April 12, 2021

Radhika Fox
Acting Assistant Administrator for the Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Comments on Proposed Delay of Effective and Compliance Dates of National Primary Drinking Water Regulations: Lead and Copper Rule Revisions.
Docket No. EPA-HQ-OW-2017-0300

Dear Acting Assistant Administrator Fox:

On behalf of our more than 3 million members and supporters, the Natural Resources Defense Council (NRDC) submits these comments on the Environmental Protection Agency's (EPA) proposal to delay the effective date and compliance date of the Lead and Copper National Primary Drinking Water Regulations, 86 Fed. Reg. 14063 (March 12, 2021).

NRDC supports EPA's plan to review the Lead and Copper Rule Revisions ("LCRR"). NRDC has advocated for a stronger Lead and Copper Rule for decades and submitted extensive comments on EPA's proposed revisions to this standard, urging EPA to make much-needed and long-overdue updates to the Lead and Copper Rule.[1] But the Final January 2021 Rule—the first major revision to the LCR in nearly 30 years—failed to make adequate improvements, instead leaving in place an inadequate treatment technique, slowing the rate of lead service line replacement, and condemning millions of Americans to drink lead-contaminated water for a generation. NRDC petitioned for review of this unjust and illegal rule,[2] and we welcome EPA's proposal to now review the LCRR. We hope EPA will take this opportunity to promulgate a Lead and Copper Rule that provides robust public health protections, ensures the full removal of all lead service lines, and reduces the disproportionate burden of lead poisoning on communities of color and low-income communities. The agency should ensure that President Biden's commitment that "100 percent" of all lead service lines should be removed is achieved. As Vice President Harris stated yesterday, April 11, 2021, "No child should have to drink water poisoned by lead. The American Jobs Plan will replace 100 percent of lead service lines in our country—creating good-paying union jobs along the way."[3] EPA should make sure that these goals are guaranteed by a revised Lead and Copper Rule. Additionally, as it undertakes its review, EPA should ensure that the Lead and Copper Rule Revisions are consistent with Executive Order

[1] Natural Resources Defense Council, Comment on Proposed Lead and Copper Rule Revisions (Feb. 12, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2017-0300-1546 [hereinafter NRDC Cmt.].
[2] *See NRDC v. EPA*, No. 21-1020 (D.C. Cir.).
[3] Vice President Kamala Harris (@VP), Twitter (Apr. 11, 2021, 4:30 PM), https://twitter.com/VP/status/1381343798488412162.

13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, as well as Executive Order 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis.

The following comments explain why such a review is necessary to address certain shortcomings in the LCRR and why EPA should use this review period to revise the Lead and Copper Rule. If EPA determines that it needs to delay the LCRR's effective date while it undertakes this review, it should explain why that delay is necessary to the reconsideration process.

I. EPA Should Review the LCRR to Make it More Health Protective

As it reviews the LCRR, EPA should revisit and strengthen the following provisions, as raised in NRDC's previous comments on the proposed rule. If EPA chooses not to revise these provisions it should, at a minimum, adequately explain its decision not to do so.

a. Setting an MCL for Lead

First, as we discussed at length in our previous comments, EPA should set an at-the-tap MCL for lead of 5 ppb. This is feasible—and thus required by the Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(7)(A), which requires EPA to set an MCL unless "not economically or technologically feasible"—and would substantially simplify implementation and enforcement of the Lead and Copper Rule. [4]

If EPA chooses not to set an MCL, it should at least correct the LCRR's failure to adequately explain why setting an MCL is not economically or technologically feasible. The LCRR only states that EPA's decision to "promulgate a treatment technique rule for lead instead of a maximum contaminant level (MCL) in 1991 has been upheld by the United States Court of Appeals for the District of Columbia Circuit."[5] But, as NRDC raised in its comments on the proposed rule, the D.C. Circuit's decision turned entirely on two justifications that no longer apply. [6] Because the SDWA has been amended to ban lead-containing plumbing and fixtures, lead service lines owned or controlled by water utilities are now the dominant source of lead contamination. And the SDWA was amended in 1996—after the Court's decision—to include a risk-risk tradeoff provision that now allows EPA to set a higher MCL than it otherwise would if needed to prevent a harmful increase in the concentration of other contaminants in drinking water.[7] In revisiting the Rule, EPA should take the opportunity to explain why it is still not feasible to set an MCL in light of these statutory and factual changes over the last twenty-five years.

[4] *See* NRDC Cmt. at 4-10.
[5] 86 Fed. Reg. 4198, 4206 (January 15, 2021).
[6] *See* NRDC Cmt. at 8-10.
[7] 42 U.S.C. § 300g-1(b)(5).

b. Creating a Health-Protective Treatment Technique

If EPA does not set an MCL, EPA should revisit elements of its treatment technique that do not "prevent known or anticipated adverse effects on the health of persons to the extent feasible,"[8] and replace these with feasible and more protective alternatives. These include lowering the lead action level to 5 ppb, mandating lead service line replacement within ten years, and strengthening corrosion control requirements.[9] EPA should also improve the Rule's monitoring and public education components to avoid under-detection and under-reporting of lead contamination and to ensure that the public understands the health risks posed by lead in drinking water and what they and water utilities can do to minimize those risks.[10] For example, EPA should follow the lead of the Michigan Lead and Copper Rule and make critical updates to mandatory consumer information, and should require public water systems to explicitly identify lead service lines as a source of lead in drinking water.

As NRDC and others explained in comments on the proposed rule, these changes are both feasible and would make the treatment technique more health protective. For example, it is feasible for EPA to lower the lead action level to 5 ppb. EPA already set 5 ppb as the practical quantitation level.[11] And the vast majority of United States water systems are capable of meeting this standard: more than three-quarters of water systems in the United States have 90th percentile lead levels below 5 ppb, and another ten percent of water systems have 90th percentile lead levels below 10 ppb.[12] Yet EPA failed to explain why it declined to lower the action level in light of this data, instead relying on EPA's 1991 assessment that 15 ppb "reflects EPA's assessment of a level that is generally representative of effective corrosion control treatment."[13] In its review of the LCRR, EPA should revisit its decision not to lower the action level and, if it chooses not to do so, adequately explain this decision.

It is also feasible for EPA to mandate lead service line replacement within ten years. Complete lead service line replacement is supported by AWWA and the National Drinking Water Advisory Council, and the benefits of doing so far outweigh the costs.[14] It is clear that public water systems, including in communities such as Flint and Newark that have serious economic challenges, have been able to fully replace every one of their thousands of lead service lines within about 3 years. Despite this, the LCRR gives no indication that EPA even considered incorporating a deadline for mandatory lead service line replacement into the final Rule. EPA should use its review of the Rule to remedy this.

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[8] *Id* § 300g-1(b)(7)(A).
[9] *See* NRDC Cmt. at 10-12.
[10] *See Id.* at 3, 11-12.
[11] 86 Fed. Reg. at 4207.
[12] NRDC Cmt. at 6.
[13] 86 Fed. Reg. at 4208.
[14] NRDC Cmt. at 11.

c. Avoiding Backsliding

The Safe Drinking Water Act requires "[a]ny revision of a national primary drinking water regulation" to "maintain, or provide for greater, protection of the health of persons."[15] In our comments, NRDC and others noted that at least two aspects of the Rule violate this requirement.[16] The LCRR failed to remedy these backsliding violations and failed to adequately explain why these changes and the rule as a whole—which appear on their face to be less health protective than the previous LCR—are not backsliding and in violation of the SDWA.

First, the Rule slows the replacement rate for lead service lines from 7% per year to 3% per year, extending the time for full replacement from 14 years to over 33 years.[17] While EPA asserted that other changes to the service line replacement program—including excluding partial replacements and lines that have "tested out" from the replacement rate—mean the service line replacement program overall does not amount to backsliding, it offered only a perfunctory argument purporting to show that these changes will mitigate harm from the slowdown in the replacement rate, speculating that "this rule results in a greater rate of removal."[18] But this is far from clear, and EPA bears the burden of demonstrating that slowing down the replacement rate so significantly is not backsliding. EPA cites the lack of LSL replacement under the previous rule but fails to grapple with the fact that much of this failure to achieve LSL replacement likely was driven by widespread violations of the LCR, which contributed to the lack of LSL replacement. For example, EPA's own audit of state files indicated that 92 percent of LCR treatment technique violations were not reported to EPA and thus not reflected in EPA's Safe Drinking Water Information System. [19] Even so, an NRDC analysis showed that nearly 30 million Americans were served by water systems that violated the LCR and 5.5 million were served by systems exceeding the Action Level for lead.[20] As it revisits the rule, EPA should mandate a 10% replacement rate. At a minimum, EPA should provide an adequate and evidence-based explanation for why slowing the replacement rate is not illegal backsliding.

Second, the Rule weakened the prior definition of lead service line in 40 C.F.R. 141.2 by eliminating the prior rule's inclusion of lead pigtails and lead goosenecks.[21] While EPA explained that "EPA has kept these connectors out of the LSL definition to ensure water systems are conducting LSLR on service lines and not counting replacement of connectors as a replaced

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[15] 42 U.S.C. § 300g-1(b)(9).
[16] NRDC Cmt. at 1, 14.
[17] 86 Fed. Reg. at 4293.
[18] *Id.* at 4216.
[19] EPA, "2006 Drinking Water, Data Reliability Analysis and Action Plan for State Reported Public Water System Data in the EPA Safe Drinking Water Information System/Federal Version (SDWIS/FED)".
[20] Dr. Kristi Pullen Fedinick, "What's in Your Water: An Updated Analysis," Sept. 14, 2018, https://www.nrdc.org/experts/kristi-pullen-fedinick/whats-your-water-updated-analysis.
[21] 86 Fed. Reg. at 4281.

LSL," it did not directly address NRDC's backsliding concern. [22] For example, EPA did not provide evidence that, under the prior LCR, water systems replacing connectors instead of full service lines was a significant problem. Nor did EPA provide evidence that leaving connectors in the ground as a result of this policy change will not increase lead-contaminated water over the long term. EPA should reconsider its decision to exclude connectors from the definition of lead service line or, at a minimum, explain why this new definition does not provide for less health protection than the prior definition.

d. Monitoring for Lead in Schools and Childcare Facilities

EPA should also replace the flawed school and childcare facility testing provisions with a more comprehensive testing program, or better yet, a "filter first" requirement. Currently, the school testing provisions provide for testing only once every five years, and are not even consistent with scientific protocols and EPA's own recommendations in its *3Ts for Reducing Lead in Drinking Water Toolkit*, including testing all outlets used for drinking or cooking and shut-offs of problem outlets.[23] Any requirements placed on schools or child care facilities should result in either a scientifically appropriate characterization of all drinking water quality throughout a school building, or should mandate the provision of safe drinking water, for example through a "filter first" provision that would ensure the use of filter stations certified to reduce lead from water.

In response, EPA stated that it "disagrees that sampling requirements be expanded, as the intent is to provide a preliminary screen for lead in schools and child care facilities and an improved understanding of the importance of lead testing, and is not a replacement for comprehensive testing as detailed in the 3Ts."[24] But EPA failed to explain how instituting a program it acknowledges is not comprehensive will not lead schools to neglect comprehensive testing in favor of this new EPA-endorsed school testing regime. Nor did EPA adequately explain why this extremely limited and likely misleading testing program will not ultimately confuse and mislead families about whether a school's water is safe to drink. In its review of the LCRR, EPA should reconsider the school testing requirements.

e. Cost Benefit Analysis

EPA should fix the flaws in its cost-benefit analysis to reflect the true benefits of a strong rule. As NRDC explained in its comments on the proposed rule, EPA failed to monetize certain quantifiable benefits—including adult cardiovascular benefits and benefits to children in homes not served by lead service lines—and did not justify its use of 3% and 7% discount rates for future benefits.[25] EPA did not adequately explain these choices in the final Rule.

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[22] *Id.* at 4241.
[23] NRDC Cmt. at 15, 46-50.
[24] 86 Fed. Reg. at 4233.
[25] NRDC Cmt. at 16-22.

With respect to adult cardiovascular benefits, EPA explained that while it chose not to monetize these benefits, it still considered these benefits in reaching its decision that the benefits justified the cost of the LCRR.[26] In reviewing the LCRR, EPA should clarify how—if it is true that these benefits were not monetized—it factored them into its cost-benefit analysis. EPA should also revisit its decision to not monetize benefits to children in homes without lead service lines, a decision the LCRR made no mention of.

With respect to its choice of discount rates, EPA simply stated that it is following OMB Circular A-4, which recommends discount rates of 3% and 7%.[27] But OMB chose those discount rates in 2003, when the rate on 30-year treasury notes was 3%—and that rate is now 0.4%.[28] The final Rule does not explain why EPA continues to stand by these discount rates in light of these changed circumstances. As it revisits the Rule, EPA should use a lower discount rate and, if it chooses not to do so, fully justify its choice of a discount rate higher than zero.

II. EPA Should Promulgate a Revised Rule After Holding a Public Hearing on an Amended Proposal

The Safe Drinking Water Act requires EPA to "provide opportunity for public hearing *prior to* promulgation of" national primary drinking water regulations like the revised Lead and Copper Rule.[29] Consistent with this statutory requirement, NRDC and others asked EPA to hold public hearings before finalizing the Lead and Copper Rule revisions.[30] EPA ignored those requests and failed to hold a public hearing. While NRDC is glad to see EPA holding a series of listening sessions and roundtables, this will not cure the legal infirmity of the LCRR: because the statute requires hearings "prior to promulgation" of a national primary drinking water regulation, 42 U.S.C. § 300g-1(d), hearings on an already-promulgated final rule don't satisfy this requirement. Instead, EPA must propose a new rule and hold a public hearing on that proposal.

A public hearing is not only necessary to cure this legal defect: it is also necessary to give the public an opportunity to give oral testimony to EPA on their lived experiences of lead-contaminated drinking water and local implementation of the LCR. For decades, the LCR has failed to protect communities from lead-contaminated water. And this failure has affected some communities more than others, with a disproportionate burden on low-income communities and communities of color. Members of these communities and others were denied their statutory right to present oral testimony to EPA on the LCRR. EPA must correct this by holding public hearings on a new proposed rule.

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[26] 86 Fed. Reg. at 4245.
[27] EPA, Public Comment and Response Document for the Final Lead and Copper Rule Revisions, at 439.
[28] NRDC Cmt. at 13, 18; *see also* Inst. for Pol'y Integrity, Comments on Lead and Copper Rule Revisions 5–9 (Feb. 12, 2020)
[29] 42 U.S.C. § 300g-1(d) (emphasis added).
[30] *See* November 24 Letter to Administrator Wheeler.

III. Additional Technical Comments

NRDC also requests that EPA take this time to reconsider and evaluate the following provisions of the final LCRR to ensure that they result in actual public health protection while minimizing complexity of implementation.

a. The definition of a lead service line should incorporate any and all portions of lead between the water main and the building inlet or 18" inside a building, including goosenecks and pigtails.[31]

b. Service line physical verification requirements must be clear and consistent to achieve public health protection, and inventory information should always be available to the public and publicly mapped.

c. Corrosion control treatment and water quality parameter requirements should be consistent with EPA corrosion control guidance manual recommendations. New corrosion control studies should be mandatory for all water systems with lead action level exceedances, with a phased in study schedule for lower risk water systems.

d. Corrosion control treatment for lead control should be designed for full simultaneous compliance; compliance with other MCLs should not be authorized as an excuse for failure to comply with lead controls.

e. The use of an orthophosphate inhibitor should not be mandatory if superior lead control is achieved through a different treatment strategy, including lead (IV) oxide scales. If the final rule specifies inhibitor doses that must be evaluated as part of a corrosion control study, scientific evidence of their superior effectiveness in relevant water qualities and conditions must be provided.

f. For long term trend and corrosion control evaluation, the revised sampling requirements for LSL sampling sites should continue to mandate collection and analysis of first liter samples <u>in addition to</u> the fifth liter samples. Research shows that different forms of lead in plumbing respond differently to corrosion control treatment. The first liter samples are necessary to assess corrosion control treatment for systems that have multiple lead sources that will remain after full LSL replacement, and to assure that interior plumbing is not contributing to excessive lead exposure beyond the LSL contribution. Research shows that high lead is possible in locations without LSLs. Under the revised tiering requirements of the LCRR, LSL systems would collect no data regarding the household lead contribution.

[31] The SDWA provides: "The term "lead service line" means a pipe and its fittings, which are not lead free (as defined in section 300g–6(d) of this title), that connect the drinking water main to the building inlet." 42 U.S.C. §300j-19b(a)(4). EPA's definition must be at least as comprehensive as this definition.

g. The elevated lead levels found in Michigan LCR fifth liter samples indicate the extent to which historical data have significantly underestimated the contribution from lead service lines. A combination of improved LSL targeted sampling, as included in the final LCRR, plus a reduced action level that eliminates the trigger level, will result in a rule that prioritizes risk reduction at the highest risk LSL water systems while reducing implementation complexity.

Sincerely,

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cc: Docket No. EPA-HQ-OW-2017-0300

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