

April 16, 2013

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Perciasepe:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened for EPA's planned proposed rulemaking entitled "Lead and Copper Rule, Long-term Revisions" (LCR LTR). This notice of proposed rulemaking is being developed by the U.S. Environmental Protection Agency (EPA) under the Safe Drinking Water Act (SDWA).

The Lead and Copper Rule (LCR) was promulgated in 1991 and requires water systems to minimize lead and copper in drinking water, primarily by reducing water corrosivity and preventing the leaching of these metals from the premise plumbing and drinking water distribution system components. EPA has revised the LCR three times since the original rule was promulgated to clarify and correct provisions of the rule and to improve the effectiveness of the rule in reducing drinking water exposure to lead. EPA is currently developing proposed revisions that are intended to improve the health of individuals by reducing exposure to lead and copper in drinking water, and to improve the effectiveness of the LCR by streamlining requirements.

On August 14, 2012, EPA's Small Business Advocacy Chairperson convened this Panel under section 609(b) of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). In addition to its chairperson, the Panel consists of the Acting Director of the Standards and Risk Management Division within EPA's Office of Ground Water and Drinking Water, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Chief Counsel for Advocacy of the Small Business Administration (SBA). It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during this process as well as from public comment on the proposed rule. The options the Panel identified for reducing the rule's economic impact on small entities will require further analysis and/or data collection to ensure that the options are practicable, enforceable, protective of public health, environmentally sound and consistent with the SDWA.

SUMMARY OF SMALL ENTITY OUTREACH

Prior to convening the Panel, EPA conducted outreach with small entities that will potentially be affected by these regulations. In July 2012, EPA invited SBA, OMB, and nine potentially affected small entity representatives (SER) to a conference call, and solicited comments on preliminary information sent to them. EPA shared the small entities' written comments with the Panel as part of the Panel convening document.

After the SBAR Panel was convened, the Panel distributed additional information to the SERs on August 29, 2012, for their review and comment and in preparation for another outreach meeting. On September 12, 2012, the Panel met with the SERs to hear their comments on the information distributed in these mailings. The SERs were asked to provide written feedback on ideas under consideration for the proposed rulemaking. The Panel received written comments from the SERs in response to the discussions at this meeting and the outreach materials. See Section 8 of the enclosed Panel Report for a complete discussion of SER comments. Their full written comments are also attached. In light of these comments, the Panel considered the regulatory flexibility issues specified by RFA/SBREFA and developed the findings and discussion summarized below.

PANEL FINDINGS AND DISCUSSION

Under section 609(b) of the RFA, the Panel is to report its findings related to these four items:

- 1) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.
- 2) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

- 3) Identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule.
- 4) A description of any significant alternatives to the planned proposed rule which would minimize any significant economic impact of the proposed rule on small entities consistent with the stated objectives of the authorizing statute.

The Panel's most significant findings and discussion with respect to each of these items are summarized below. To read the full discussion of the Panel findings and recommendations, see Section 9 of the enclosed Panel Report.

A. Number and Types of Entities Affected

There are over 65,000 small public water systems that may be impacted by the revisions to the rule. A small public water system serves between 25 and 10,000 people. These water systems include over 48,000 community water systems that serve year round resident populations and more than 18,000 non community water systems that serve non-transient populations (e.g. water system run by office parks or school).

B. Recordkeeping, Reporting, and Other Compliance Requirements

The LCR includes reporting and recordkeeping requirements for monitoring results, public notification, and sampling results. The Paperwork Reduction Act (PRA) requires that all reporting and recordkeeping requirements have practical utility and appropriately balance the needs of the government with the burden on the public. As EPA proceeds with any revisions to the requirements of the current LCR, EPA will also assess the need for revisions to reporting and recordkeeping requirements and will consider them in any estimation of the burden and benefits of the rule changes.

C. Related Federal Rules

There are currently national primary drinking water regulations for over 90 contaminants and rules for communicating with water system consumers through public notification and consumer confidence reports. The Panel notes that EPA's drinking water rules have all been developed with careful attention to the interaction between each new rule that requires treatment changes. The Panel recommends that EPA continue to ensure that any revisions to the LCR be coordinated with, and do not either duplicate or conflict with, the requirements of these other rules.

There are also states that have adopted numeric phosphorus criteria for rivers, lakes, streams, reservoirs and estuaries under the Clean Water Act (CWA) which can impact National Pollutant Discharge Elimination System permit limits for phosphorus. One of the treatment techniques for controlling lead and copper corrosion is to add orthophosphate to drinking water, which may impact the phosphorus levels in the wastewater discharges from these communities. Therefore the Panel recommends EPA consider flexibility in the treatment requirements and allow systems to utilize treatments other than orthophosphate as a corrosion control technique.

D. Regulatory Flexibility Alternatives

The Panel recommends EPA consider a number of alternatives to the current LCR and to the planned proposed revisions to the LCR.

Sample Site Selection Criteria

The 1991 LCR sample site selection criteria directed systems to sample from locations that were most likely to have high concentrations of lead and copper in drinking water, with lead being the priority. EPA is revisiting these criteria to examine whether they still target the sites most likely to have the highest lead levels. EPA is also evaluating whether to monitor at separate sites for copper.

The Panel agrees that the sample site selection criteria from the 1991 Rule should be revisited, and that EPA should consider changes to how the LCR directs systems to prioritize sampling sites. Specifically, the Panel recommends EPA:

- Remove the date ranges and 50/50 mix requirement for copper pipes with lead solder
- Develop separate site selection criteria for systems with LSLs which prioritizes full and partial LSLs
- Assess the advantages and disadvantages of separate copper sampling sites on the reduction of health risk to consumers

The Panel recommends that EPA continue to evaluate the occurrence and distribution of elevated copper levels until such time as additional research and occurrence data demonstrate a substantial opportunity for health risk reduction.

Public Education for Copper

Currently, there are no public education materials provided on the health risks of copper exposure, or steps consumers can take to reduce the risk of exposure. EPA is evaluating whether education materials should be provided to consumers for copper. EPA is also evaluating the target audience for any materials that might be developed (new homes versus system-wide). The Agency is considering requiring copper outreach materials for systems exceeding the copper action level, and at new copper construction sites.

The Panel recommends EPA:

- Specify in the proposed rule to whom the water systems must distribute public education materials
- Develop options which focus the distribution of copper public education materials to customers within those systems which exceed the copper AL
- Consider providing template or sample language for copper public education materials and make it available electronically for download
- Consider allowing the public education materials to be included with information that is already being distributed to consumers, such as Consumer Confidence Reports or water bills
- Consider a non-regulatory approach for copper PE for systems that do not exceed the copper AL by encouraging systems to distribute consumer factsheets on copper for their customers

The Panel notes that flushing after water has stood unused for prolonged periods can reduce copper levels at the tap. Active outreach by water systems to the local community and plumbers could also inform the public.

Optimized Corrosion Control Treatment (OCCT)

EPA is evaluating whether to require systems to re-optimize corrosion control treatment by re-evaluating and revising the corrosion control treatment if the system exceeds the action level in the future. EPA is also evaluating whether the re-optimization process should require systems to consider specific treatment options.

The Panel recommends EPA:

- Consider clarifying the timeframe for the re-optimization process in the proposal
- Include a deadline (a maximum time from WQP submission to approval) by which optimal water quality parameters will be set by the Primacy Agency
- Develop options to allow flexibility in the re-optimization process for small systems to enable primacy agencies and small systems to investigate their implementation of the current optimization treatment process to determine if better implementation of the current treatment will correct the problem, before embarking on a comprehensive study of corrosion control optimization

Copper Waiver

EPA is considering a copper monitoring waiver which would allow systems with water qualities not considered aggressive to copper to eliminate copper monitoring. This copper waiver could reduce costs for systems that can demonstrate water qualities which are unlikely to leach copper. SER comments largely supported a copper waiver for systems which can demonstrate non-aggressive water qualities.

The Panel recommends EPA:

- Specify the criteria for copper waivers to minimize implementation burden on small systems
- Develop a copper monitoring waiver for systems which can demonstrate that their water qualities do not encourage the leaching of copper
- Complete the review of copper data which support the water quality parameters (pH greater than 7; alkalinity less than 250 mg/l CaCO₃) by which the copper waiver will be assessed, and submit the analysis of those data to independent experts for peer review

Point of Use (POU) Treatment in Lieu of Optimized Corrosion Control Treatment

EPA is considering the use of POU treatment units in lieu of OCCT for NTNCWSs serving fewer than 10,000 people. Typically, the Panel expects that a POU option is only practicable for those systems that have control over all of the taps within their system which are used for human consumption; however, one SER mentioned that there are CWSs which have many of the same characteristics of NTNCWSs (such as water systems that are operated by apartment complexes, colleges, or boarding schools), and therefore may choose to utilize POU devices in lieu of OCCT, if given the opportunity. The SER further suggested that only allowing NTNCWSs to utilize POU in the revisions may be unnecessarily restrictive. The Panel recommends EPA develop options which allow CWSs to install POU in lieu of CCT in addition to NTNCWSs.

Sampling Procedures

The current LCR sampling protocol requires water systems to collect one-liter, first-draw samples from taps in selected households for testing. However, for households with Lead Service Lines (LSL), the first-draw sample does not capture the volume of water that is from the LSL. EPA is considering revisions to the sampling procedures which would eliminate pre-stagnation flushing and capture water from the LSL. SERs suggested encouraging normal use before sampling, and that sampling instructions for residents (who often do the sampling) must be clear and simple.

The Panel recognizes the difficulties in obtaining consistent sample results from consumer's taps, and recommends EPA:

- Develop options which provide flexibility in revisions to the sampling protocols which allow systems to provide clear, understandable instructions to homeowners who will be taking lead and/or copper samples
- Consider a maximum stagnation time, and language instructing residents to continue normal water use up until the period of stagnation begins

Lead Service Line Replacement (LSLR)

EPA is contemplating several revisions to mandatory LSLR requirements. The potential revisions are listed below, and would apply for as long as the system is subject to LSLR requirements.

- Delay Mandatory LSLR Requirement until after OCCT Re-optimization
- Eliminate Partial LSLR
- Revise the Seven Percent Replacement Requirement.
- Eliminate follow up sampling of LSLRs
- Provide a Pitcher-filter or Other Treatment Unit Prior to LSLR

While the Panel agrees with the potential changes to LSLR outlined in the report, the Panel also recognizes that the effects of changing sampling protocols in the several different ways outlined in the report are not clearly known. It is likely, with changes to the LSL sampling protocols and site selection criteria EPA is considering, some systems not already exceeding under the current rule may exceed the lead AL and be triggered into LSLR as a result. The Panel is sensitive to the concerns that these LSLR requirements could be burdensome for small systems, particularly for very small systems.

Therefore the Panel recommends EPA:

- Provide a transparent cost analysis of the potential changes to the LSLR requirements
- Evaluate, in its cost analysis, the number of systems, by size category, expected to engage in LSLR due to AL exceedances resulting from changes in the LCR and assess the related cost impacts of those AL exceedances in light of the change from partial to full replacements
- Provide more clarity in the rule on how systems which repeatedly exceed the AL would carry out the potential revised LSLR requirements, specifically public notification

Definition of Control

EPA's current interpretation of the term control is limited to ownership. But in the original Lead and Copper Rule, promulgated in June 1991, EPA established a broad definition of control as it applies to lead service lines in the distribution system that included: (1) authority to set standards for construction, repair or maintenance of the line; (2) authority to replace, repair or maintain the service line; or (3) ownership of the line.

EPA is considering revisions to the definition of control to include the portion of the service line not currently owned by the system, but may otherwise be under the control of the system because it has the authority to repair, replace, or maintain the line. This possible revision would expand the definition of service lines under the control of water systems in a manner similar to the 1991 LCR, to require greater full replacements. SER comments around this potential revision centered on concerns that EPA was making the water system responsible for repair of private property. Many SERs were concerned that this potential change would unduly increase costs for their systems. All of the SERs that commented on this potential revision expressed concern about changing the definition of control.

The Panel recommends that EPA consider other alternatives to achieving full LSLR, other than expanding the definition of control as outlined in Section 3 of the report. This would be a reaffirmation of EPA's determination in the 2000 lead and copper rule, when EPA last considered this issue.

Reduction of Lead in Drinking Water Act of 2011

EPA intends to revise the regulations to include the revised statutory definition of lead free plumbing materials in the regulations. EPA also intends to clarify how best to distinguish plumbing materials that are exempt from the requirements because they *"are used exclusively for non-potable services such as manufacturing, industrial processing, irrigation, outdoor watering, or any other uses where the water is not anticipated to be used for human consumption."*

The Panel recommends that EPA promptly issue guidance on the Reduction of Lead in Drinking Water Act of 2011 in order to provide manufacturers, distributors, systems, and other affected parties with sufficient time to comply with the January 2014 effective date of the Act.

Sincerely,

/S/

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Enclosure