in September, 2017 to assert that they are carrying out 98% of the EPA's programs. Their concerns about ability to meet all the air, water, waste and disaster response obligations with budget cuts concerned them. (It should be noted that the ECOS letter was sent shortly after three major hurricanes across Texas, the Gulf Coast coastline, Florida, U. S. Virgin Islands, Puerto Rico and the California forest fires). While the commenter is not an expert on how the EPA budget, State and Tribal Assistance Grants (STAG) and SRF programs should be designed for FY2019 and future years—it is possible that implementation of the revised LCR program require state agency coordination with local officials, state responsibilities and costs.

The 1996 Congressional amendments to the Safe Drinking Water Act (SDWA)¹⁰ made it clear that all Federal agencies that own or operate a public water system must comply. Although this firm does not have direct expertise in budgeting for Federal lands government agencies with facilities this commenter recommends advance notification to key Federal Agencies that will have obligations to implement a revised lead and copper rule. Some Federal agencies that anticipate cuts to operational budgets or staff may learn too late that they have obligations to implement the revisions to the 1991 Lead and Copper rule. These agencies might include General Services Administration, Department of Defense/U. S. Veteran's Association, Bureau of Land Management, and Department of Interior's Bureau of

¹⁰ 42 U. S. C Section 300f. The statute applies to public drinking water or public water systems as well as Federal facilities.

Indian Affairs (BIA). According to DOI's website¹¹, BIA oversees housing improvements at 566 Federally recognized Native American Indian tribes through the Housing Improvement Plan.

A superficial review of Housing and Urban Development's 2018-2022 Strategic Plan¹² does not indicate any references to the implementation of this rule but does mention lead in paint. Perhaps HUD and other agencies need adequate advance notification for their own agencies' unique issues and budgetary planning.

Thank you for consideration of these comments offered to broaden EPA's understanding of the possible coordination and implementation of the rule. Copies of these comments will be sent directly to Mr. Peter Grevatt, Director, OGWDW and Mr. Andrew Hanson.

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¹¹ <https://www.doi.gov/international/what-we-do/tribes>

¹² <https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf> See pp 20-22 not on page 17 as referenced in the HUD Strategic Plan's Table of Contents.