

Date Signed: August 18, 1989

MEMORANDUM

SUBJECT: Implementation and Enforcement of the Lead Prohibition and Lead Public Notification Requirements of the Safe Drinking Water Act in Fiscal Years 1990 and Beyond

FROM: Michael B. Cook, Director (signed by Robert J. Blanco)
Office of Drinking Water

TO: Water Management Division Directors
Regions I - X

Several questions have arisen about the implementation and enforcement of the lead ban and lead public notification requirements of Section 1417 of the Safe Drinking Water Act (SDWA) for fiscal years 1990 and beyond. Lead is one of the four contaminants to which the Office of Drinking Water has assigned a high priority due to the significant health risk caused by exposure to this contaminant. The lead ban in Section 1417 of the SDWA is one of the primary mechanisms through which exposure to lead can be controlled and public health can be protected. It is crucial, therefore, that we convey to the States the importance we place on implementing and enforcing the requirements of Section 1417. The purpose of this memorandum is to clarify our expectations in this regard.

Detailed guidance on this subject was provided to the Regions last October; however, it is important to restate and elaborate on some of the fundamental principles contained in that guidance. The most important item is that in FY 1990 and beyond, the States must demonstrate effective implementation and enforcement of the lead ban. The Regions must evaluate this demonstration; if the State's program is unsatisfactory, they are to withhold five percent of the State's program grant.

Before discussing the FY 1990 requirements. I will briefly review the other items noted in the October 4, 1988 Guidance.

A. Statutory Authority

Section 1417(a) of the SDWA prohibits the use of any pipe, solder or flux which is not "lead free" in the installation or repair of any public water system or in any plumbing in a residential or nonresidential facility providing water for human consumption which is connected to a public water system.

Section 1417(a)(2) requires each public water system to identify and provide notice to persons who may be affected by lead contamination of their drinking water and specifies the contents of the public notification. EPA promulgated final regulations on October 28, 1987 to implement this provision (40 CFR 141.31).

Section 1417(b) provides that the prohibition on the use of lead in public water systems and the public notification requirements shall be enforced in all States as of June 19, 1988. The section further specifies that the States shall enforce the lead prohibition through State or local plumbing codes, or other means of enforcement as the State may determine to be appropriate.

Section 1417(c) authorizes EPA to withhold up to five percent of a State's Section 1442(a) public water system supervision (PWSS) program grant if the Administrator determines that the State is not enforcing the lead prohibition or the lead public notification requirements.

B. Approach

It is EPA's policy to use its statutory authority to withhold the full five percent of a State's grant if the State is not meeting the requirements of Section 1417.

C. Status of Implementation in FY 1989

In FY 1989, in order for a State to receive its full PWSS grant, the State was required to submit to EPA a certification describing: (1) its lead ban and whether it covered the entire State; and (2) the procedures the State used or was using to implement the lead public notification requirements. The Regions were to review this certification and other available information against the requirements of the SDWA and the October 4, 1988 Guidance to determine whether to approve the certification. The certification had to be submitted to EPA by March 31, 1989.

Currently, all States have approved certifications in place, with the exception of Pennsylvania. However, it has come to our attention that in some cases the State lead bans themselves may not meet the minimum federal statutory criteria; that is they do not cover pipe, solder, and flux, or they don't cover the entire State. Given this situation, the Regions should carefully review the certifications they have approved. If the lead bans do not meet the statutory criteria described above, the Region should immediately notify the State and see that a corrective action is initiated as soon as possible. If the State is unwilling or unable to correct a deficiency in its lead ban, then the Region is to withhold five percent of the State's FY 1990 PWSS grant.

Additionally, we are very concerned about the low rates of compliance with the public

notification requirements in many States. Failure by the State to enforce the public notification requirements is to result in the withholding of grant funds in FY 1990 as described below.

D. Implementation in FY 1990 and Beyond

In FY 1990 and beyond, two items are required: an initial certification (as described in Section C) and a demonstration of effective implementation and enforcement of the lead ban and the lead public notification requirements. This section will discuss each of the requirements and possible mechanisms for obtaining this information.

1. Effective Implementation and Enforcement.

The States should provide the Region information which demonstrates that the requirements of the lead ban/lead public notification regulations are being uniformly and effectively enforced throughout the State and that violations are being acted upon. The information should include:

- (a) Any changes in laws, regulations, or ordinances which may affect the lead ban program (i.e., the lead ban itself and the lead public notification requirements);
- (b) A summary of public notification compliance which includes the number of systems that have complied with the public notification requirements and the percent of the State's population these systems serve. In those States which have systems which have not complied with the public notification requirements, the State should submit a description of the activities it is taking to follow-up with those systems.
- (c) A summary of State lead ban program compliance and enforcement activities, including a description of the mechanisms used to enforce the lead ban and the level of enforcement activity.
- (d) A description of activities related to the lead ban program and public outreach and educational activities planned for the coming fiscal year, and highlights of those activities for the past year.

2. Evaluation of State Submissions

Regions should review the information submitted to determine whether or not the State is effectively implementing and enforcing the lead ban and lead public notification provisions. Because each State may choose how to implement the program it is difficult to give nationwide evaluation criteria; however, the following is a list of some elements to consider:

- Is it clear from the State submission(s) which organization(s) are responsible for overseeing the lead ban/lead public notification programs? Do these organizations have the authority and/or the capability to effectively implement the program?
- How many "spot-checks" of compliance with the lead ban has the State performed? What were the results? How many violations found were acted upon by the State? If the State has performed no "spot-checks" or has not acted upon violations, how can this be effective enforcement and implementation?
- How many enforcement actions for violations of the lead ban or lead public notification requirements has the State taken? Were these actions stringent enough to deter future violators? If the State has not taken any enforcement actions, how can the State claim an effective enforcement program?
- What is the level of compliance with lead public notification requirements? How have the States dealt with noncompliance?
- What specific outreach activities (other than public notification for systems which have not complied with the lead public notification requirements) has the State conducted? If the State has done none or has put forth only a minimal effort, how can it claim an effective program?
- Is the Region aware of any information which sheds doubt on the effectiveness of the State lead ban program? Have you brought such concerns to the State?

These questions may help to focus your review of the State submissions. If, in your judgement, a State has not demonstrated effective implementation and enforcement of the lead ban/lead public notification requirements, then five percent of the State's grant should be withheld.

3. Mechanisms/Timing for the Regional Determination of Adequate Implementation and Enforcement and the Resulting Grant Decision

The Region may use whatever mechanism it believes appropriate to obtain the information from the State and make its determination on the adequacy of the State's lead ban program. Although the details are left to Regional discretion, the Regions are to begin FY 1990 by making it clear to their States that 5% of the State's FY 1990 PWSS grant is dependent on adequate implementation and enforcement of the lead ban.

The approach which we would prefer the Regions take would be to negotiate an acceptable lead ban implementation program with each State and include this program in the State's FY 1990 workplan. The Region, at the beginning of the fiscal year, would hold 5% of the State's PWSS grant in reserve, and would inform the State that it will be evaluated on its lead ban program at midyear evaluations. If the State is adequately implementing the program, it will receive the remaining 5% of their program grant.

If a Region feels strongly, however, that withholding 5% of the State's grant at the beginning of the year would damage their relationships with their States, they may award the full grant and make implementation and enforcement of the lead ban an express condition of the grant. We suggest the following wording: The State Primacy Agency will implement and enforce the lead ban and the lead public notification requirements of Section 1417 of the Safe Drinking Water Act in accord with EPA guidances. If the State Primacy Agency is not the agency responsible for the lead ban, it will provide EPA with a demonstration that the lead ban and lead public notification provisions of the SDWA are being implemented and enforced in the State. If the State fails to perform this task, EPA will withhold (or if all funds have been awarded, deobligate) 5% of the total amount of the State's grant.

As noted above, the Region may use any mechanism or combination of mechanisms it believes appropriate to the situation. The FY 1990 Office of Water Accountability System (OWAS) measures contain an item on the implementation of the lead ban; we will focus on this during our midyear evaluations of the Regions.

I believe that effective implementation of Section 1417 of the SDWA is critical. It is essential that the Regions send the right message to their States; that is, that EPA is serious about enforcement and implementation of the lead ban and that we simply cannot accept a program which is not meeting the requirements of the SDWA.

I hope that this guidance is useful. I recognize the problems that you are having in trying to oversee the implementation of Section 1417 and urge you to continue your efforts.

cc: Drinking Water/Groundwater Protection Branch Chiefs
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