

December 02, 2021

Via e-mail

White House Environmental Justice Advisory Council
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Dear White House Environmental Justice Advisory Council members:

The undersigned thank the White House Environmental Justice Advisory Council (WHEJAC) for your role in ensuring that the Biden Administration places the concerns of impacted and underrepresented communities front and center. WHEJAC plays a unique and important role, as community members and environmental justice champions who have the ear of various arms of the Administration. Because of this unique position, we hope that WHEJAC will be able to communicate to President Biden, Vice President Harris, the Council on Environmental Quality (CEQ), and the White House Interagency Council on Environmental Justice (Interagency Council) the necessity of not squandering the unique moment we find ourselves in regarding equitable access to clean water. With lead service line replacement enjoying bipartisan support, unprecedented bipartisan congressional investment in water infrastructure improvement, and EPA and President Biden both acknowledging the role of infrastructure in climate resilience, the administration must recognize that now is the time to require our federal agencies to take bold, decisive action. Indeed, EPA will announce no later than December 16, 2021 whether it will keep or change the Trump Administration's ineffective—and in some instances regressive—changes to the Lead and Copper Rule, which is supposed to control the level of lead in drinking water.

I. Accountability for Federal Water Infrastructure Investments

This WHEJAC meeting was held on the heels of the passage of the Bipartisan Infrastructure Deal (BID), which contains unprecedented federal investment in water infrastructure. We hope that the “Build Back Better” bill, passed through reconciliation, will build on the foundation set forth in the BID. Firstly, we want to echo the requests of the Administration previously issued by WHEJAC in May 2021 related to Justice 40. Secondly, we urge WHEJAC to request that all relevant agencies commit to prioritizing disadvantaged communities for receipt of funds from the BID.

In several BID sections, including the funds for EPA's Drinking Water and Clean Water State Revolving Funds (SRFs) and for lead service lines, at least 49 percent of the funding must be provided as grants or 100 percent forgiveness of principal as “subsidy for eligible recipients.”

We believe that the aforementioned 49 percent of funding must be provided as subsidy for “disadvantaged communities” under the relevant statutes¹ and EPA should act accordingly. Additionally, the Safe Drinking Water Act and Clean Water Act both were amended by the BID to increase the *minimum* amount of funding that goes to disadvantaged communities as grants and 100 percent principal forgiveness.²

However, for some of the other categories of water infrastructure appropriations, the BID does not explicitly require prioritization of disadvantaged communities for receipt of funds, or even for receipt of grants in particular. Because there are numerous agencies involved, and state governments also play a significant role in distribution of funds, this Administration must think creatively about financial incentives and levers to ensure these funds primarily benefit disadvantaged communities. In a call with advocates on Friday, 11/12/21, EPA Assistant Administrator for Water Radhika Fox indicated EPA would be taking measures itself and engaging states to overcome obstacles to funding for disadvantaged communities. EPA and states must ensure that disadvantaged communities have technical assistance to apply for funding and that there is equitable disbursement of funds. Transparency in that process will be critical to ensuring the Administration does not repeat the mistake of past infrastructure investments that have disproportionately benefited already wealthy and healthier communities. We urge that WHEJAC specifically recommend that EPA adopt and fund such measures and issue strong guidance to states in carrying out the BID to ensure that disadvantaged communities get the technical assistance they need to apply for funds and are prioritized for funding, as intended under the new statute.

It is crucial that agencies identify points of influence wholly under their control for implementation of water infrastructure funding. An example would be from the May WHEJAC recommendations relating to the mapping, monitoring, and inventorying of homes with lead service lines, decentralized wastewater systems, and other failing infrastructure. We encourage

¹ The appropriations for the State Revolving Funds are allocated on page 971–72 of H.R. 3684 (The Infrastructure Investment and Jobs Act). In both subsections (2) and (3), the text states that 49 percent of the funds made available to each State (DWSRF) shall be used by the State to provide “subsidy to eligible recipients” in the form of assistance agreements with 100 percent forgiveness of principal or grants (or any combination of these). The SDWA authorizes such “subsidy” of 100 percent principal forgiveness or grants only for “disadvantaged communities,” as defined in the Act. 42 U.S.C. § 300j-12(d). Thus, those communities are the only “eligible recipients.” Other DWSRF funding is for loans that must be repaid. *See* SDWA §§1452(a)(2)(A) & (F), 42 U.S.C. §§ 300j-12(a)(2)(A) & (F). Congress demonstrated that they indeed intended that disadvantaged communities would be receiving these funds by stating that such additional subsidies would be provided “*notwithstanding section 1452(d)(2) of the Safe Drinking Water Act (42 U.S.C. 300j-12).*” Section 1452(d)(2) of the SDWA places a *ceiling* on the percent of funds available used for additional grants or principal forgiveness for disadvantaged communities. Thus, H.R. 3648 provides that that ceiling does not apply to the 49 percent of funds specifically allocated to disadvantaged communities under it. The nearly verbatim language for the CWSRF on page 971, paragraph (1) of H.R. 3684 also indicates that the CWSRF additional subsidization provisions are intended to help disadvantaged communities with the ceiling on such funds waived. *See* 33 U.S.C. § 1383(i) (Clean Water Act section 603(i)).

² H.R. 3684, Section 50102(b)(2)(B) (expanding to a minimum of 12 percent of the DWSRF subsidies for disadvantaged communities) and Section 50210(a)(1)(B)(i-ii) (explaining that a minimum of 10 percent of CWSRF shall go to disadvantaged communities or certain green infrastructure projects).

subsequent WHEJAC recommendations to build on that, pushing the Administration to leverage federal authority in enforcement and compliance as well as authority for civil rights investigations to ensure that funding is not misdirected or bottlenecked on its way to the communities that need it most.

II. Proactive Lead Service Line Replacement and Lead and Copper Rule Overhaul

As you recognized in your May 2021 recommendations, “[t]he human toll of inequality is shown in . . . disproportionately high rates of lead poisoning in children of color.”³ The Lead and Copper Rule (LCR or Rule) has done nothing to address that disparity. The Rule is fundamentally broken and has failed communities for the past 30 years. Cynthia Giles, the former Assistant Administrator for EPA’s Office of Enforcement and Compliance Assurance from 2009 to 2017, recently urged EPA to overhaul the LCR noting “the unreliability of the reported lead levels and the widespread violations” of the Rule, and “mountain of evidence that violations of the lead [and copper] rule may be as much as ten times what EPA’s data claims.”⁴ While it is widely understood that formula-fed infants under six months old can receive the majority of their lead exposure through drinking water,⁵ the unreliable data regarding lead levels in drinking water has often been the basis for many—including academics and government agencies—to incorrectly overlook or downplay water as a possible significant source of lead poisoning.⁶

We want to acknowledge the important recommendations on the Lead and Copper Rule provided by WHEJAC that would help reduce that disparity. Recommending: proactive lead service line replacement (LSLR); a prohibition on partial replacements; reversal of the Trump Administration’s slow-down of the rate of LSLR; incentivizing state programs to combat lead in drinking water in schools and childcare facilities; incentivizing prioritization of contractors from communities of color; and improved monitoring and databases are all crucial steps for EPA to take moving forward.

³ White House Env’tl Just. Advisory Council, Final Recommendations: Justice40 Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions 77 (2021), <https://www.epa.gov/sites/default/files/2021-05/documents/whiteh2.pdf>.

⁴ Comments by Cynthia Giles, *Comments on Proposed Revisions to the Lead and Copper Rule*, Docket ID No. EPA-HQ-OW-2017-0300 (Feb. 4, 2020) at 8; see also Erik Olson & Kristi Pullen Fedinick, Nat. Res. Def. Council, *What’s in Your Water? Flint and Beyond: Analysis of EPA Data Reveals Widespread Lead Crisis Potentially Affecting Millions of Americans* (2016), <https://www.nrdc.org/sites/default/files/whats-in-your-water-flint-beyond-report.pdf>.

⁵ See Valerie Zartarian et al., *Children’s Lead Exposure: A Multimedia Modeling Analysis to Guide Public Health Decision-Making*, 125 *Env’tl Health Perspectives* 9 (2017), <https://ehp.niehs.nih.gov/doi/pdf/10.1289/EHP1605>.

⁶ See Rebecca Renner, *Out of Plumb: When Water Treatment Causes Lead Contamination*, 117 *Env’tl Health Persps.* (2009); see also U.S. Env’tl Prot. Agency, EPA-747-F-01-004, *Fight Lead Poisoning with a Healthy Diet 2* (2019), https://www.epa.gov/sites/default/files/2020-01/documents/fight_lead_poisoning_with_a_healthy_diet_2019.pdf; *In re Clarksburg Water Board*, CWA-03-2021-0110DS (U.S. Env’tl Prot. Agency July 14, 2021) (finding dangerously high levels of lead in drinking water in homes after Childhood Lead assessment found elevated blood lead levels in three children).

Since EPA has stated that it will be announcing its decision as to whether to overhaul the Lead and Copper Rule in the next few weeks, and the White House will be asked to clear any decisions on this matter, we also urge you to further call for EPA to do the following:

- Mandate the proactive full LSLR to be completed on a mandatory schedule in no more than 10 years for all water systems, at no cost to the consumer, with prioritization for communities disproportionately exposed to lead from other sources.
- Require corrective action for all water systems at no higher than 5 ppb, based upon rigorous revised monitoring requirements designed to detect high lead levels.
- Create strong incentives for water systems to help schools and childcare centers install certified point of use filters for lead removal, with frequent and comprehensive mandatory testing of all water outlets as an alternative.
- Require comprehensive and effective communication about the dangers of lead, the prevalence of lead in drinking water, and steps that can be taken to reduce exposure so that families can take appropriate actions to protect their children. Impose consequences for misleading information and enhanced communication when high lead levels are discovered.
- Require certification by senior management of water systems, subject to criminal penalties, that all components of LCR were complied with, and dramatically increase enforcement of the LCR.

With the BID providing \$15B in funding for LSLR, the issue of LSLR enjoying bipartisan support, and EPA's draft Strategy to Reduce Lead Exposures and Disparities in U.S. Communities committing to "[r]educe lead exposures locally with a focus on communities with disparities and promote environmental justice" and to "[r]educe lead exposures nationally through protective standards, analytical tools, and outreach,"⁷ the *only* appropriate action for EPA to take is to completely overhaul the current LCR as set forth in WHEJAC's May 2021 recommendations and the additional ones set forth above. President Biden, Vice President Harris, EPA Administrator Regan, and CEQ Chair Mallory must ensure that half measures are avoided and that a new rule becomes the gold standard in justice oriented environmental protection.

Respectfully submitted,

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⁷ U.S. Env'tl Prot. Agency, *Draft EPA Strategy to Reduce Lead Exposures and Disparities in U.S. Communities 3* (2021), <https://www.epa.gov/system/files/documents/2021-11/updated-public-comment-draft-lead-strategy-11-16-2021.pdf>.

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Cahaba River Society
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Center for Biological Diversity
Center for Environmental Health
Center for Neighborhood Technology (CNT)
Childhood Lead Action Project
Choctawhatchee Riverkeeper
Citizens for Alternatives to Radioactive Dumping (CARD)
City of Trenton (NJ) / Trenton Water Works
Clean Water Action
Coalition on Lead Emergency
Conservation Law Foundation
Conservation Voters of Pennsylvania
DC League of Conservation Voters
Defend Our Health
East Chicago Calumet Coalition Community Advisory Group (C.A.G.) of USS Lead Superfund Site
East Trenton Collaborative
Environmental Defense Fund
Faith in Place, IL Affiliate of Interfaith Power and Light
Flint Rising
Freshwater For Life Action Coalition
Freshwater Future
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Immigrants & Minorities Unify Services Association
International Society for Environmental Epidemiology, North American Chapter
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Michigan Welfare Rights Organization
Milwaukee Riverkeeper
New Jersey Future
New Jersey Latino Action Network
New Jersey League of Conservation Voters
New Jersey Policy Perspective
New York League of Conservation Voters
Newark Water Coalition
Newburgh Clean Water Project
NJ Work Environment Council
North Carolina League of Conservation Voters
Ohio Environmental Council
Oregon Environmental Council
Portland Advocates for Lead-free Drinking Water
Protect Our Aquifer
River Guardian Foundation
Rural Coalition
Safe Water Engineering LLC
Saint Joseph's Carpenter Society
San Francisco Bay Physicians for Social Responsibility
Shelby County Lead Prevention & Sustainability Commission
Sierra Club
St. Francis Prayer Center
Tennessee Riverkeeper
The Alliance for the Great Lakes
United Parents Against Lead
Water Equity & Climate Resilience Caucus
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