May 31, 2023

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

Dear Administrator Regan:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened for the U.S. Environmental Protection Agency's (EPA) planned proposed rulemaking entitled "National Primary Drinking Water Regulation (NPDWR): Lead and Copper Rule Improvements (LCRI)." This notice of proposed rulemaking is being developed by EPA under the Safe Drinking Water Act (SDWA).

SDWA is the core statute addressing drinking water at the federal level. Under SDWA, EPA sets public health goals and enforceable standards for drinking water quality. In 1991, EPA promulgated the Lead and Copper Rule (LCR), which requires public water systems (PWSs) to minimize lead and copper in drinking water by reducing water corrosivity and preventing lead and copper from leaching from premise plumbing and drinking water distribution system components. The rule established an NPDWR for lead and copper that consists of a treatment technique requirement, including but not limited to corrosion control treatment (CCT), lead service line replacement (LSLR), and public education action, as well as established levels (ALs) for the 90^{th} percentile values of lead and copper, routine monitoring and sampling. Between 2000 and 2007, EPA revised the LCR on three different occasions to streamline rule requirements, promote and strengthen national implementation, and reduce burden for water systems.

On January 15, 2021, EPA promulgated the Lead and Copper Rule Revisions (LCRR), which added new provisions for lead sampling for schools and childcare facilities, a mandate that water systems create an inventory of service line materials, and an expansion of public education and notification requirements. The final rule also added a trigger level (TL) for lead to require mitigation protocols earlier and in more communities as well as an updated tap sampling protocol to be more representative of water that has sat stagnant in the lead service line (LSL). EPA extended the effective date of the LCRR to December 16, 2021, to conduct a review of the LCRR in accordance with Executive Order 13990 and to obtain public input by holding a series of virtual public engagements from April to August 2021. EPA specifically sought engagement with communities that have been disproportionately impacted by lead in drinking water, especially low-income people and communities of color that have been underrepresented in past rulemaking efforts.

On December 17, 2021, EPA published the findings of its review of the LCRR, in which EPA identified significant opportunities to improve the LCRR. EPA announced its intention to propose and finalize a new NPDWR: the LCRI, stating the agency's intention to finalize the LCRI prior to October 16, 2024, which is the compliance date of the LCRR. EPA stated that all rule areas except for the initial inventory requirements of the LCRR would be subject to change under the LCRI. The initial inventories are due by the compliance date of October 16, 2024. EPA identified the following priority areas for improvement:

- Proactive and equitable LSLR,

- Strengthening compliance tap sampling to better identify communities most at risk of lead in drinking water and to compel lead reduction actions, and

- Reducing the complexity of the regulation through improvement of the action and trigger level construct.

On November 15, 2022, 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 Director of the Standards and Risk Management Division within EPA's Office of Ground Water and Drinking Water (OGWDW), 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 SDWA.

SUMMARY OF SMALL ENTITY OUTREACH

Concurrent to gathering input from small entities through the SBAR Panel process, EPA sought advice and recommendations to inform the proposed LCRI through several other consultations and engagements. These include consultations with the EPA Science Advisory Board, the National Drinking Water Advisory Council, state and local governments, federally recognized tribal governments, and meetings focused on environmental justice.

Prior to convening the Panel, EPA conducted outreach with small entities that will potentially be affected by these regulations. In September 2022, EPA invited SBA, OMB, and 14 potentially affected small entity representatives to a meeting held on September 12th, 2022 and solicited comments from them 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 small entity representatives (SERs) on November 15, 2022, for their review and comment and in preparation for another outreach meeting. On November 29, 2022, the Panel met with the SERs to hear their comments on the information distributed to them. 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 Sections 6 and 7 of the Panel Report for a complete discussion of SER comments. Their full written comments are also included in Appendix B. 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 the following 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 8 of the Panel Report.

A. Number and Types of Entities Affected

EPA considers small entities to be public water systems serving 10,000 people or fewer. All community water systems (CWSs) and non-transient non-community water systems (NTNCWSs) are subject to the existing LCR and LCRR requirements. As of December 2020, approximately 91.1 percent of all CWSs (45,000 systems) and 99.8 percent of all NTNCWSs (17,000 systems) serve 10,000 people or fewer.

While NPDWRs apply to all drinking water systems, SERs commented that some of the changes in the existing LCRR and proposed LCRI might pose problems for water systems serving fewer than 100 people and water systems that primarily serve schools and child care facilities. The Panel notes that the LCRR currently establishes different requirements based on system size and type and provides flexibilities for systems serving 10,000 people or fewer that exceed the TL or AL. The Panel recommends that EPA evaluate whether it is appropriate to further differentiate LCRI requirements based on the differences among smaller water systems (*e.g.*, flexibilities for very small systems serving fewer than 500 people, small systems serving between 501 and 3,300 people, and small systems serving between 3,301 and 10,000 people). The Panel also recommends that EPA consider the costs associated with multiple rule areas of the proposed LCRI requirements in the economic analysis and ways to reduce the burden on small systems including the interrelationship amongst the areas of the rule requirements.

B. Recordkeeping, Reporting, and Other Compliance Requirements

The LCRR includes reporting and recordkeeping requirements for service line inventorying and replacement, monitoring results, public notification, and sampling results. At the same time, the Paperwork Reduction Act 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 LCRR, 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.

Panel recommendations on specific potential rule compliance requirements can be found in Section D of this summary.

C. Related Federal Rules

There are NPDWRs for over 90 contaminants. EPA's drinking water rules were 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 LCRR be coordinated with, and do not either duplicate or conflict with, the requirements of other drinking water regulations, and EPA should consider other drinking water rule costs for small systems.

One of the treatment strategies that the LCRR identifies for controlling lead and copper corrosion is to add orthophosphate to drinking water, which may impact the phosphorus levels in the wastewater discharges in communities, including those with numeric discharge criteria for phosphorous under the Clean Water Act. The panel also recommends that EPA should estimate the impacts of the addition of phosphate on wastewater treatment plants. However, under SWDA, EPA is required to set regulatory standards that reduce adverse health effects to the extent feasible; this includes the lead and copper regulations. EPA has previously determined that CCT is technologically feasible and affordable.

D. Regulatory Flexibility Alternatives

<u>LSLR</u>

EPA is considering many improvements to the LCRR LSLR requirements, including a requirement that could result in the replacement of all LSLs in the nation as quickly as feasible. In addition to regulatory requirements, EPA has and will continue to take non-regulatory actions to achieve replacement of all LSLs.

The Panel recognizes the steps EPA has taken, and will continue to take, to ensure federal funds are available to drinking water systems, especially those within disadvantaged communities. These funds include but are not limited to available funding through the Bipartisan Infrastructure Law, the Drinking Water State Revolving Fund, and the Water Infrastructure Improvement for the Nation Act. Despite the many efforts EPA takes to ensure federal funds are available to water systems, the Panel recognizes that funding streams are not guaranteed to be available to all small systems, that some small systems may not pursue available funding opportunities for a variety of reasons, and that, in the absence of this funding, these communities may have difficulty financing LSLR. The Panel recommends that EPA evaluate available recent data and LSLR cost information (including EPA's Drinking Water Infrastructure Needs Survey and Assessment) to inform the economic analysis for the proposed LCRI. When evaluating the cost of compliance, the Panel recommends that EPA recognize that external funding sources may not be available to all small systems.

SERs identified factors such as customer engagement and cooperation, contractor availability, and supply chain issues that will challenge the rate at which they can replace 100 percent of their LSLs. When developing the LSLR requirements, the Panel recommends that EPA consider the barriers to 100 percent LSLR that SERs identified that make LSLR challenging. In the LCRR, EPA recognized that customers may refuse to participate in LSLR and required documentation of customer engagement. The Panel recommends that EPA include a provision in the LCRI to account for customer refusals in the mandatory LSLR provision and increase clarity in terms of what "good faith" attempts mean when

engaging the customer. The Panel recommends that EPA provide additional time for small systems to comply with all LSLR requirements from the LCRR that are revised by the LCRI, including a transition period following the effective date to provide time for small systems to plan LSLR-required activities.

SERs expressed the importance of national-level technical assistance for small systems in both the pre-Panel and Panel meetings. Therefore, the Panel recommends that EPA respond to SER concerns on the need for assistance in understanding and complying with the LCRI requirements. EPA supports small systems through several different avenues, *i.e.*, developing guidance on the initial service line inventory, providing technical assistance through the Environmental Finance Centers, holding monthly webinars focused on issues small systems face, and hosting an annual drinking water workshop to bring together stakeholders in drinking water systems. Considering the SERs continued concerns and the degree to which technical assistance is crucial in reducing regulatory compliance costs, the Office of Advocacy recommends that EPA continue to consult regularly with small entities and state regulatory authorities to ensure the efforts to provide technical assistance to small systems to address regulated and emerging contaminants are effective and remain appropriately targeted.

EPA intends to propose LCRI requirements that incorporate equity principles, especially for LSLR. Due to the cost of replacing the customer-portion of an LSL, EPA notes that underserved communities could potentially experience disproportionate exposure to lead from LSLs if measures to ensure equity are not incorporated into the LCRI. EPA specifically asked for SER input about ways to ensure equitable LSLR in the LCRI. Multiple SERs stated that LSLR and other system repairs are generally based on (1) infrastructure needs and what may fail first rather than who the infrastructure serves and (2) how to complete the most pressing infrastructure work as efficiently as possible. One SER mentioned that equity should consider factors outside of finances, such as English as a second language and achieving proper communication and notice on construction projects.

EPA notes that the LCRR required LSLR plans to include an LSLR prioritization strategy based on factors including but not limited to the targeting of known LSLs, LSLR for disadvantaged consumers, and populations most sensitive to the effects of lead. Systems can include additional factors important to their community, *e.g.*, unknown service lines suspected to be lead, areas with pressing system repairs or infrastructure needs, areas with older homes, populations with higher blood lead levels based on available data. The Panel recommends that EPA consider the range of additional factors raised by SERs in addition to equity principles when developing the LSLR plan and other LSLR requirements (*e.g.,* areas with pressing system repairs, infrastructure needs, and areas with older homes).

<u>Tap Sampling</u>

In the LCRR review, EPA concluded that there are opportunities to better identify the communities that are most at risk of elevated drinking water lead levels. For the LCRI, EPA is evaluating alternative tap sampling protocols that may better identify higher lead levels.

EPA is considering a new tap sampling protocol that requires systems to collect both first- and fifth-liter samples at LSL sites and to use the higher concentration for the 90th percentile lead level calculation. SERs discussed various factors that may pose challenges for small systems to comply with a new sampling protocol, including increased costs and burden for systems with LSLs, increased complexity of the protocol and communicating instructions to customers, and difficulty obtaining customer participation. SERs also expressed a lack of confidence in relying on homeowners to take routine samples and suggested ideas like developing training videos on how to take fifth-liter samples. EPA

notes that, under the current LCRR, systems with low 90th percentile lead levels and those without lead sources may reduce their monitoring frequency. EPA recognizes that by updating the sampling protocol, among other rule requirements, there will likely be additional systems that exceed the AL, thus requiring actions to reduce drinking water lead exposure not otherwise required in order to protect public health. EPA will take the costs and benefits of these additional actions into consideration in the economic analysis for the proposed LCRI. The Panel recommends that EPA clarify aspects of the sampling protocol in the proposed LCRI rule language, such as a definition of a wide mouth bottle, and provide additional time for small systems to comply with monitoring and sampling requirements from the LCRR that are revised by the LCRI.

Reduce Rule Complexity

To provide better health protection and more effective rule implementation, EPA is evaluating options for utilities to address lead contamination at lower levels and improve sampling methods. Additionally, EPA is considering potential revisions to the LCRR to reduce complexity of the lead AL and TL construct as well as ensure that the rule is easily understandable and triggers appropriate and feasible corrective actions.

EPA is aware that actions to reduce rule complexity could take various forms, but in the LCRR review, EPA identified a possible revision to eliminate the lead TL and lower the AL. Removing the lead TL could reduce compliance costs, but a lower lead AL could raise compliance costs by increasing the number of water systems that exceed the AL and must then take additional actions (*i.e.*, CCT adjustment, public education, and increased sampling). Most SERs stated that the lead TL should be removed to reduce rule complexity; however, one SER advocated for retaining the TL, noting that it could be beneficial to have a warning prior to an AL exceedance. The Panel recommends that EPA consider removing the TL.

The Panel notes that EPA has committed to evaluating lower AL levels to increase public health protection and the impacts that such a change will have on smaller systems, even though many of the SERs expressed concern about the impact such a change would have. The Panel recommends that, if EPA determines that a lower AL is required, EPA provide additional time for small systems to comply with AL requirements from the LCRR that are revised by the LCRI, including additional time for planning for the lower AL. The Panel recommends that EPA also consider the appropriate level of public education requirements following an AL exceedance for small systems. The Panel further recommends that EPA consider additional flexibilities and compliance assistance for small entities serving isolated or primary non-English language-speaking communities. The Panel also recommends that EPA issue guidance on the LCRI, including sampling, on the same date as the date of publication of the final rule (or as soon as possible after that date) to ensure the maximum time available for training and transition.

Small System Flexibility

While EPA is focusing its rulemaking process on the priority areas discussed above, EPA announced that it would also consider additional changes to equitably improve public health protection and improve rule implementation to ensure that the LCRI prevents adverse health effects of lead to the extent feasible. Specifically, EPA stated in the LCRR review that the agency could make improvements to the LCRR small system flexibility. EPA discussed the role of LSLR in the LCRR small system flexibility within an overall rule construct where LSLR is mandatory for all systems regardless of tap sampling results. The Panel recommends that EPA request comment on additional flexibilities for small water systems to effectively reduce drinking water lead exposure and whether EPA should allow these methods as

compliance alternatives as part of the small systems flexibilities. EPA should review the costs and availability of compliant POU or POE devices to ensure that the flexibility remains available to small systems that want to use it.

Sincerely,

WILLIAM NICKERSON Digitally signed by WILLIAM NICKERSON Date: 2023.07.05 09:57:43 -04'00'

William Nickerson
Small Business Advocacy Chair
Office of Policy
U.S. Environmental Protection Agency

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Enclosure