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## Township Law *E-Letter*

### **Lead and Copper Rule Changes – Impact on a Township**

*Effective June 14, 2018 the State issued new lead and copper rules for water supplied to the public. The new rules will phase in new lead action levels, redefine what constitutes a “service line” and a “lead service line,” mandate new reporting, sampling, and line replacement requirements, as well as create water system advisory councils both at the state level and within municipalities. Several legal and practical considerations have been raised and a coordinated group of four water suppliers have filed suit in an attempt to block the rules. Currently, the rules remain in effect and pose a number of practical challenges for small and large water suppliers. Although EGLE has developed promised guidance on a number of issues, those documents will likely continue to be developed. This E-letter summarizes the current rule changes and upcoming compliance dates that townships continue to work towards despite continuing litigation and likely further direction from EGLE.*

#### **THE NEW RULES**

The new rules were effective June 14, 2018. Important aspects of the rule changes include assessing current municipal water lines and creating an inventory. The inventory and information gathered will be used as a basis to form a townships replacement plan of those lines that require replacement under the rules. Some of the key changes are as follows:

**Action Level.** The copper action level will remain the same, at 1.3 parts per million. The current action level for lead is 15 parts per billion (ppb) at the 90th percentile. Beginning January 1, 2025 the 90th percentile for lead must be below 12 ppb. This is lower than the federal action level and one of the most stringent action levels in the nation.

**Exceeding the Action Level.** If the supply exceeds the lead action level after implementing corrosion control, the replacement of lead service lines is accelerated to 7% per year. Consistent with other rule changes, any galvanized service line that is or was connected to lead piping must also be replaced. Public education materials with statutorily required language—including that the water supplier has violated the action level for lead—must be sent to all customers and other at-risk groups and individuals. Public education materials must be approved by EGLE before distribution.

**Copper.** There are notification requirements for elevated levels; the notice of testing results must now include copper as well as lead. Otherwise, the changes are really the “Lead Rule.”

**Sampling.** Additional sampling will also be required. A sample is taken after the first liter is drawn, a second sample of the fifth liter will now be required at sites served by lead service lines. Tier 1 and Tier 2 sample site criteria have been modified to exclude copper pipes soldered with lead. They must now either contain lead pipes or be served by a lead service line. Priority is given to sites with a higher potential risk for lead exposure. The new sampling pool must be submitted to LARA by January 1, 2020. If the supply uses corrosion control, the three-year sampling cycle will be harder to obtain, as the water supply must have no lead service lines or have 90th percentile lead at 5 ppb (and copper at 650 ppb) for three consecutive years. EGLE issued a sampling infographic as well as sampling instructions in mid-March 2019.

**Service Line.** The definition of a “service line” has been expanded from beyond the curb stop. Now, the service line is defined to extend to the first shut-off valve inside the building or 18 inches, whichever is shorter. Updates to the rules regarding “control” of the service line also place additional requirements on suppliers. This significantly expands the impact on private property.

**Control of the Service Line.** A supplier is presumed to control the entire service line if they have authority to set standards for construction, repair, or maintenance. Control is assumed; a supplier must prove it does not control a service line.

**Lead Service Line.** A “lead” service line is also expanded. Not only does the new definition of “service line” expand where a “lead” service line can be located to include the portion on customer property, but it also expands the definition to goosenecks or fittings. A lead service line means **either** a service line which is made of lead or any lead pigtail, lead **gooseneck**, or other **lead fitting** that is connected to the service line, or both. The “either/or” drafting expands the impact; now a single lead gooseneck will transform a service line into a lead service line. A water supply that previously had no lead service lines, but used lead goosenecks to connect galvanized service lines to the main, may now have several new lead service lines to replace under the new rules.

**Required Replacement.** Previously, replacement of service lines was only required if the water supply exceeded the action level. Under the present rules, five percent (5%) of the lead service lines must be replaced each year regardless of the action level (this replacement schedule is starting January 1, 2021). Any service line, even galvanized service lines, must be replaced if they are now or ever were connected to a lead service line. The EGLE may approve individual replacement plans in conjunction with an asset management plan (AMP). Annual status reports on replacement must be submitted to the EGLE.

**Inventory Requirements.** Water suppliers are also required to make a preliminary inventory of all service lines under their control by **January 1, 2020**. A final, verified inventory is due on **January 1, 2025**. EGLE also requires updated inventories every five years after 2025. They recently created a preliminary inventory form as well as a preliminary inventory memo to assist with implementing this requirement.

**Consumer Notices.** Additional and updated consumer notices are also required. All water suppliers must deliver a consumer notice of the lead and copper tap water monitoring results. If the action level is

exceeded, then it must issue a public advisory. Education material must be available as standalone printed publications. They must emphasize not only health problems, but also impacts on child development; the materials are submitted to EGLE prior to delivery.

**Water System Advisory Councils.** A statewide council was created to assist with public awareness campaign materials. Local Advisory Councils are required if the supply serves more than 50,000 people. They are tasked with awareness, assistance, and collaboration. One goal is to help convince property owners to allow the supplier to replace their portion of the service line.

**Penalty.** Failure to comply with the rules (or other provisions of the Safe Drinking Water Act) are subject to an injunction requiring compliance and a civil penalty of \$5,000 per day. MCL 325.1022. Violations may also be prosecuted as a misdemeanor with one-year jail terms and \$5,000 per day fines. MCL 325.1021(1).

## LEGAL CHALLENGES

Soon after the rules were adopted, several water suppliers challenged the rules at the administrative level. They requested a declaratory ruling that the rules exceeded the scope of the EGLE's authority. The department denied the request, stating that it did not have the authority under state law to review the challenges proposed. Despite this challenge not providing any relief, water suppliers have also challenged the rules in the Michigan Court of Claims.

The parties proceeding in the Michigan Court of Claims have challenged the rules on the grounds that they violate the Administrative Procedures Act, are arbitrary and capricious and beyond the scope of the Safe Drinking Water Act, violate the Michigan Constitution Art. 9, § 18 and Art. 7, § 26. Motions were filed, and oral argument was scheduled for May 24, 2019, which was cancelled and rescheduled for July 8, 2019.

## PRACTICAL CONSIDERATIONS

**EGLE Guidance.** The EGLE is working to provide guidance and get answers to everyone “as soon as they can.” Although additional guidance has been released (see the [EGLE website](#)), as of early May, additional material remains in development. It is unclear what the EGLE is accepting as appropriate asset management plans and what lead and service line replacement rates result from those plans. In general, the core components of an AMP remain the same: Asset Inventory, Level of Service, Critical Assets, Revenue Structure, and a Capital Improvement Project Plan. EGLE submission guidelines presently available address the AMP generically, with no added requirements for service line replacement. While EGLE has provided the previously mentioned sampling infographic and specific inventory forms, further guidance will be of great assistance in removing ambiguity and uncertain from the rules.

**Expenses of Replacement.** Not all townships are heavily impacted by the rule changes. For those townships with no water systems or new water systems there may be little concern financially as few if any lead line may exist in their systems. Other townships may receive wholesale service from an adjacent authority, city or village, which likely places the immediate concerns upon those other municipalities. The rates for those townships, however, will likely be impacted. For those that will need to replace lines,

funding the replacement remains unclear. Some water suppliers are introducing capital charges through their rates to pay for the improvements. This is similar to replacement of other capital assets that are scheduled on a local entities 5-year capital improvement plan or AMP. Some municipalities have also bonded to raise sufficient revenue. Presumably, those bond payments are secure through municipal water rates and tax-raising authority. Currently special assessments are viewed as incompatible with the rule's requirement that the lead service line be replaced at the water suppliers' cost. Litigation regarding the rules may shed further light on the topic.

**Communication.** Communication and transparency are key. It will be important to inform residents and customers regarding the project as it unfolds and moves forward. The water supplier should develop a communication plan:

- General brochures; workers taking inventory should always have them available
- Special brochures for schools, day cares, pediatrician offices, and other specially affected populations
- Insert materials with supply bills
- Place notices on supply and municipality websites
- Host special meetings and community events
- Contact local media outlets
- Identify neighborhoods for replacement work and consider neighborhood meetings.
- Develop FAQs
- Prepare for customer response: hotlines, website information, dedicated point staff for concerns

**Inventory.** There are two inventory requirements: 1) a preliminary distribution system material inventory due January 1, 2020 and 2) a complete distribution system material inventory due January 1, 2025. The preliminary inventory "shall consist of a thorough assessment of distribution system materials based on existing sources of information." It is a snapshot of the current distribution system information. Preliminary inventory work will vary widely from water supplier to water supplier, depending on the quality of information already within administrative files. Sources of information to consider include:

- Inspection and maintenance records
- Operation and maintenance manuals
- Construction specifications
- Permit files
- Meter installation records
- Plumbing codes
- Plumbing permits
- As-Built drawings
- Existing water quality data
- Distribution maps and drawings
- Property tax records
- Interviews with senior personnel, building inspectors and retirees
- Standard operating procedures
- Billing records
- Community survey
- Water asset databases
- Geographic Information System
- Policy documents
- Municipal codes
- Inspections during current visits
- Consult with engineers and consider contracting the work and records review where needed

It will be important to manage the new data efficiently. Creating a GIS layer will help centralize the information and locate it in a system where the Township, the water supplier, and the public will be able to access and utilize it. As that information is coming in from various sources, as noted above, it will be important to have a central person or team bringing it all together, organizing it, and keeping it uniform. The complete inventory identifies where lead, galvanized, and other construction materials are present in the piping, service lines, storage structure, pumps, and controls. At this preliminary stage identifying a service line as “unknown” is sufficient; it will thus be tagged for follow up and final certification.

The data collected in the preliminary inventory is the foundation for the final inventory. The rules require five-year comprehensive updates. Collect and manage your data with the final inventory and future updates in mind.

**Replacement.** The first replacements beginning in 2021 may not be problematic, depending on the quality of records available to the water supply and the amount of support received from customers. You should consider prioritizing sensitive populations, including LSLs identified at schools, day care centers, pediatrician offices, senior or elderly populations, dialysis centers, or other sensitive populations in the community. Costs may be reduced with coordination with other street projects and work. Utilize your asset management plan, if possible. Replacements of service lines will need to be completed on a same-day basis to ensure continued service. Organizing replacement work in adjacent blocks may reduce crew mobilization costs.

Replacement Notice. At least 45 days prior to replacing service lines, the water supplier must provide notice to residents of the buildings served that they may experience a temporary increase in lead levels and guidance to minimize exposure to lead. Generally, the notice will be mailed, but multifamily buildings may be posted in a high traffic location; EGLE may provide for additional methods of notice.

**-- Chris Patterson and Matthew A. Kuschel**

*Fahey Schultz Burzych Rhodes PLC, Your Township Attorneys, is a Michigan law firm specializing in the representation of Michigan townships. Our lawyers have more than 150 years of experience in township law and have represented more than 150 townships across the state of Michigan. This publication is intended for our clients and friends. This communication highlights specific areas of law and is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.*

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