

**PULP**

PENNSYLVANIA

UTILITY LAW PROJECT



June 2, 2021

VIA E-File

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street, Filing Room
Harrisburg, PA 17120

**RE: Rulemaking to Implement of Act 120 of 2018,
Docket No. L-2020-3019521**

Dear Secretary Chiavetta,

Please find the **Joint Comments of the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA) and the Green & Healthy Homes Initiative (GHHI)**, which are respectfully submitted for consideration in the above referenced docket, pursuant to the Notice of Proposed Rulemaking published in the *Pennsylvania Bulletin* on April 3, 2021. An electronic copy will be provided to Commission Staff, as indicated below.

Respectfully submitted,

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Rulemaking to Implement Act 120 of 2018 : **Docket No. L-2020-3019521**
at 52 Pa. Code Chapters 65 and 66 :

JOINT COMMENTS OF

**THE COALITION FOR AFFORDABLE UTILITY SERVICES AND ENERGY
EFFICIENCY IN PENNSYLVANIA**

AND

GREEN & HEALTHY HOMES INITIATIVE

June 2, 2021

I. INTRODUCTION AND BACKGROUND

The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)¹ and the Green & Healthy Homes Initiative (GHHI)² (collectively referred to herein as the Joint Commenters) file the following comments in response to the Pennsylvania Public Utility Commission's (Commission or PUC) Notice of Proposed Rulemaking (NPRM), published in the *Pennsylvania Bulletin* on April 3, 2021, to implement of Act 120 of 2018 (Act 120 or the Act).

Act 120 addressed the urgent need to replace lead service lines (LSLs) and damaged wastewater service laterals (DWSLs) by amending the Public Utility Code at 66 Pa. C.S. § 1311(b) to direct water utilities to replace customer's LSLs and to instruct utilities how to recover the associated costs. Through this rulemaking, the Commission proposes to expand 52 Pa. Code Chapter 65, adding a Subchapter B to establish the process for LSL replacements and to add a new Chapter 66 to address wastewater service. The Joint Commenters will focus attention on LSL replacement in the following comments.

LSL replacement is a complex process, requiring both technical and policy expertise. The Commission thus initiated a broad stakeholder process in advance of publishing this NPRM for

¹ CAUSE-PA is a statewide unincorporated association of low-income individuals which advocates on behalf of its members to enable consumers of limited economic means to connect to and maintain affordable water, electric, heating and telecommunication services. CAUSE-PA membership is open to moderate- and low-income individuals residing in the Commonwealth of Pennsylvania who are committed to the goal of helping low-income families maintain affordable access to utility services and achieve economic independence and family well-being.

² The Green & Healthy Homes Initiative (GHHI) is a nonprofit organization dedicated to promoting healthy housing and is the nation's leading voice in the efforts to eradicate childhood lead poisoning. GHHI has worked in over 61 cities and over 20 states to pass legislation and implement best practices around lead poisoning prevention and healthy housing. In Pennsylvania, GHHI serves as an advisor to the state childhood lead poisoning prevention program and provides technical assistance to Pittsburgh and Philadelphia to align, braid and coordinate evidence-based healthy, safe and energy efficient housing intervention programs.

comment. On October 24, 2019, the Commission issued a Secretarial Letter serving as an Advance Notice of Proposed Rulemaking (ANOPR) seeking comments from interested stakeholders regarding the regulatory implementation of Act 120 which would establish statewide parameters for LSL remediation programming. CAUSE-PA and GHHI, together with Pittsburgh United, submitted joint comments in response to the ANOPR,³ as well as reply comments responding to issues raised by other stakeholders.⁴ The Joint Commenters continue to support the positions set forth therein and hereby incorporate those comments by reference.⁵

The Joint Commenters appreciate the Commission's thoughtful consideration concerning specific implementation procedures and requirements for entities responsible for ensuring LSL replacement. Specifically, we appreciate the inclusion of prioritization requirements, communication and outreach requirements, and a prohibition on partial LSLRs. However, additional language must be included in the regulations to ensure that vulnerable communities, including low income communities, communities of color, and immigrant communities, are prioritized at all stages of LSLR and protected from the health hazards of lead exposure. In turn, additional notice and disclosure requirements are critical to ensure that tenants and other non-owner occupants are protected from exposure to lead based on the actions or inaction of a landlord or property owner. Lengthy timelines proposed for lead removal in this rulemaking are also of great concern. The Joint Commenters recommend shortening these timelines, as this urgent public health crisis requires more expedient action. Finally, it is absolutely critical for the rulemaking to

³ Joint Comments of CAUSE-PA, GHHI, and UNITED, Docket No. M-2019-3013286 (Nov. 22, 2019).

⁴ Reply Comments of CAUSE-PA, GHHI, and UNITED, Docket No. M-2019-3013286 (Jan. 16, 2020).

⁵ 52 Pa. Code § 1.33 (a) ("Documents on file with the Commission may be incorporated by reference into a subsequent pleading, submittal or other document. A document may be so incorporated only by reference to the specific document and to the prior filing and docket number at which it was filed.")

include safeguards necessary to protect not only the safety, but also the affordability of water service for low income households.

The Joint Commenters appreciate the opportunity to comment on this important proposed rulemaking. We commend the Commission for its efforts to keep this effort moving forward and encourage the Commission to finalize this rulemaking without delay to protect Pennsylvania's most vulnerable communities from the public health and safety crisis caused by LSLs, while shielding those same households from costs that could interfere with their ability to access and maintain water service to their home.

II. COMMENTS

Pennsylvania is one of many states facing a lead exposure crisis that poses a serious risk to public health and safety statewide.⁶ Low income and communities of color have a higher risk of lead exposure, and are more likely to experience the negative health impacts associated with exposure to lead through drinking water. Act 120 allows utilities to propose and seek Commission approval for comprehensive LSL remediation programming.⁷ Through this rulemaking, the Commission has proposed regulatory parameters for ratepayer funded LSL remediation programming. The Joint Commenters offer the following comments on how the proposed rulemaking can be amended to help utilities best design and implement LSL replacement programs that will ensure safe service and utilize ratepayer funds in a just, reasonable, and non-discriminatory manner.

⁶ General Assembly of the Commonwealth of Pennsylvania, Lead Exposure Risks and Responses in Pennsylvania: Report of the Advisory Committee and Task Force on Lead Exposure (April 2019) (hereinafter Lead Task Force Report).

⁷ See 66 Pa C.S. § 1311.

§ 65.52 - Definitions

The Joint Commenters support the inclusion of pigtails and goosenecks in the definition of “lead service line.” Lead pigtails are short pieces of lead pipe that were sometimes used to connect the water main to customers’ service lines to provide flexible connection between the rigid pipes. Lead goosenecks are short pieces of flexible piping from the corporation stop on the main to the pipe that extends to the curbstop. Lead was often used for pigtails and goosenecks because it was durable and easily bent. Lead pigtails and goosenecks can leach lead into drinking water, and it is important for them to be removed along with the rest of the lead service line. Thus, Joint Commenters support the Commission’s decision to specifically include pigtails and goosenecks in the definition of “lead service line” to help ensure that all possible sources of lead contamination are removed during the LSLR.

§ 65.53 - Time to replace LSLs

Section 65.53 of the Commission’s proposed regulations establishes that the requirement to remove and replace LSLs applies to all LSLs in the system, regardless of ownership. The Joint Commenters fully support this requirement to protect the health of Pennsylvanians, particularly low income communities and communities of color most at risk for lead exposure. This requirement will fill an important gap in the regulation of LSLs. Currently, the Federal Lead and Copper Rule only requires replacement of LSLs if the entity is exceeding the lead action level, and even then requires replacement only of some entity-owned LSLs.⁸ The Joint Commenters assert that customer-owned LSLs also present a significant threat to public health, especially when a consumer lacks the resources to replace the LSL on their own. Even if an entity has not reported a

⁸ 40 C.F.R. § 141.84(a), (b)(1).

present exceedance of the lead action level, customers receiving drinking water through LSLs remain at risk. Therefore, the Commission's LSL replacement mandate is important and necessary to ensure the provision of safe drinking water service.

Given the acute risk to consumer health and safety, the Joint Commenters urge the Commission to reduce the lengthy timeline that the proposed regulations allow for completing LSL replacements. A Class A public utility or an authority is required to replace all LSLs within 25 years. This is an unacceptably long time for consumers to be exposed to lead in their drinking water. LSLs present a significant health risk, especially to children. Customers should not have to wait another generation for this threat to be eliminated.

Numerous examples indicate that a much faster timeline for removing all LSLs is feasible. Pittsburgh Water and Sewer Authority (PWSA) plans to replace all of its LSLs within 10 years of first exceeding the action level (2016 to 2026).⁹ The York Water Company reports that it replaced all known LSLs in its system in four years.¹⁰ Flint, Michigan will replace all of its LSLs in five years.¹¹ Newark, New Jersey is doing the same over the course of three years.¹² Even the current Lead and Copper Rule, which is widely acknowledged as providing inadequate protections for public health, mandates a faster timeline than the proposed regulations: water systems are required to replace all lead lines within 15 years if they're exceeding the action level.¹³ The Joint

⁹ Pittsburgh Agrees to Replace Thousands of Lead Pipes to Clean Up Its Drinking Water, NRDC Blog March 30, 2020, available at: <https://www.nrdc.org/experts/nrdc/pittsburgh-agrees-replace-thousands-lead-pipes-clean-its-drinking-water>

¹⁰ York Water, *Lead Information*, available at <https://tinyurl.com/94kv2rsa>.

¹¹ Steve Carmodi, President Biden Wants To Replace All Lead Pipes. Flint Has Lessons To Share, National Public Radio, May 25, 2021, available at: <https://www.npr.org/2021/05/25/997671845/president-biden-wants-to-replace-all-lead-pipes-flint-has-lessons-to-share>

¹² City of Newark nears completion on project to replace all lead water service lines, News 12 NJ, April 8, 2021, available at: <https://newjersey.news12.com/city-of-newark-nears-completion-on-project-to-replace-all-lead-water-service-lines>

¹³ 40 C.F.R. § 141.84(a), (b)(1).

Commenters further note that existing and potential federal funding for full LSL replacement provides the opportunity to significantly shorten this timeline.

Under the proposed regulation, some people may be drinking lead for ten years by the time the replacements even start and it will take additional time for approval, which will further hinder the ability to comply with the timeframe for full LSL replacements. The Joint Commenters therefore recommend that the Commission shorten the timeframe for replacing all LSLs to 10 years. In the meantime, the Joint Commenters recommend that the Commission require entities to provide targeted education and flushing instructions to all customers with known or suspected lead service lines, as well as free filters to low and moderate income customers with known lead service lines. We suggest an income threshold of no less than 250% of the federal poverty level for households to receive free filters, as households with this level of income or below typically lack the discretionary income to afford filters.

The Joint Commenters share the Commission's concerns about the effect of LSLR programs on rates, and urge the Commission to include mitigation provisions within the rulemaking to help control costs. First, we note that the entire cost of the LSLR programs does not need to be recovered within the same timeframe for replacement. To that end, we recommend that the Commission require entities to amortize the cost of the program over a 25-year period to mitigate the immediate impact to customer bills. Moreover, it is important that the regulation explicitly require utilities to seek all available public funds and long-term financing programs to help reduce the cost of the program to ratepayers. The Joint Commenters encourage the Commission to require utilities to exhaust all avenues for funding – including federal and state dollars – before allowing utilities to put forth a rate increase request to recover LSL replacement costs. In seeking recovery of costs for LSL programming, entities should be required to document

all sources of financing pursued by that entity. Finally, we urge the Commission to take clear and decisive steps to ensure that water affordability programs are appropriately funded, adequately designed, and readily accessible to ensure that low income households can continue to access and maintain safe *and* affordable water services. It is absolutely critical that we remediate lead in our water systems, but it is also critical that we ensure all Pennsylvanians – regardless of wealth – are able to maintain service to their home. This delicate balancing act is difficult, but not insurmountable, and we urge the Commission to meet this challenge head on – if not in this rulemaking, then in a subsequent rulemaking designed to address growing unaffordability of water services driven largely by critical infrastructure investment needs.

§ 65.56. LSLR Plan requirements

Section 65.56 of the Commission’s proposed regulations sets forth the requirements for LSLR Plans, including service line inventory; planning and replacements; and communications, outreach, and education. Communities with the highest risk of lead exposure and the fewest available resources must be prioritized for all stages of lead service line remediation programming, including inventory, planning, replacement, and outreach. Low income communities, communities of color, and immigrant populations face disproportionately high risks of lead exposure, as they are more likely to live in older homes and lack the discretionary resources necessary to remediate lead on their own, and should be prioritized for replacement over those with the resources to do so on their own.

In the NPRM Order, the Commission states that “lead poisoning is a preventable environmental health hazard and, if not addressed, affects customers regardless of race, ethnicity,

or socioeconomic status.”¹⁴ While this statement is correct, it does not consider the level at which some communities are impacted over others. The fact that every human is susceptible to lead poisoning does not alter the fact that some communities are disproportionately exposed to elevated levels of lead in their water for a more prolonged period of time resulting in increased deleterious health impacts. This exposure level is driven by socioeconomic and race-related factors which cannot be minimized and should be explicitly considered to maximize the effectiveness of any LSL replacement program. One study concluded, “Lead toxicity is a source of ecological inequity by race and a pathway through which inequality literally gets into the body.”¹⁵ As Dr. Bruce Lanphear, an expert in childhood lead exposure, testified in the PWSA Compliance Plan proceeding:

People who live in older homes and poorly maintained rental housing are at increased risk for higher blood lead concentrations, as are people with nutrient-deficient diets. Black people and people of low-income backgrounds are also at higher risk for elevated blood lead levels because they are more likely to be living in older, poorly maintained housing that contains residual lead paint and older pipes and plumbing fixtures that are more likely to contain lead.¹⁶

Dr. Lanphear went on to describe how the risk of lead exposure in Pittsburgh specifically falls disproportionately upon low income neighborhoods and communities of color within the city.¹⁷

The goal of any LSL replacement program is to protect public health, and so the program’s design should integrate public health factors related to residents’ vulnerability to lead exposure. Thus, in order to ensure that vulnerable populations are appropriately prioritized, the Commission

¹⁴ See Notice of Proposed Rulemaking at 1803.

¹⁵ Robert J. Sampson, Alix S. Winter, The Racial Ecology of Lead Poisoning, Toxic Inequality in Chicago Neighborhoods, 1995-2013, Du Bois Review (2016), available at: https://scholar.harvard.edu/files/alixwinter/files/sampson_winter_2016.pdf (page 19)

¹⁶ See *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority*, Docket Nos. M-2018-2640802, M-2018-2640803, Pittsburgh United Statement C-3, at 7-8 (citing Nat’l Toxicology Program, U.S. Dep’t of Health & Human Servs., Health Effects of Low-Level Lead 17 (2012); Allegheny Cty. Lead Task Force, Final Report and Recommendations 12 (2017); and Bruce P. Lanphear et al., Environmental Lead Exposure During Early Childhood, 140 J. of Pediatrics 45-46 (2002)).

¹⁷ *Id.* at 11-14.

must specify in the regulation that this prioritization will occur at all stages of LSLR programming. While the proposed regulation addresses prioritization at 65.56(c)(1)(i) related to communication, outreach, and education, this subsection requires additional clarification as to specific prioritization criteria. Moreover, subsection 65.56 (a) and (b) should be further amended to explicitly include prioritization criteria for service line inventory, and planning and replacement to ensure that the most vulnerable communities are prioritized at every stage of LSL replacement.

Including specific prioritization within the regulation would prevent extended delays in remediating properties or neighborhoods that are more difficult to serve. For example, batch LSL replacement may be easier for utilities and municipalities. However, obtaining consent for LSL replacement from every homeowner on a given block may be more difficult in neighborhoods with a higher proportion of rental properties or other complex ownership issues. Low income communities and communities of color have higher concentrations of renters and are more likely to have other ownership issues, like tangled title, that complicate replacement efforts. Without explicit prioritization included in the regulation, it is likely that those most in need of lead service remediation will be last in line for help. It is imperative that the most vulnerable communities are prioritized, not simply the easiest to access.

A. Amend § 65.56(a) to include safeguards for vulnerable communities.

Subsubsection 65.56(a) of the Commission's proposed regulations specifies the timeframe for an entity to complete an inventory and sets forth the requirements of a Service Line Inventory. While the 65.56(b) planning and replacements and 65.56(c) communications, outreach, and education each require an entity to describe its method of prioritization, there is no such requirement regarding prioritization of service line inventory. The Joint Commenters urge the Commission to amend subsection 65.56(a) to include a requirement that the entity explain how it

will ensure that historically underserved populations, including low income communities, communities of color, and immigrant communities, are not overlooked in the inventory process.

B. Amend § 65.56(a) to require inventories to be completed within a more reasonable timeframe.

As proposed, the regulation requires a Class A public utility or authority to complete a Service Line Inventory within 60 months of the filing date of the public utility or authority's LSLR program. A Class B or C public utility must complete inventory within 36 months of the filing date of its LSLR program. Municipal corporations providing water service beyond its corporate limits also has 60 months after the filing date to complete inventory. Other entities completing an acquisition of a water distribution system have 36 months after the date of the acquisition to complete their Service Line Inventories. See § 65.56(a). The Joint Commenters request the Commission significantly shorten that timeframe in the final rulemaking and direct that all entities complete their inventory within three years.

Act 120 was signed into law on October 24, 2018. The Act was to go into effect in 60 days. Although regulations to implement this Act are only now in the proposed stage, entities providing drinking water to Pennsylvania residents have been apprised of this upcoming action for three years. Further, the way the regulatory process is constructed in this Commonwealth, this rulemaking may not be finalized for at least two more years. At the time of publication, when this rule is effective, five years may have already passed since the passage of Act 120. At that point in time, no entity should require *an additional* five years (60 months) to complete a Service Line Inventory. If each entity took the full time allotted to inventory the service lines, it would be 2028 *at the earliest* for just the inventory to be complete. The actual work would not have begun. Methods for conducting a service line inventory are well established, and do not require entities to recreate the wheel in order to complete the inventory process. Utilities can borrow from available

information and apply it, conforming to Pennsylvania requirements immediately upon finalization of those requirements in regulation. Consuming lead has serious and irreversible health consequences. Ten years to *begin* mitigating the problem is simply too long.

§ 65.56(b). Planning and replacements.

Subsection 65.57(b) of the proposed regulations sets forth the minimum requirements for addressing planning and replacements and requires an entity to submit information regarding the entity's LSLR criteria, processes, and procedures. The Joint Commenters urge the Commission to amend subsection 65.57(b) to specifically require entities to describe their plan to replace LSLs at no upfront cost to consumers, prioritize traditionally disadvantaged communities, and specify plans to handle landlord refusals.

A. Amend § 65.56 to require entities to specify in their LSLR plan that LSLs will be replaced at no upfront cost to the consumer.

The Joint Commenters urge the Commission to amend § 65.56 to specifically require that LSL replacements and other remediation measures, such as the provision of filters following a LSL replacement,¹⁸ must be offered at no direct cost to consumers. Providing LSLR at no upfront cost is the only way to ensure that LSL programming is equally available and accessible to low and moderate income households. LSL replacement can cost thousands of dollars, an expense that low and moderate income families simply cannot afford. Even less expensive LSL remediation, such as filters and replacement cartridges – which require ongoing expenditures, are often out of reach for low and moderate income households.

¹⁸ Lead levels in water may temporarily spike after an LSL replacement, so – in addition to ensuring that filters are available to all consumers pending replacement of an identified lead service line – filters should also be made available to consumers following replacement. Benjamin Trueman et al., Evaluating the Effects of Full and Partial Lead Service Line Replacement on Lead Levels in Drinking Water, 50 *Env'tl Sci. Tech.* 7389-96 (2016); Am. Water Works Ass'n, Communicating About Lead Service Lines, at 7 (2017), available at <https://www.awwa.org/portals/0/files/resources/publicaffairs/pdfs/finaleadservicelinecommguide.pdf>

Low and moderate income households struggle to keep up with their monthly water bills, and many cannot obtain credit to make an investment in LSL remediation efforts. These struggles have been exponentially compounded by the economic ramifications of the COVID-19 pandemic. Even prior to the pandemic, most families in the United States reported that they lacked the funds to pay for an emergency expense of \$400, indicating that the upfront cost of LSL replacement would be out of reach for most U.S. families.¹⁹ Approximately 640,339 Pennsylvania households have an income below the federal poverty level.²⁰ The total annual income for a household of two is no more than \$16,910 for the entire year.²¹ More than 1.2 million households cannot afford their basic necessities each month, despite having income above the federal poverty level.²² According to the United Way's Asset Limited Income Constrained Employed (ALICE) study, approximately 37 percent of Pennsylvania households cannot afford their *basic* living expenses.²³ It is unrealistic – and frankly, unreasonable – to expect these same households to come up with thousands of dollars to make their water safe for consumption. The Joint Commenters assert that it is therefore crucial that consumers not be responsible for paying the direct cost of LSL replacement.

Further, it is important that consumers do not shoulder the cost of property restoration once lead service lines have been removed. Property restoration should be included as part of the remediation plan. LSLR should only be deemed complete when full remediation and restoration efforts have occurred. Restoration should include, at a minimum, ensuring any damage to the property necessary for mobility, such as stairs, walkways, and ramps are repaired. The property

¹⁹ See Bd. of Governors of the Fed. Reserve Sys., Report on the Economic Well-Being of U.S. Households in 2017 - May 2018, <https://www.federalreserve.gov/publications/2018-economic-wellbeing-of-us-households-in-2017-dealing-with-unexpected-expenses.htm> (last visited Aug. 12, 2019).

²⁰ United Way, ALICE in Pennsylvania: A Financial Hardship Study, at 9 (2019) (hereinafter ALICE in Pennsylvania), available at <https://www.uwp.org/wp-content/uploads/ALICE-Report.pdf>.

²¹ US Dep't of Health and Human Services, Poverty Guidelines, <https://aspe.hhs.gov/poverty-guidelines>.

²² ALICE in Pennsylvania at 9.

²³ Id. at 9.

need not be improved upon in restoration efforts but it needs to be at least as functionally usable as it was prior to the replacement of the LSLRs. The final regulation should ensure remediation efforts include repairs to restore the integrity of the foundation/wall around the replacement site.

It is important for the Commission to specify that customer-driven replacement and reimbursement under Act 120 should be limited to pre-program reimbursements or subsequent to customer refusals pursuant to subsections 65.58(d) and 65.56(b)(10)(ii) respectively. According to subsection 65.58(d), customers may be reimbursed if they replaced their service line of their own accord within one year prior to the commencement of the program, and subsection 65.56(b)(10)(ii) indicates that if customers refuse a replacement, they may be required to replace on their own and seek reimbursement. These are each acceptable means of addressing situations where a consumer has already replaced their own line prior to the implementation of a given utility's Act 120 program or initially refuses the LSLR but later completes the replacement on their own. However, the Commission should specify that entities may not require consumers to initiate and pay the upfront cost of lead service line replacement and later seek reimbursement. A promise of a future reimbursement is meaningless for those who cannot afford the upfront costs. Such a scheme would foreclose low and moderate income households from accessing the program, as they most often lack the resources to pay the upfront cost, even if they are later reimbursed for some or all of the expense.²⁴ Reliance on customer-driven replacement and reimbursement on a forward going basis would also cause for haphazard replacement, and would not take advantage of economies of scale made possible through utility-run replacement programming.

²⁴ See ALICE in Pennsylvania at 9.

B. Amend § 65.56(b)(3) to include mandatory prioritization criteria datapoints and data tracking.

Subsection 65.56(b)(3) requires that an entity's LSLR plan must include the prioritization criteria considered by the entity when developing its LSLR schedule. However, the proposed regulation does not include any specific criteria to be considered. In order to avoid inconsistent application and unnecessary delays, the Commission should specify certain prioritization criteria that should appear in every plan. Due to the critical nature of these LSLR Plan components, it is vital that the parameters established in the regulation provide specific criteria for identifying sensitive populations.

For reasons explained more fully above discussing §65.56(c)(1)(i) prioritization for communications and outreach, the Commission should require that the Planning and Replacements section of all LSLR Plans include an explanation of the entity's efforts to prioritize low income communities, communities of color, and immigrant communities. These communities are among the highest risk for lead exposure and should be prioritized at all stages of LSLR programming.²⁵ The Joint Commenters additionally recommend required biannual reporting that includes equity metrics. In other words, entities should be required to track the demographics of customers who participate in a LSLR program to ensure equitable deployment of program dollars and to allow for course correction if the reports indicate that certain populations are not equitably served.

C. Amend § 65.56(b)(10) to include a requirement for enhanced notice and other disclosures to tenants when lead is identified and when a property owner is not responsive or has refused LSL replacement.

Subsection 65.56(b)(10) requires that an LSLR plan includes an entity's procedure for documenting a customer's refusal of or failure to accept the offer by the entity to replace an LSL,

²⁵ Lead Pipes and Environmental Justice; A study of lead pipe replacement in Washington, DC; March 2020 https://www.edf.org/sites/default/files/u4296/LeadPipe_EnvironJustice_AU%20and%20EDF%20Report.pdf

but there is no guidance regarding required disclosures to tenant-occupied properties. The Joint Commenters urge the Commission to amend subsection 65.56(b)(10) to require entities to provide robust notice and disclosures to tenants who are at risk of lead exposure – both upon identification of a lead service line or due to a landlord or property owner’s refusal to accept a LSLR. Notice should also be provided to tenants when the entity is unable to determine the material of the service line. The presence of LSLs presents a health hazard to tenants and their children that would not be apparent unless the tenant is directly informed. Thus, it is critical that the Commission require disclosures to tenants who may be at risk of lead exposure to ensure these households can take precautions to help protect themselves from the health hazards of lead exposure.

As noted above, low income consumers more often live in poorly maintained rental housing, and often face increased health risks associated with lead exposure from multiple sources. These same households are more likely to be renters. While landlords are legally required to disclose the presence of lead-based paint in rental units,²⁶ the law surrounding the disclosure of LSLs is less clear. It is therefore imperative that the Commission explicitly require all entities to inform all end users – including tenants – when it discovers that a property is served by a LSL and again if the landlord or property owner has refused to accept a LSLR or is otherwise not responsive to requests for authorization. Without clear tenant notice requirements, tenants will unknowingly consume lead tainted water. Notice to tenants should be required to provide remediation and mitigation information, as well as resources for tenants to seek assistance if faced with the loss of service based on a landlord’s refusal to accept a LSLR. As described more fully in these comments below, alerting tenants that they are drinking water from LSLs must be followed up by actions tenants can take to protect their health and safety.

²⁶ Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S. Code § 4852d (a)(1)(B).

D. Amend § 65.56(b)(10) to require entities to document the reasons for customer refusals.

While subsection 65.56 requires that an entity's LSLR plan include its procedure for documenting a customer's refusal, the proposed regulation does not explicitly require that the entity document the *reason* for the refusal. This is vital information for evaluation of the program and removing barriers to participation. Thus, the Joint Commenters urge the Commission to require entities to record the reason a customer is refusing an LSL. This vital datapoint is simple to collect, yet extremely valuable for evaluating barriers to participation in order to better target outreach efforts. For example, if the customer's reason is: "can't afford it," then the utility needs to do a better job explaining that it is free. If the reason is "I don't have an LSL" then the utility should explain how it will take steps to verify. In fact, after PWSA started asking customers why they were refusing LSLRs, they were able to use that information to tailor subsequent outreach, and has subsequently convinced many customers who initially refused LSLRs to accept. Thus, the Commission should require documentation of the reason for LSL refusal.

§ 65.56(c) Communications, outreach, and education.

Subsection 65.56(c) of the Commission's proposed regulations requires an entity to outline the communications, outreach, and education steps it will take to inform customers of the harmful effects of LSLs and the entity's plan to remove LSLs. The Joint Commenters recommend the following baseline procedures that each utility should undertake to seek customer consent, including at least one attempt by mail, phone, and in-person. Additionally, entities should coordinate with the lead advisory committees to develop a plan for in-person canvassing. It is also extremely important that customers be allowed to accept LSLRs right up to the point when the public side line is being replaced. Many customers will not accept until they see construction crews working on their neighbor's properties.

A. Amend § 65.56(c)(1)(i) to include prioritization of low income communities, communities of color, and immigrant communities.

Subsection 65.56(c)(1)(i) indicates that an entity’s LSLR plan must describe how the entity will “Prioritize LSLR efforts to target sensitive populations as defined by the Environmental Protection Agency or Pennsylvania Department of Environmental Protection, areas with elevated levels of lead in tap water, areas with high concentrations of LSLs and areas of the entity’s distribution system which have elevated corrosion rates.” This proposed language identifies LSL replacement as an environmental justice issue and begins to address prioritization needs, but is incomplete and requires clarification. For example, neither the Federal Lead and Copper Rule²⁷, nor the Pennsylvania’s Safe Drinking Water Act,²⁸ nor Pennsylvania’s Lead and Copper Rule²⁹ provide any formal definition of the term “sensitive population.”

Given LSL is an environmental justice issue, the Joint Commenters recommend the Commission require entities to access the Federal Environmental Protection Agency’s EJSCREEN: Environmental Justice Screening and Mapping Tool³⁰ to ensure the most vulnerable and at-risk populations in the Commonwealth are prioritized. According to their website, the EPA’s EJSCREEN E “is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators.” The EPA further offers clarity regarding exposure and risk assessment in its *Guidelines for Exposure Assessment* (U.S. EPA 1992). These guidelines “suggest that it is often helpful for risk assessors to characterize and quantify the magnitude of risk for specific highly

²⁷ 40 CFR Part 141 Subpart I

²⁸ 35 P.S. § 721.1

²⁹ 25 Pa. Code 109.1101, et. seq.

³⁰ United States Environmental Protection Agency, *EJSCREEN: Environmental Justice Screening and Mapping Tool*, available at: <https://www.epa.gov/ejscreen/overview-demographic-indicators-ejscreen>

exposed, highly sensitive, or highly susceptible subgroups within the larger population. Considering vulnerability and susceptibility in an assessment is critical to protect those populations at greatest risk when making risk management decisions.”³¹ Factors included in this assessment, as with EJSCREEN, incorporate race/ethnicity and socioeconomic status. The Commission should therefore require entities for purposes of determining prioritization of LSLRs to include in the definition of sensitive populations the six demographic indicators identified in the EJSCREEN mapping tool: percent low income, percent people of color; less than high school education, linguistic isolation, individuals under age 5, and individuals over age 64.

This clarification is needed to provide additional guidance on the requirement in section 65.56(c)(1)(i) regarding how the entity will prioritize sensitive populations. The lack of consistent guidance will lead to confusion and inconsistent prioritization among entities, which will in turn place members of sensitive populations at a higher risk of lead exposure.

The CDC indicates, “Children who live in households at or below the federal poverty level and those who live in housing built before 1978 are at the greatest risk of lead exposure.”³² The CDC also indicates “communities of color are at a higher risk of lead exposure because they may not have access to safe, affordable housing or face discrimination when trying to find a safe, healthy place to live.”³³ Additionally, children who are immigrants, refugees, or recently adopted from outside of the United States are also at risk for higher lead exposure.³⁴ All of these characteristics can be cross checked against census data collected by zip code to map out areas

³¹ United States Environmental Protection Agency, EPA ExpoBox, available at: <https://www.epa.gov/expobox/exposure-assessment-tools-lifestages-and-populations-highly-exposed-or-other-susceptible>

³² See Center for Disease Control, *Childhood Lead Poisoning Prevention/ Populations at Higher Risk*, available at: <https://www.cdc.gov/nceh/lead/prevention/populations.htm>

³³ *Id.*

³⁴ *Id.*

with a higher likelihood of poor housing stock containing lead service lines. Thus, the Joint Commenters recommend that the Commission encourage entities to use census data and GIS mapping technology to identify low income and communities of color accurately and effectively in order to target these communities for priority remediation.

The Joint Commenters also urge the Commission to require that materials be provided in multiple languages. It is critical that the comprehensive outreach and education plans required as part of LSL remediation programming reach these vulnerable populations to ensure they are provided the tools to protect themselves from exposure throughout the process of identifying and replacing lead service lines. Language may be a significant barrier for those with limited English proficiency.³⁵ To ensure that residents with identified LSLs are adequately informed about the risk of lead exposure and the steps they may need to take to protect themselves from harm, all communications should be provided in plain language,³⁶ as proposed in 65.56(c)(1)(iv), that can be understood by the general public. While it is important that all communications are provided in plain language, it is of equal importance that this information is provided in multiple languages. The Joint Commenters recommend that utilities be instructed to translate all outreach and education materials into Spanish, as well as other languages spoken by 5% or more of individuals in the entity's service territory. For languages less commonly spoken, notices should include a statement in those languages informing the consumer to contact the utility for assistance. Given the gravity of the risk associated with lead exposure, it is critical that the Commission apply these

³⁵ See Kay Nolan, In weather emergencies, a lack of Spanish-language information endangers the public, Washington Post (May 30, 2021), available at: <https://www.washingtonpost.com/weather/2021/05/30/spanish-weather-language-gap/>

³⁶ U.S. Department of Health and Human Services – Plain Language: <https://www.acf.hhs.gov/digital-toolbox/content/plain-language>

enhanced language access requirements to ensure that all consumers are adequately informed of their risk.

Additional Considerations

A. Lead service line remediation programming must be designed to protect tenants if a landlord refuses to replace a lead service line at the rental property.

Another major impediment to the successful remediation of LSLs through Act 120 implementation is the fact that low income households are more likely to live in rental units and the complicating factors associated with landlord and tenant relationships.³⁷ Section 65.56(b) requires entities to provide notice to customers of the risk of termination but does not address or require entities to provide information to tenants about the risks of lead exposure or the consequences of their landlord's inaction. Additional steps must be taken to protect tenants and other occupants who reside in housing with private side lead service lines. The Joint Commenters urge the Commission to amend the proposed regulations to provide step-in rights for entities to provide LSLRs where a landlord's failure to respond or refusal to accept a LSLR places tenants at an increased risk of lead exposure and/or the loss of critical water services to their home.

Addressing resolution of this issue in PWSA's Chapter 32 Compliance Plan Stage 1 proceeding, the Commission stated:

[I]f a landlord declines to permit the PWSA to replace the private-side LSL, it will likely create a condition of the customer service line such that there is a risk to the public health or safety of the tenants becoming subject to service termination for reasons not within their control. As such, we request the Authority to develop and submit appropriate Tariff language that would provide the PWSA with step-in rights to make the necessary replacement of the private LSL where a landlord is nonresponsive to the pre-termination notice procedures. Such step-in rights would be intended to avoid service termination to the PWSA's tenant-customers due to

³⁷ ALICE in Pennsylvania at 65.

circumstances beyond the tenants' control – that is, due to the landlord standing in the way of the tenants receiving safe service. Because the exercise of such step-in rights may result in the landlord filing a complaint against the PWSA, the Tariff should be clear on the PWSA's limitation of liability with respect to property restorations when performing a private-side LSL.³⁸

The Joint Commenters urge the Commission to amend the proposed regulation to include similar language allowing an entity to exercise step-in rights to perform the LSLR when a landlord or property owner is unwilling or unable to authorize the work. Landlords have a contractual duty to provide safe, habitable housing.³⁹ In all too many instances, economically vulnerable households rent from landlords who are either inaccessible or unwilling to take the necessary steps to protect the health and wellbeing of their tenants.⁴⁰ Unfortunately, low income households are often unable to access legal representation to protect their contractual rights.

Lead contaminated water is a matter of public safety and consumers who live in poorly maintained rental housing are especially susceptible to the health risks associated with lead. The Commission should therefore take decisive steps to ensure that tenants have equitable access to LSL programming– even if a landlord is not responsive to outreach efforts or is unwilling to accept LSL remediation programming. Indeed, as noted previously, the mere disclosure of the presence of lead is insufficient to protect low income tenants who do not have the funds to relocate to a safer home – and lack the necessary authority to accept a LSLR. Tenant's should not be placed at risk of lead exposure due to the negligence of their landlord.

Furthermore, in situations where LSL replacement is truly not an option, utilities should be required to offer tenants alternative lead remediation programming, such as free testing kits, filters,

³⁸ See *supra*, n. 9,

³⁹ See *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897, (1979).

⁴⁰ See Irene Lew, *Housing Inadequacy Remains a Problem for the Lowest-Income Renters*, Joint Centers for Housing Studies of Harvard University (May 19, 2019), available at: <https://www.jchs.harvard.edu/blog/housing-inadequacy-remains-a-problem-for-the-lowest-income-renters/>.

and replacement cartridges; free filter installation and maintenance assistance; and educational materials, with information about the effects of lead exposure to help provide some protection for tenants. This information should also be in plain language, easily understood by the general public and also made available in multiple languages as noted above. Lead lines are a public health and safety issue and, and as such, reasonable remediation should be available to all consumers who are at risk of lead exposure – including tenants – even when replacement is not an option.

Should the Commission decide against requiring entities to exercise step-in rights, we urge the Commission to require entities to include in their plans enhanced notice requirements for tenants which follow the requirements for notice consistent with Chapter 15, Subchapter B of the Public Utility Code prior to termination for LSLR refusal. It is critical that at the very least tenants have an opportunity to assist in obtaining landlord approval for a LSLR and to protect their rights as a tenant. This requires at least the length of time provided to tenants in advance of a utility termination pursuant to the Public Utility Code. We recommend reviewing comments in the PWSA Stage 1 Compliance Plan proceeding where this issue was discussed at length. It is important to also require entities to track and report on the number of tenant-occupied properties where the landlord refuses replacement so that we can better understand the scope of the problem.

B. The cost of lead service line remediation programming should be shared across all customer classes.

According to Act 120, the Commission has the authority to allocate the cost associated with the replacement of a customer-owned lead water service line among “each customer, classes of customers and types of service.”⁴¹ LSL remediation programs are public purpose programs, designed to address a public health crisis that was not caused by a particular class of customers.

⁴¹ 66 Pa. C.S. § 1311(b) (iv)

All consumer classes derive specific and tangible benefits from the availability of these programs. As such, the costs for public purpose programs are most appropriately shared across all customer classes. Indeed, most service lines underneath private property were installed by a utility – not the customer. For over 100 years, lead was the most common material that utilities used for service lines.⁴² It was not until the 1920s that lead restrictions began to be implemented, though LSLs continued to be installed in some areas until the early 1970s.⁴³ Unless a customer subsequently replaced their service line, the material used is typically a legacy of the water utility’s historical infrastructure material choices – not the choice of an individual homeowner.

The cost of replacing lead service lines should be borne by all those who benefit from the system as a whole – not just a single class of customers. This includes commercial and industrial customers, which not only enjoy the benefits of the system – but also the benefits of a vibrant, healthy, and economically stable community as a whole. Thus, the Commission should set clear expectations that the utilities come forward with a proposal for cost recovery that will distribute program costs across all rate classes.

C. Low and moderate income households with identified LSLs should be provided free filters until the LSL is replaced.

Until a lead service line is replaced, consumers are at risk of lead exposure. Under the proposed regulation, it may take several years for the replacement to actually occur. As explained above, low and moderate income households struggle to afford basic life necessities, and do not have adequate resources to afford filters, bottled water, or other interim mitigation measures.

⁴² See Richard Rabin, *The Lead Industry and Lead Water Pipes: “A Modest Campaign,”* 98 Am. J. Pub. Health 1584, 1585 (2008), available at <https://ajph.aphapublications.org/doi/10.2105/AJPH.2007.113555> (describing the efforts of Lead Industries Association to encourage use of lead in drinking water pipes and the inclusion of lead as an acceptable material in plumbing codes long after its adverse health effects were well-established).

⁴³ See *id.*

In order to protect low and moderate income consumers from lead exposure while a replacement is pending, the Joint Commenters recommend that low and moderate income households with income at or below 250% of the federal poverty level be provided free NSF-certified filters until the line is replaced. This will help protect consumers from lead exposure until the line can be replaced.

III. CONCLUSION

The Joint Commenters appreciate the opportunity to submit written comments for this critically important proposed rulemaking. We support this rulemaking moving forward with amendments incorporated as recommended in these comments. With the Commission focusing efforts on developing appropriate program parameters to ensure consumers who are most at risk of lead exposure have access to effective LSL remediation programming, Pennsylvania could serve as a model for other states, making the Commonwealth a leader in one of the most urgent and emergent public health crises.

Respectfully submitted,

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