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Reducing Exposure to Lead in Drinking Water: Status of Revisions to Lead and Copper Rule (Parts 1 & 2)

The Administration is considering substantial changes to the current regulatory approach to reducing exposure to lead in drinking water. The US EPA (EPA) is assessing long-term revisions to the Lead and Copper Rule (LC Rule), a Safe Drinking Water Act (SDWA) regulation that seeks to protect public health by minimizing lead and copper in drinking water, primarily through corrosion control measures. Lead contamination in drinking water has been the subject of national scrutiny in the aftermath of the public health crisis in Flint, Michigan, where high levels of lead leached from aging pipes into the city's drinking water after the city switched its source of drinking water to the Flint River, the quality of which was more corrosive than the prior source. Congress eventually banned lead pipes in new construction with amendments to the SDWA in 1986, but in a 2016 survey, the American Water Works Association estimated that 6 million lead-containing service lines continue to distribute drinking water to 15-22 million people in the United States. As state and local governments nationwide confront similar challenges, EPA appears poised to address the legacy of lead infrastructure through updates to the LC Rule. In January 2018, EPA Administrator Scott Pruitt pledged to update the LC Rule as part of his "war on lead" in drinking water.

The SDWA requires EPA to determine a health-based maximum contaminant level goal (MCLG) for identified contaminants that may be found in drinking water. MCLGs reflect levels at which no adverse health effects are likely to occur, with an adequate margin of safety and are not enforceable. The MCLG for lead is zero, based on EPA's finding that there is no safe level of lead exposure, particularly for young children and pregnant women.

The SDWA also requires EPA to establish enforceable national primary drinking water regulations. For each contaminant with an MCLG, EPA must designate either a maximum contaminant level (MCL) or a "treatment technique." MCLs must be set "as close to the MCLG as feasible," whereas "treatment techniques" are allowed if it is not economically or technologically feasible to ascertain the MCL. EPA has established a "treatment technique" for lead, which is set forth in the LC Rule.

First promulgated in 1991, the LC Rule includes requirements for corrosion control treatment, source water treatment, lead service line replacement, and public education, as well as monitoring, reporting, and recordkeeping . Some of these requirements are triggered if action levels are exceeded. The action level for lead is 15 parts per billion (ppb) (or 0.015 mg/L) and is triggered if more than 10% of consumer taps sampled during a monitoring period contain lead concentrations in excess of 15 ppb. An exceedance indicates that corrosion control is not effective and the public water system must take additional steps to reduce lead in drinking water. The applicable corrective action depends upon the size of the public water system and the actions previously taken. Replacement of lead service lines is a last resort.

Critics have argued that the LC Rule is too reactive, too complex, and too lenient. EPA discussed these concerns in an October 2016 white paper, which declared that the LC Rule and its implementation "are in urgent need of an overhaul." The white paper indicates that EPA views the LC Rule as insufficiently proactive because it compels protective actions only after an action level is

exceeded, thus creating a disincentive for public water systems to identify potential problems in drinking water before they become a public health concern. The LC Rule is also "one of the most complicated drinking water regulations for states and drinking water utilities to implement." Identifying the source(s) of lead contamination can be difficult, and the LC Rule is the only regulation that requires sampling in homes, often by the consumers themselves. Many lead service lines are also partially or entirely privately owned, and the responsibility for addressing the lead contamination may be up to the homeowner. Furthermore, the LC Rule confers public water systems with considerable discretion in regard to how they optimize corrosion control treatment, leaving many systems without fully optimized or maintained corrosion controls.

To address these concerns, EPA is considering technology-driven and health-based revisions to modernize and strengthen the LC Rule. Regulatory changes may include full lead service line replacement, health-based benchmarks, more prescriptive corrosion control treatment requirements, point-of-use filters, and improvements to sampling requirements, among other ideas. US EPA's Office of Ground Water and Drinking Water met with stakeholders as recently as January 2018, and solicited written comments from the public in March. EPA's current rulemaking schedule calls for the Agency to release a draft rule in August 2018 and a final rule in February 2020.

Whether the EPA ultimately follows through with a draft rule in 2018 remains to be seen. Meanwhile, communities across the United States are taking action to address lead contamination in their jurisdictions. For example, the Michigan Department of Environmental Quality will soon release an update to its own Lead and Copper rule, which may provide a template for other states. In January 2017, the State of Illinois passed a law that requires each school to conduct lead testing, and mandates remediation if elevated lead levels are found. New York, New Jersey, Oregon, Virginia, and California have also implemented similar laws (some are voluntary). While these states and other public water systems may have learned lessons from Flint, actually tackling the invisible problem of lead contamination is challenging as it can be extremely costly to implement and is fraught with economic, political and legal issues.

Addressing those issues in a fair and balanced way is important, especially because failure to comply with the LC Rule can expose public water systems to significant criminal and civil liability. For example, the Flint, Michigan disaster led to 15 criminal charges, two class action lawsuits, and a settlement that requires the State of Michigan to fund $100 million for the City of Flint's replacement of lead service lines. The SDWA includes a citizen suit provision, and the Natural Resources Defense Counsel and Newark Education Workers Caucus recently filed a Notice of Intent to Sue the City of Newark, New Jersey and the New Jersey Department of Environmental Protection for alleged violations of the SDWA—specifically, failure to comply with various provisions of the LC Rule.

Please stay tuned for Part 2 of this post, which will address in more detail issues related to liability under the SDWA and LC Rule.

By Sarah Quiter on May 17, 2018

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