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February 5, 2024

TO: The Environmental Protection Agency

FROM: State of Kansas; Office of the Attorney General of Kansas

RE: Notice of Proposed Rulemaking: “National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI)”

Docket No.: EPA-HQ-OW-2022-0801

The Attorneys General of Kansas, Arkansas, Florida, Georgia, Iowa, Idaho, Louisiana, Mississippi, Montana, Nebraska, South Carolina, South Dakota, Texas, Utah, and Wyoming submit the following public comment regarding the Environmental Protection Agency’s (EPA’s) proposed rule entitled *National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI)*, 88 Fed. Reg. 84878 (December 6, 2023). This proposed rule creates a heavy-handed mandate on states that is nigh impossible to comply with and is also a financial burden on already squeezed middle class families. It is unworkable, underfunded, and unnecessary and should be withdrawn.

I. Introduction

In 1974, Congress passed the Safe Drinking Water Act, authorizing the Environmental Protection Agency to regulate the nation’s drinking water.¹ The Act required the EPA to identify possibly harmful contaminants in the water, set “maximum containment goals,” and promulgate regulations to achieve those goals.² In response, the EPA identified lead as one such contaminant. By law, the States must enact laws and regulations over their own drinking water that are at least as stringent as the standards promulgated by the EPA.

¹ Pub. L. 93–523, Dec. 16, 1974, 88 Stat 1660, as codified by 42 U.S.C.A. § 300g-1 *et seq.*

² See generally 42 U.S.C.A. § 300g-1.

And States such as Kansas have in fact passed laws and regulations to control lead levels in the water.³

About three years ago, the EPA approved the 2021 Lead and Copper Rule Revisions (the 2021 rule).⁴ The rule would require pipe replacement only if the amount of lead reached a certain threshold and the rule set a reasonable timeline for such replacement.⁵ The 2021 regulations were set to take effect in October of this year, and the States had taken measures to comply. But the rule has not yet taken effect.

Rather than wait and see what the outcome of the 2021 Rule will be, the EPA is now proposing even more stringent standards. The proposed rule mandates that every State, public water system, and even individual homeowners⁶ replace their lead pipes within the next ten years with very few exceptions. The proposed rule requires a “rolling average” of ten percent replacement every year.⁷ This despite the fact that, while Congress authorized an additional \$15 billion toward replacing lead pipes and “associated activities directly connected to the identification of the [lead pipes] and planning for the replacement of [the pipes]”⁸ in the Infrastructure Investment and Jobs Act,⁹ neither this Act nor Safe Drinking Water Act mandate pipe replacement.

The proposed rule is unlawful for three primary reasons: (1) it implicates the major questions doctrine, (2) it violates the commerce clause, and (3) it is arbitrary and capricious. Ultimately, this proposed rule is unworkable, underfunded, and unnecessary. It creates an almost impossible burden for each state and its citizens without evidence of a tangible benefit over the 2021 rule that was already set to go into effect. The EPA should change course and withdraw the proposed rule.

II. The proposed rule implicates the Major Questions Doctrine

The proposed rule requires not just States and public water systems, but **every homeowner** to replace every lead pipe line in the country within the next ten years. The sheer expense and scale of this rule is staggering. It will affect millions of homeowners,

³ See, e.g., Kan. Admin. Reg. 28-15a-80.

⁴ 86 Fed. Reg. 71574.

⁵ 88 Fed. Reg. 84884–97.

⁶ Private homeowners would be required to replace the service line connecting their homes to the main line.

⁷ 88 Fed. Reg. 84916.

⁸ *Id.* at 84881.

⁹ Pub. L. 117–58, November 15, 2021, 135 Stat 429.

raise utility prices for American families, and cost, by some estimates, \$60 billion in compliance alone¹⁰—almost none of which is offset by the federal government.

By EPA estimates, there are over 54,100 lead pipes in Kansas alone.¹¹ Other estimates place the number at closer to 160,000.¹² The EPA estimates it will cost an average of “\$4,700, ranging from \$1,200 to \$12,300 per line replaced.”¹³ But in many cases, the actual costs have been far higher. For example, in 2022, a Chicago homeowner received a \$28,500 quote to remove the service line that connects her home to the city main.¹⁴ Using the EPA’s estimates, the proposed rule is expected to cost \$28 to \$47 billion just in compliance costs.¹⁵ Others estimate this cost is likely to exceed \$60 billion.¹⁶ Add to this the increased water prices to which each American family will be subjected, and the overall cost could easily reach hundreds of billions of dollars. This will increase exponentially if each and every State, public water system, and homeowner is required to replace their lead service lines on the same extremely short timeline.

No agency can act without Congressional authorization. The greater the scope of the proposed action, the clearer that Congressional authorization must be. As the EPA itself has previously acknowledged, “under the major questions doctrine, a clear statement [is] necessary to conclude that Congress intended” to grant an agency authority to enact a measure “projected to have billions of dollars of impact.”¹⁷

The sweeping and consequential nature of the proposed rule implicates this doctrine. Therefore, the EPA must be able to point somewhere in either the Safe Drinking Water Act or the Infrastructure Investment and Jobs Act where Congress clearly gave its

¹⁰ Rachael Frazin, *Lead Pipe Replacement Funds in Bipartisan Deal Draw Skepticism*, The Hill (Aug. 8, 2021), <https://shorturl.at/bmuD5>.

¹¹ EPA, Fact Sheet 7th Drinking Water Infrastructure Needs Survey and Assessment April 2023, <https://shorturl.at/hwTUZ>.

¹² Allison Kite, *Kansas and Missouri Have 256,000 Lead Pipes. EPA Wants Them Removed Within 10 Years*, Missouri Independent (Dec. 1, 2023), <https://shorturl.at/ksvz8>.

¹³ EPA, *Strategies to Achieve Full Lead Service Line Replacement*, Oct. 2019, <https://shorturl.at/IHZ57>.

¹⁴ Monica Eng, *Eye-Popping Lead Removal Prices*, Axios (July 21, 2022), <https://shorturl.at/cvCFG>.

¹⁵ See Sophia Campbell and David Wessel, *What would it cost to replace all the nation’s lead water pipes?*, Brookings Institute (May 13, 2021), <https://shorturl.at/zDGKP>.

¹⁶ Annie Snider, *Biden Says Bipartisan Deal Will Solve the Country’s Lead Problem. It Won’t.*, Politico (Aug. 2, 2021), <https://shorturl.at/hjnuC>.

¹⁷ *West Virginia v. EPA*, 597 U.S. 697, 716 (2022). In *West Virginia*, “the EPA’s own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices).” *Id.* at 714. In addition to resulting in higher water prices, the proposed rule will result in \$28 to \$47 billion in direct costs, a great share of which will be borne by private homeowners, the States, and public water systems.

approval for this course of action. It cannot, because such clear authorization does not exist. The EPA may set containment goals for certain contaminants and require corrosion control, but nowhere in either Act did Congress grant the EPA authority to require full-scale replacement, and certainly not on the proposed timeline. And there is **no** authority for the EPA to force private homeowners to bear the brunt of the costs.

III. The proposed rule invokes the outer limits of the Commerce Clause

The proposed rule also invokes the outer limits of the Commerce Clause, so Congressional authorization cannot be merely implied. Congress has the power to “regulate commerce . . . among the states.” U.S. Const. art. I, § 8, cl. 3. “[T]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.”¹⁸ Congress’s power does not extend to purely local, non-economic activity; it is limited to commercial activities that substantially affect interstate commerce or noneconomic activity with a direct nexus to interstate commerce.¹⁹ “Inaction” is not a commercial activity.²⁰ Neither Congress nor an agency can compel people to engage in commerce, thus creating a market to regulate.²¹

The proposed rule does not simply regulate the pipes that are owned and operated by public water systems; it seeks to regulate the pipes that connect each individual house with the main, even though these pipes are privately owned by the homeowner and on private property (and only supply water to that one household). This is akin to the federal government seeking to dictate the size of a church parking lot because cars happen to drive on it.

The implications of that type of exercise of power are not theoretical. For example, it is not hard to imagine a scenario where, through no fault of their own, a family lives in a home that happens to have lead pipes already under the ground. Perhaps they have owned that home for decades and have no plans to sell it, and they have found ways to deal with whatever lead may be present in their water supply (whether through filters or otherwise). The proposed rule still compels that family to act. If it takes effect, they will be required to pay thousands of dollars—possibly close to \$30,000—out of pocket to dig up and replace the pipes, regardless of the amount of lead actually in the water, the effectiveness of cheaper mitigation efforts, etc. It is suspect at best as to whether *Congress* even has the power to require this, much less an unelected federal bureaucracy.

¹⁸ *Solid Waste Agency v. Army Corps of Engrs.*, 531 U.S. 159 (2001).

¹⁹ *See id.* at 561–62.

²⁰ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

²¹ *Id.*

By comparison, the Supreme Court recently curtailed an overreach by this same agency, striking down the EPA’s definition of “waters of the United States” under the Clean Water Act.²² The Court held the agency could only regulate wetlands that actually connected to navigable waters such that they were “‘indistinguishable’ from those waters.”²³ Absent a demonstrable interstate nexus, the EPA cannot regulate bodies of water sitting on people’s properties. Similarly, the EPA must demonstrate that the subject of the regulation here—pipes that have lain underground for decades—have such a clear connection to interstate commerce that the EPA can require individual, private homeowners to dig them up and replace them. The proposed rule falls short of demonstrating that.

At a minimum, this invokes the outer limit of Congress’ commerce power and there should be clear authorization.

When deciding whether an agency’s proposed action derives from a permissible interpretation of a statute, the Court has held it will construe the statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress,²⁴ and “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”²⁵ There is no “clear indication” that Congress intended a full-replacement requirement when passing either the Safe Drinking Water Act or the Infrastructure Investment and Jobs Act. While the EPA may promulgate regulations to contain contaminants in the water, these regulations must be “economically and technologically feasible.”²⁶ And while Congress has authorized funds for the replacement of lead pipes,²⁷ it has not *mandated* that *all* lead pipes must be replaced *within ten years*.

It is also doubtful whether Congress would have the authority to force many Americans to make a purchase they do not wish to make under the guise of regulating interstate commerce. The EPA justifies its proposed rule by pointing to the aggregate effects lead exposure could have on the healthcare system.²⁸ By not replacing lead pipes, the proposed rule argues, individual health concerns could, in the aggregate, effect the

²² *Sackett v. EPA*, 598 U.S. 651, 684 (2023).

²³ *Id.*

²⁴ *Solid Waste Agency*, 531 U.S. at 173.

²⁵ *Id.*; accord *VanDerStok v. Garland*, 86 F.4th 179, 188 (5th Cir. 2023) (“How do we know when an agency has exceeded its statutory authority? Simple: the plain language of the statute tells us so.”).

²⁶ 42 U.S.C.A. § 300f(1).

²⁷ See 135 Stat 429.

²⁸ See 88 Fed. Reg. 84880.

national healthcare system.²⁹ But the Supreme Court already rejected a very similar argument. No matter the aggregate effect uninsured individuals had on the healthcare system, Congress could not force them to purchase health insurance.³⁰ Congress cannot require a “mandatory purchase to solve almost any problem.”³¹ And the fact that everyone will likely participate in the healthcare market at some point “does not authorize Congress to direct them to purchase particular products in th[at] or other markets today.”³² The EPA cannot, therefore, require private homeowners to dig up their existing pipes and purchase replacements.

IV. The proposed rule is arbitrary and capricious

The EPA has no authority to enact regulations that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.A. § 706(2)(a). The proposed rule fails this test because it will cost the States, public water systems, and individual households billions of dollars without resulting in any measured benefit, the agency lacks clear Congressional authorization to impose these burdens, and the proposed rule does not adequately explain why it is departing from past practice.

As things currently stand, States and public water systems are required to contain the levels of lead in the water. They do so by “install[ing] and operat[ing] optimal corrosion control treatment.” Many factors determine the amount of lead that can be in the water; “[t]he amount of lead in drinking water depends heavily on the corrosivity of the water.” While the EPA is tasked with establishing containment levels for lead and enacting regulations to meet those levels, never before has the agency required a complete replacement, and certainly not on such a tight timeline. And nowhere does either Act authorize a regulation of this scale.

As the rule acknowledges, “corrosion control is generally effective in reducing lead to low levels.”³³ While it may be accurate to say “there are no known safe levels of lead,”³⁴ this is not a reason to require across-the-board replacement within the next ten years. By the same logic, there are no known safe speeds which will not result in injury in the event of a car accident. But rather than outlaw cars, governments focus their efforts where it will do the most good: requiring lower speeds in school zones, regulating seat belts, and outlawing drunk driving. That is what should happen here. The States should be free to

²⁹ *Id.*

³⁰ *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 558.

³¹ *Id.* at 553.

³² *Id.* at 557.

³³ 88 Fed. Reg. 84880.

³⁴ *Id.* at 84799.

continue to utilize their resources to contain contaminants and replace pipes where it is most urgently needed while monitoring those that might pose a problem in the future.

As the proposed rule also acknowledges, the full replacement requirement will not be effective at eliminating all lead sources from the water.³⁵ The EPA may claim these heart conditions will be drastically reduced if there is no lead in the water, but the rule will not result in *no* lead contaminant in the water. Because many homes have lead in their internal plumbing and many pipes have lead connectors—neither of which are affected by the proposed rule—the rule will not result in completely eliminating lead. The EPA therefore can only speculate at what might happen if one source of lead is removed, and the justification for the costly, unprecedented change is simply inadequate.

Finally, there is a clear alternative with the 2021 rule. The changes brought about by this rule will likely be effective at removing some level of lead contaminant from the water. It is nonsensical to add expensive, nearly impossible-to-comply-with requirements on top of this without taking into account the effect this rule has when it has been implemented.

V. The proposed rule is unworkable, underfunded, and unnecessary

In addition to being unlawful, this proposed rule creates a mandate that is unworkable, underfunded, and unnecessary. It also increases utility expenses for ordinary Americans at a time when inflation is already making it difficult for them to make ends meet. Energy and utility prices have already increased, and this administration has failed to control inflation across the economy.

The federal government will not be the ones that bear the brunt of this excessive cost. Congress has only appropriated \$15 billion toward lead pipe replacement. Members of Congress have said it is “laughable” to believe this would cover the costs to completely replace the Nation’s pipes.³⁶ Not all of this money will even go directly toward the replacements; a certain percentage will be siphoned off by the EPA’s own administrative expenses.³⁷ And even the money that makes it to communities must be paid back. “[H]alf of the money provided by the bill would come in the form of loans that communities have to repay, putting a large share of the funding beyond the reach of many of the communities that need it most.”³⁸

³⁵ See Snider, *supra* n.15.

³⁶ *Id.*

³⁷ See 42 U.S.C.A. § 300j-19b(c).

³⁸ Snider, *supra* n.15.

So, the EPA expects most private homeowners and the most in-need municipalities to pay for the replacement by themselves,³⁹ an enormous expense many Americans cannot afford. If that's not bad enough, the EPA also expects this rule will lead to increased water prices for all American families, in some cases by hundreds of dollars per year.⁴⁰ Under President Biden, Americans are already burdened by high energy and utility prices, which are increasing at rates that outstrip even the crushing inflation witnessed in other household expenses over the last few years.⁴¹ And at least partly due to the inflation that this administration failed to control, most—over 60%—do not have savings set aside for emergencies, let alone to pay for unnecessary pipe replacements.⁴²

There is no need for any of this. In 2021, the EPA approved the 2021 Lead and Copper Rule Revisions.⁴³ The 2021 rule, which requires replacement only if the amount of lead in the water exceeds a specified level and avoids unrealistic timelines for completion, does not take effect in October of this year.⁴⁴ It is irrational to replace that rule, which has not yet gone into effect, with a stricter one, especially, as many other commenters had already said, it will be nearly impossible for States, PWSs, and individual households to completely replace their lead pipes in the next ten years. Add to that the unfunded mandate, and the goals of the proposed rule will never actually be realized. But it does not have to be this way. The EPA can and must change course by abandoning this proposed rule.

VI. Conclusion

All of the undersigned states want clean water for their citizens and are taking steps to ensure that will happen. The proposed rule is not only heavy handed but also an unreasonable way to achieve this goal. It sets an almost impossible timeline, will cost billions, and will infringe on the rights of the States and their residents—all for benefits that may be entirely speculative. The EPA should withdraw the rule.

³⁹ 88 Fed. Reg. 84993.

⁴⁰ *Id.* at 84987.

⁴¹ See United States Energy Information Administration, *U.S. Residential Electricity Bills Increased 5% in 2022, After Adjusting for Inflation* (May 31, 2023), <https://shorturl.at/iSWY0>.

⁴² See Jessica Dickler, *Only 19% of Americans Increased Their Emergency Savings in 2023. That 'Puts Households in a Bind,' Expert Says*, CNBC, Oct. 25, 2023, <https://shorturl.at/jwCU1>.

⁴³ 86 Fed. Reg. 71574.

⁴⁴ 88 Fed. Reg. 84884–97.

Respectfully Submitted,



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