



December 15, 2019

Via Electronic Submission

Ms. Mackenzie Matthews
Department of Energy and Environment
Affordability and Efficiency Division
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Attention: Lead Pipe Replacement Assistance Program Comments

Dear Ms. Matthews:

Thank you for the opportunity to comment on the emergency and proposed rulemaking: Determinations of Eligibility for the Lead Pipe Replacement Assistance Program (“rulemaking” or “proposal”). On behalf of the DC Environmental Network, DC Sierra Club Clean Water Committee, and the Natural Resources Defense Council’s (“NRDC’s”) approximately 9,700 Washington, DC-based members and online activists, we submit these comments.

Attached, please find general comments on the rulemaking, and specific questions and recommendations on sections of the proposed rule.

We particularly appreciate your diligent work to build this program and ensure that it is executed safely and equitably. We look forward to continuing to work with you and your colleagues at the District of Columbia Department of Energy and Environment (“DOEE”) as well as the District of Columbia Water and Sewer Authority (“DC Water”) and our coalition of advocates and community representatives to build a first-rate lead pipe replacement program and improve water quality in the District.

NATURAL RESOURCES DEFENSE COUNCIL

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Sincerely,



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GENERAL COMMENTS:

Information and transparency:

We are troubled by the lack of publicly available information about the implementation of this program as well as the potential gap in data about the rates at which different groups are receiving pipe replacements. DOEE and DC Water should track and report on who is receiving assistance under the Lead Water Service Line Replacement and Disclosure Amendment Act of 2018 (“the Act”). This includes both all applications and replacements under the Lead Pipe Replacement Assistance Program (“LPRAP”), and relevant DC Water (or contractor) activity associated with infrastructure work, such as small diameter water main upgrades. At a minimum, DOEE and DC Water should track and make public the following information about both voluntary LPRAP replacements, and success rates of DC Water’s efforts to replace full service lines (including tracking when and why DC Water may fail to replace a full service line):

- **Demographic data:** race, income, and languages spoken of people requesting assistance through LPRAP and the DC Water replacements. The agencies should also track whether properties are renter- or owner-occupied.
- **Location data:** the public should have access to (at a minimum) the Ward and Advisory Neighborhood Commission (ANC) Single Member District (SMD) where replacements (or failures to replace lines) take place.
- **Compliance:** Especially in the first year of the program, DOEE and DC Water should survey and track resident compliance with flushing and filtration protocols. This can be accomplished, for example, with telephone surveys, filter cartridge replacement assistance, and site visits.

In addition both DOEE and DC Water should be required to report to DC Council and the public on the following:

- **Outreach:** efforts, generally (attempts to contact homeowners, literature such as doorhangers or flyers distributed, and methods used).
- **Applications:** number of applications, application processing time, reasons for delays in processing, number of denials, reasons for denying applications.

Multi-family homes:

We recommend that DOEE promulgate rules that address multi-family homes and that DOEE consider the income in a way that maximizes participation in the program. If any unit in the building would be eligible for the maximum assistance, then we recommend DOEE consider the property eligible for maximum assistance.

Improving cost-effectiveness of the program:

We recommend that DOEE and DC Water require that contractors use trenchless methods of replacing lead pipe whenever feasible and require contractors seek special exemptions to use other methods, which should only be granted if trenchless replacement is not feasible.

Reasonable cap:

We recommend that DOEE raise the reasonable cap on replacement costs significantly.

Approved contractors:

It is a problem that DC Water has not yet published a list of approved contractors. Having to seek out a contractor without assistance is a barrier for residents to access the program. We recommend that DC Water publish a robust list of approved contractors promptly, and in the event that the utility needs time to finalize such a list, we recommend (a) that it do so in no more than 3 months, and (b) it publish an interim list of participating contractors immediately. Contractors should be skilled and capable of conducting trenchless replacements.

Safety, flushing, and filtration:

When pipes are replaced very high levels of lead can be released because of the disturbance to the system. We are very concerned that individuals are not receiving adequate information about the high risk of exposure to high levels of lead after replacements or adequate assistance in flushing their pipes and filtering their water.

DOEE and DC Water should prioritize communicating in a clear, accessible way the dangers of not flushing and filtering a system properly after a replacement. Residents should be advised to flush their water for at least 30 minutes. They should be advised to filter their water for at least 6 months, and DC Water should provide on-tap filters certified by NDF-I for lead removal with filter replacement assistance during that time.

DOEE and DC Water should develop a protocol for flushing and filtration as soon as possible, and that protocol should be available for public comment. We would like to provide more detailed feedback on these points.

SPECIFIC COMMENTS: Below is a copy of the proposed rulemaking with comments on specific provisions.

DEPARTMENT OF ENERGY AND ENVIRONMENT
NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

Determinations of Eligibility for the Lead Pipe Replacement Assistance Program

The Director of the Department of Energy and Environment (Department), pursuant to the authority set forth in the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq.* (2013 Repl. & 2019 Supp.)); the Lead Water Service Line Replacement and Disclosure Amendment Act of 2018 (the Act), effective March 13, 2019 (D.C. Law 22-241; 66 DCR 923 (January 25, 2019)); Section 203(15) of the Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996, effective April 18, 1996 (D.C. Law 11-111; D.C. Official Code § 34-2202.03(15) (2019 Repl.)); and Mayor’s Order 2006-61, dated June 14, 2006, hereby gives notice of the adoption of the following emergency rules to add a new Chapter 38 (Lead Pipe Replacement Assistance Program Eligibility Determinations) to Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR).

The rulemaking establishes the process and appeal procedures related to a new assistance program for DC Water customers, referred to as the Lead Pipe Replacement Assistance Program (LPRAP) for which the Department will be providing funding. LPRAP provides eligible property owners with Department-funded benefits towards the replacement of their lead service line. The eligibility criteria were established in the Act. Accordingly, the Department will determine whether residents meet the eligibility criteria for receiving assistance through this program and will advise DC Water as to whether residents meet the eligibility criteria for receiving assistance. These regulations establish a process for DC Water residential customers to apply for benefits under LPRAP, and for the Department to make a determination of eligibility.

This rulemaking is being promulgated as an emergency to allow eligible District property owners to immediately have access to the described benefits. DC Water notifies the property owner when it is replacing the service lines on public property and gives the owner the opportunity to pay for the services lines on private property to be replaced at the same time. Under the Act, DC Water must replace lead service lines on private property when replacing lead service lines on public property if the owner consents and funding is available. If the lead service line is only on private property, the cost to replace the lead service line is prohibitive to many District residents. It is necessary to adopt this rule immediately to promote the public welfare by implementing this assistance program.

These emergency rules were adopted on October 1, 2019, became effective immediately, and will remain in effect for up to one hundred twenty (120) days from the date of adoption, or January 29, 2020, or until publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever occurs first.

Title 20 DCMR, ENVIRONMENT, is amended by adding a new Chapter 38 as follows:

**CHAPTER 38 LEAD PIPE REPLACEMENT ASSISTANCE PROGRAM
ELIGIBILITY DETERMINATIONS**

3800 LEAD PIPE REPLACEMENT ASSISTANCE PROGRAM
3801 APPLICATION PROCESS
3802 ELIGIBILITY
3803 BENEFITS
3804 DENIAL, REDUCTION, OR REVOCATION OF BENEFITS
3805 ADMINISTRATIVE APPEALS
3899 DEFINITIONS

3800 LEAD PIPE REPLACEMENT ASSISTANCE PROGRAM

3800.1 This chapter sets forth the process and appeal procedures for the Department’s determination of income eligibility for the Lead Pipe Replacement Assistance Program (LPRAP).

3801 APPLICATION PROCESS

3801.1 In order for the Department to determine the financial eligibility of an applicant to receive LPRAP assistance, a person shall file an application with the Department.

3801.2 The Department shall prescribe the form of the application to be filed, and provide either a paper or electronic application, which shall be signed by the applicant. The application shall state that the making of a false statement in the application, or the signing of the application with knowledge that facts stated in the application are not true, carries criminal penalties in accordance with Section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-2405).

3801.3 An authorized representative may apply on behalf of an applicant if the applicant provides:

- (a) A written and signed statement stating why the applicant cannot complete an application without a representative; and
- (b) The name and address of the person authorized to act on the applicant’s behalf.

3801.4 If requested by an applicant with a disability, or the representative of a person with a disability authorized pursuant to § 3801.3, the Department may assist the applicant or representative with the aspects of the application process necessary to ensure that the applicant with a disability has an equal opportunity to submit an application.

3801.5 The Department may assist with an application for an applicant who is unable to apply for the benefit in person for a reason other than disability, including making a visit to an applicant's home, if:

- (a) The applicant is sixty-five (65) or older, infirm, or unable to travel; or
- (b) The applicant's residence is located in a building or complex of buildings that house many other likely applicants.

3802 ELIGIBILITY

3802.1 In order to be eligible for a benefit, the applicant shall:

- (a) Be the property owner;
- (b) Reside in the District of Columbia; and
- (c) Meet the income criteria established at D.C. Official Code § 34-2159.

3802.2 A determination of financial eligibility shall be based on the gross income of the household, unless a member of the household is self-employed, in which case the determination of financial eligibility shall be based on the adjusted gross income.

3802.3 As a condition of eligibility, each applicant shall sign a release, or provide electronic acknowledgement, authorizing the Department to obtain or verify information necessary to process the application or for reporting purposes.

3802.4 Each applicant shall cooperate fully in establishing his or her eligibility, the nature of the need, and the extent of the need, each of which shall include providing documentation or other proof of:

- (a) Household composition;
- (b) Income; and
- (c) Any additional information that the Department may require.

Commented [BV1]: This is too broad and too open to interpretation.

Commented [BV2]: This is too broad.

3802.5 The Department may obtain the information used in determining eligibility from:

- (a) A document;
- (b) A telephone conversation or interview for which notes are taken;
- (c) Data from another government agency or utility provider;
- (d) Internet data; and

Commented [BV3]: Should this not be an OR?

(e) Other relevant sources.

Commented [BV4]: Ought there be some minimum standard for what is considered relevant?

3802.6 The eligibility and benefit determination will be completed within thirty (30) days after the Department receives a completed application, or, in the event of an unexpected or extenuating circumstance that affects the Department, such as a natural disaster, as promptly thereafter as possible, except that the following shall toll the timeline:

Commented [BV5]: Ought we define this a little better?

- (a) An applicant's failure to supply information to document facts stated in an application;
- (b) An inability to contact an applicant after three (3) attempts;
- (c) Evidence of misrepresentation in an application;
- (d) A failure to respond by a third party from whom the Department has requested information and over whom the Department has no control; or
- (e) A delay in receipt of necessary information over which the Department has no control.

Commented [BV6]: At a minimum this should state who determines whether there has been a misrepresentation and how to appeal such a determination.

3802.7 The Department shall notify the applicant of the eligibility and benefit determination in accordance with the provisions of D.C. Official Code § 34-2159.

3802.8 An applicant has ninety (90) days from the date of approval to complete the work. If the work is not completed within ninety (90) days, the Department may require the applicant to reapply to receive benefits.

3803 BENEFITS

3803.1 Benefits for LPRAP will be provided in accordance with the provisions of D.C. Official Code § 34-2159.

3803.2 The cap on replacement costs is equal to one thousand two hundred fifty dollars (\$1,250.00) plus one hundred fifty dollars (\$150.00) per foot of pipe to be replaced. An application with project costs in excess of this cap may be denied or required to submit an additional quote for further consideration.

Commented [BV7]: This should be raised.

3803.3 Nothing in this chapter shall be interpreted to mean that a LPRAP benefit provided to eligible households by the Department is an entitlement, continuing or otherwise.

3803.4 If the Department determines that remaining available funds may be insufficient to provide relief during a fiscal year, the Department may:

- (1) Suspend the process of taking applications; or

Commented [BV8]: Perhaps we should suspend the process of processing applications but:
-Still accept them, AND
-Notify people of the suspension and the reason; AND
-Contact people who applied previously when funds are replenished.
We believe this is more in line with the spirit and letter of the authorizing legislation.

- (2) Suspend the process of awarding assistance.

3804 DENIAL, REDUCTION, OR REVOCATION OF BENEFITS

3804.1 If an applicant is determined ineligible for LPRAP, the Department will provide to the applicant notice of ineligibility, to include:

- (a) A statement of the determination of ineligibility and an explanation of that determination;
- (b) A statement of the action that the applicant must take, if any, to be found eligible; and
- (c) Notice of the applicant’s right to appeal the determination, as provided in § 3805.

3804.2 If the Department determines that a prior eligibility decision for LPRAP was based on material error, falsity, misrepresentation, concealment, omission, or fraud, the Department will:

- (a) Reopen the application;
- (b) Inform the applicant of the Department’s final action or intended action;
- (c) Provide the applicant with a reasonable opportunity to respond; and
- (d) Revise or revoke the determination of eligibility.

3804.3 The applicant shall not have a right to appeal a reduction, suspension, or revocation of the benefit based on a lack of available funding.

3805 ADMINISTRATIVE APPEALS

3805.1 With respect to a matter governed by §§ 3801 to 3804 of this chapter, an applicant adversely affected or aggrieved by an action of the Department may file a written appeal to the Director of the Department, or the Director’s designee, stating the basis of the appeal, and providing any information or material that would support a change to the Department’s action. The appeal must be filed within thirty (30) calendar days after receipt of the notice of the action.

3805.2 The decision of the Director or the Director’s designee upon appeal shall become the final action of the Department. An applicant may seek review of that decision with, and request a hearing before, the Office of Administrative Hearings (OAH) within thirty (30) days of the Department’s action. Prehearing practice and the conduct of the hearing shall be in accordance with the Department of Consumer

Commented [BV9]: We are concerned about language access. Perhaps if any DC rules about language access and accessibility (reading level as well as languages) apply, it should be referenced here. If they do not apply, it would be great to see something.

and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801 *et seq.*) and the regulations set forth at Title 1, Chapter 28 of the District of Columbia Municipal Regulations.

3899 **DEFINITIONS**

3899.1 When used in this chapter, the following words and phrases shall have the meanings ascribed:

DC Water - the District of Columbia Water and Sewer Authority.

Department – the District of Columbia Department of Energy and Environment.

LPRAP – The Lead Pipe Replacement Assistance Program that provides eligible households with assistance for the replacement of lead service lines on private property and is administered by DC Water and the Department.

All persons desiring to comment on the proposed regulations should file comments in writing not later than forty-five (45) days after the publication of this notice in the *D.C. Register*. All comments should be labeled “Lead Pipe Replacement Assistance Program” and filed with the Department of Energy and Environment, Affordability and Efficiency Division, 1200 First Street, N.E., 5th Floor, Washington D.C. 20002, Attention: Lead Pipe Replacement Assistance Program Comments, or by e-mail to mackenzie.mathews@dc.gov. All comments will be treated as public documents and will be made available for public viewing on the Department’s website at www.doe.dc.gov. When the Department identifies a comment containing copyrighted material, the Department will provide a reference to that material on the website. If a comment is sent by e-mail, the e-mail address will automatically be captured and included as part of the comment that is placed in the public record and made available on the Department’s website.

The Department will receive comments on this proposed rulemaking at a public hearing, which is scheduled from 4:00 p.m. to 6:00 p.m. on Tuesday, December 10, 2019, at the Department of Energy and Environment, 1200 First Street, N.E., 5th Floor, Washington, D.C. 20002. A Notice of Public Hearing and the agenda for the hearing will be published in the *D.C. Register*.