



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted via email to:
LCRConsultation@epa.gov

March 15, 2018

Bob Rose
U.S. Environmental Protection Agency
Office of Water, Water Policy Staff
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: LCR Tribal Consultation

Dear Mr. Rose,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) submits the following comments to the U.S. Environmental Protection Agency (EPA) as part of the agency's request for input from Tribal entities on the potential revisions to the Lead and Copper Rule (LCR). According to the EPA, these revisions to the LCR would have an impact on Tribal governments that operate public water systems as well as Tribal governments that have primary enforcement authority (or primacy) for public water systems on Tribal lands. The regulatory revisions under consideration include:

- Tap Sampling;
- Corrosion Control and Treatment;
- Public Education for Transparency;
- Full Lead Service Line Replacement; and
- Copper Requirements.

USET SPF is an intertribal organization comprised of twenty-seven federally recognized Tribal Nations, ranging from Maine to Florida to Texas¹. USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

Access to clean, reliable drinking water is crucial to the overall health and quality of life for Tribal communities. USET SPF agrees that the standards within the LCR through the Safe Drinking Water Act have been instrumental over the past twenty-five years in minimizing water contaminants and promoting

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

safe drinking water, not just within Indian Country, but nationwide. However, while USET SPF appreciates EPA's efforts to improve and update the LCR to reduce dangerous lead and copper in drinking water, we have concerns on possible unintentional consequences these improvements will have on Tribal Nations. USET SPF provides these concerns below.

Unfunded Mandate for Tribal Nations

The delivery of clean, reliable water is essential to the health of Tribal communities. Due to the severe lack of federal investment in infrastructure within Indian Country, drinking water and other infrastructure is in need of vast improvement. The consumption of lead and copper can have debilitating health effects including damages to the brain, red blood cells, and kidneys. While USET SPF appreciates EPA's efforts to improve public health protection by working to reduce dangerous lead and copper in drinking water, we are concerned that the proposed rule imposes an unfunded mandate on Tribal Nations, rather than upholding the trust responsibility to ensure infrastructure is properly resourced in Indian Country. Decades of chronic underfunding of the federal government's trust obligations has resulted both in a dangerous lack of infrastructure, as well as infrastructure that is severely degraded.

According to the EPA's own documents on the LCR, the rule is one of the most complicated drinking water regulations to implement. Water systems, including states and public water utilities, must have expertise and resources necessary to implement and meet these complicated drinking water regulations. EPA also acknowledges the substantial costs associated with the proposed rule including lead service line replacement (LSLR). Estimated costs for LSLRs range from \$2500 to more than \$8000 per line, with costs disproportionately shouldered by low-income communities, including Tribal Nations. Further, EPA acknowledges that there are concerns about low income homeowner's ability to pay for LSLRs that are privately owned, and may result in disparate levels of drinking water protection. USET SPF reminds EPA that the federal government has a trust responsibility, both to protect of the environment and health of Tribal communities and also to provide for adequate physical infrastructure. To place the financial responsibility for compliance with the proposed rule on Tribal Nations would be a violation of that trust responsibility.

These proposed costly improvements to drinking water infrastructure come at a time when the President's Fiscal Year 2019 Budget Request contains deep cuts to funding within EPA, which proposes to cut the current EPA budget of over \$8 billion to \$6.1 billion. This includes cuts to vital programs that help to provide clean and safe drinking water, including a 20% reduction in funding within the State and Tribal Assistance Grants from \$3.5 billion to \$2.9 billion. In addition, while the Administration's infrastructure proposal does indicate support for a Tribal set-aside within its proposed Rural Infrastructure Program, it remains unclear exactly how much funding is being proposed, and whether Tribal Nations would have access to other parts of the President's plan. We feel these actions are contradictory, and effectually place the costly burden of LCR compliance on Tribal Nations. The EPA and other federal branches must acknowledge the trust responsibility to protect Tribal health and rebuild Tribal Nations by providing Tribal Nations with necessary resources and funding.

Tribal Exemption within the Lead and Copper Rule

According to Administrator Scott Pruitt's own testimony during a House Energy and Commerce hearing in December 2017, replacing lead service lines across the country could cost, "as much as \$30 billion or maybe upward of \$50 billion." The successful implementation of the proposed changes within the Lead and Copper Rule within Indian Country would require a considerable amount of funding. As you are likely aware, Tribally-operated water utilities are not publically or commercially owned. Therefore, Tribal Nations are unable to recover costs from a customer base as are other water utilities. Infrastructure, water distribution, systems updates, and other costs associated with LCR would fall directly upon Tribal governments, who are, oftentimes, only able to provide basic services to their Tribal citizens. If enacted,

Tribal Nations may have to redirect resources away from other crucial services to ensure LCR standards are being met. Further, Tribal governments are vastly different than public utilities, and do not have the staff, technical bandwidth, or access to resources to ensure compliance with LCR. If Tribal Nations are expected to comply with the new rule, EPA must provide sufficient funding for this purpose, including funding for technical assistance. In the absence of additional funding, USET SPF urges the EPA to consider either exempting Tribal governments or other Tribal entities from proposals that expand LCR standards, or allowing phased-in LCR requirements for Tribal utilities, pending the identification of funding.

Tribal Set-Aside for Lead and Copper Rule Compliance

USET SPF reminds EPA that the agency has a federal trust responsibility to Tribal Nations, which includes ensuring Tribal Nations have the all resources necessary, financial and otherwise, to protect their land and water. If the EPA is unable to provide an exemption for Tribal Nations under the proposed rule, USET SPF maintains that EPA must either identify a source of funding for LCR compliance that would include a Tribal set-aside, or provide direct funding to Tribal Nations for this purpose. USET SPF also urges that funding be increased for other Tribal water programs under EPA including the Clean Water and Drinking Water State Revolving Fund or other Tribal assistance grants. These funding streams will ensure Tribal Nations are able address lead and copper contamination in their communities. This approach is central to the exercise of Tribal sovereignty and self-determination. We urge the EPA and this Administration to fully support the protection of Tribal drinking water, as well as support Tribal self-determination and fully facilitate Tribal management of water resources and programs. Tribally-governed drinking water and other wastewater utility programs have the ability to protect water within Tribal communities with support from vital EPA programs.

In addition, USET SPF strongly believes entities eligible for Tribal set-aside funding should include Tribally-governed organizations, in addition to Tribal Nations, and exclude non-Tribal entities. Even though Tribal Nations are uniquely situated to meet Tribal safe drinking water needs in a way that respects Tribal sovereignty and culture, Tribal Nations often have to compete with other non-Tribal rural water programs for funding. In the past, Tribal programs have often not been able to effectively compete in previous grant cycles, as these Tribal programs do not offer services to non-Tribal entities.

Ongoing Tribal Consultation

In addition to providing sufficient funding, the federal government has an obligation to consult with Tribal Nations when taking actions that will affect them and their resources. It is of the utmost importance EPA continue to utilize the longstanding principles outlined in the 1984 EPA Indian Policy. These principles directing EPA to work with Tribal Nations on a government-to-government basis, as well as upholding the principle of Tribal self-governance are central to the federal government's trust responsibility. As an Agency of the federal government, EPA must continue to seek the advice and guidance of Tribal Nations as the LCR proposed rule change moves forward. This includes incorporating Tribal advice and guidance, as regulations are developed. We urge EPA to remain steadfast in its fulfillment of the trust responsibility to federally recognized Tribal Nations which includes the duty to ensure the protection of the environment and health of Tribal communities, as well as ensure meaningful consultation with Tribal Nations.

Conclusion

To ensure Tribal communities are not exposed to harmful lead and copper contaminants, EPA must work to fulfill its trust obligation by ensuring vast improvements are made to drinking water infrastructure in Indian Country. The ability for Tribal Nations to protect their environment and resources is vital to the health of future generations within Indian Country. While USET SPF appreciates EPA's efforts to improve and update the LCR to reduce dangerous lead and copper in drinking water, we continue to have concerns on the substantial costs these improvements will have on Tribal Nations who have not been provided sufficient resources for crucial improvements. On behalf of USET SPF, we thank you for the opportunity to provide

written comments during LCR consultation period. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 202-624-3550.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Francis', with a long horizontal stroke extending to the right.

Kirk Francis
President

A handwritten signature in black ink, appearing to read 'K. A. Carroll', with a stylized, cursive script.

Kitcki A. Carroll
Executive Director