LCR Challenges Municipalities Face

2018 Lead and Copper Rule Revisions
MAMA: October 11, 2018
By: Kelsey Cooke, Senior Attorney
# New Lead and Copper Rules

<table>
<thead>
<tr>
<th>Existing</th>
<th>Revised</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action Level 15 ppb</td>
<td>Action Level 12 ppb</td>
</tr>
<tr>
<td>Inventory maintained by system</td>
<td>Field verified inventory of all lines</td>
</tr>
<tr>
<td>One first draw sample/site</td>
<td>If LSL: two samples/site</td>
</tr>
<tr>
<td>90&lt;sup&gt;th&lt;/sup&gt; %ile based on all samples</td>
<td>90th %ile based on highest per site</td>
</tr>
<tr>
<td>LSLR only if exceeded AL after installation of CCT</td>
<td>LSLR req @5%/year or approved AMP</td>
</tr>
<tr>
<td>LSLR: limited to publicly owned</td>
<td>LSLR includes public and private</td>
</tr>
<tr>
<td>LSLR: not galvanized lines</td>
<td>LSLR includes galvanized if connected to LSL</td>
</tr>
</tbody>
</table>
Overview of the Problems
Challenges are Multi-faceted

- Legal
- Financial
- Logistical
The **Legal** Conundrum

- Complying with the Rules violates the Constitution
  - Can’t use public money to make improvements on private property
  - Can’t spread costs that only benefit some to the entire rate base
The **Legal** Conundrum

- Complying with the Constitution violates the Rules
  - Can’t directly charge property owners
  - Can’t replace public lead service lines without also replacing private lead service lines
The **Financial** Conundrum

- The greatest number of lead lines are located in areas of poverty or minimal income
  - Prime example is Detroit where the annual compliance cost of $52M exceeds the City’s entire asset management budget
  - Yet, municipalities have numerous investment needs to protect public health
The Logistical Conundrum

- The State is measuring the wrong thing
  - The lead action level is related to effectiveness of corrosion control
  - Yet it dictates the rate of replacement
- The result = we are off managing the wrong things
The Logistical Conundrum

The Lead and Copper Rules trump all other risk factors that drive cost-effective decisions...

...for NO reason
The **Logistical** Conundrum

- New sampling will preclude the option for flexibility
- Contractor availability
- Securing owner permission for rental properties
- And more by the day...
The **Logistical** Conundrum

- Yes, it gets worse
- Implementing the **wrong** fix
  1. Is it the lead line?
  2. Is it the plumbing?
  3. Is it neither?

- We know in many cases the answer is either 2 or 3
Sources of **LEAD** in Drinking Water

**Copper Pipe with Lead Solder:** Solder made or installed before 1986 contained high lead levels.

**Faucets:** Fixtures inside your home may contain lead.

**Galvanized Pipe:** Lead particles can attach to the surface of galvanized pipes. Over time, the particles can enter your drinking water, causing elevated lead levels.

**Lead Service Line:** The service line is the pipe that runs from the water main to the home’s internal plumbing. Lead service lines can be a major source of lead contamination in water.

**Lead Goose Necks:** Goose necks and pigtails are shorter pipes that connect the lead service line to the main.
We are between that rock and that hard place

Municipalities face at least one of three brick walls:

- Legal
- Financial
- Logistical
We are between that rock and that hard place

Perversely, non-compliance is inevitable.

As Paul Newman said...
What we’ve got here is a failure to communicate.
“We” is you

• By definition, local municipalities are water suppliers.
  • Unless all drinking water within the municipality is provided to residents by private wells.
• Because local municipalities are water suppliers, they are subject to the LCRs.
The Details
We are required to...

• If the lead action level is exceeded...replace at least 7% per year

• Offer to replace the owner’s portion of the line at water supply expense

  • One wonders, who wouldn’t take that offer?
We are required to...

- For everyone else with lead service lines (or galvanized connected to lead), replace LSLs at average of 5% per year NTE 20 years

- Unless, an alternate schedule in an asset management plan is approved by the DEQ.
Who owns what?

Our water system is a shared responsibility.

- **Source Water Intake**
- **Water Treatment Plant**
- **Water Main**
- **Reservoir and Booster Station**
- **Municipal Master Meter**
- **Transmission Main**
- **Pressure Reducing Valves**
- **Distribution Main**
- **Fire Hydrant**
- **Curb Stop**
- **Valve**
- **Service Line**
- **Meter**

Legend:
- Great Lakes Water Authority
- Municipality
- Property Owner
Logistical Challenges

• Accurate sampling
• Consent for access
• Prohibition of partial line replacements
• Available human resources
• Disposal of lead pipes
Sampling has huge ramifications

- New sampling protocol ("sequential sampling")
- Are homeowners willing to assist?
- Are they capable?
Another rock and a hard place

- Public agrees LSLR is important, but will they let you in their home? No legal right to trespass.
- What about rental properties?
- Compliance depends on decisions by homeowners over which municipalities have no control
Time for a new metaphor...
“_______ if we do, _______ if we don’t”

- We cannot replace the public portion without replacing the private
- The problem
  - There can be multi-pronged connections serving several properties
  - If one of the properties denies access, the municipality cannot reconnect services to all lines because it would be a violation!
By the way, who is going to do this?

• Are there enough people out there to do this work at the rate needed?
• Added government staff for compliance with sampling, public education, inventory
Now what do we do with it?

• Where do the lead pipes go?
• Is this creating another health risk?
• What is the cost of disposal? Who pays for that?
Pretending there is such a thing as a free lunch

- How does a water supply pay for LSLR?
  - MDEQ confirmed intent to spread costs across the rate base
  - Have urged communities to be “creative”

- Fact: Other public health projects and services will be sacrificed in order to comply with the LCR
The Impracticality of using the General Fund

• Priorities are police, fire and rescue
And by the way, there’s that thing called the law

• Expending public funds for the benefit of private property is unconstitutional

• Unless, specifically authorized by the legislature

The condition for an appropriation is not in place

- Express support of two-thirds of House and Senate. Const 1963, art 4, § 30
Lansing, we have a problem

- Municipalities are prohibited from assessing an unlawful tax upon citizens without voter approval.
- Michigan Supreme Court held that a municipal fee is an unlawful tax if it is not regulatory, proportional and voluntary.
- Spreading the cost of LSLR across a community is **NOT** proportional to the cost of service each citizen receives.
You might not know it, but when it comes to infrastructure $1+2+3=1,000$

1. The new lead rule
2. Liability for basement flooding lawsuits
3. Settlements for stormwater charges
What’s next?

• Request for a Declaratory Ruling to MDEQ
  • By GLWA, DWSD and WRC
  • Filed August 13, 2018

• MDEQ Guidance Documents

• Public Perception
Questions?

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