

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265**

**Rulemaking to Implement Act 120 of
2018 at 52 Pa. Code Chapters 65 and
66**

**Public Meeting held February 24, 2022
3019521-LAW
Docket No. L-2020-3019521**

MOTION OF COMMISSIONER RALPH V. YANORA

Before the Pennsylvania Public Utility Commission (Commission or PUC) for consideration and disposition is the Final Rulemaking Order (FRO) implementing Act 120 of 2018 (Act 120 or Act). Act 120 formalized and expanded Commission oversight of the accelerated replacement of lead water service lines (LSL) and damaged wastewater service laterals (DWSL) by public utilities. The FRO establishes standards by which regulated water and wastewater providers may seek to replace LSLs and DWSLs and recover costs associated with replacement.

Regarding water service, the science on lead exposure is well-settled. Lead exposure presents a risk to the health of children and adults. Pipes are the primary source of lead in drinking water. The removal of lead distribution components from the Commonwealth's public water supply is a critical step to ensuring drinking water safety. The public health and safety goals this rulemaking works to achieve are important efforts in the Commonwealth's rehabilitation of its water and wastewater infrastructure. My motion works to accelerate that rehabilitation and focus Commission efforts on what matters most – the best interests of the public these water and wastewater systems serve. In Newark, New Jersey, Vice-President Harris recently commended the speed at which Newark had replaced approximately 23,000 lead service lines in three years, noting that the White House has made removing every lead service line in the United States within 10 years a centerpiece of its plan to address disparities and environmental issues in the wake of water contamination crises in recent years from Newark to Flint, Michigan.¹ Lead service line removal and replacement is an issue of national importance and quick action is the call of the day.

Regarding wastewater service, our Commonwealth faces two significant challenges. The first reflects Pennsylvania's successful development and economic expansion in the 20th century. Wastewater infrastructure installed more than 50 years ago is now reaching the end of its useful life. It requires rehabilitation and modernization if it is to support us in the current century. The second challenge is one of design. The volume of modern rainfall events not only exacerbates the shortfalls of aging wastewater infrastructure, but it can also approach or exceed the design limitations of aging combined wastewater/stormwater systems. Act 120 and this rulemaking take critical steps to address these challenges.

¹ Zolan Kanno-Youngs, *In Visit to Newark, Harris Highlights Progress in Removing Lead Pipes*, New York Times, Feb. 12, 2022, Section A, Page 12, New York edition.

Pennsylvania is not alone in its focus on these issues. Regarding LSLs, on December 16, 2021, the U.S. Environmental Protection Agency (EPA) finalized its revisions to the National Primary Drinking Water Regulations for lead and copper, referred to as the Lead and Copper Rule Revisions (LCRR). The LCRR is a science-based approach that aims to better protect communities across the nation from the risks of lead exposure by “getting the lead out of our nation’s drinking water.”² The EPA’s new regulations use “science-based testing protocols” to identify more sources of lead in drinking water, provide thorough and transparent information on where lead service lines exist, and assist communities in making informed decisions to reduce lead exposure.³ Through the LCRR, the EPA’s goal is to “achieve 100% removal of lead service lines.”⁴

To achieve this goal, the EPA will now require all community water systems — not just those regulated by public utility commissions — to develop an inventory of LSLs or service lines of unknown composition and to submit LSL replacement plans to their respective state primacy agency, in Pennsylvania the Department of Environmental Protection (DEP), by October 16, 2024.⁵ The centerpiece of the EPA program is the development of detailed service line inventories by water service providers to identify what is known and not known about their service lines, how service providers are to communicate that information to the public, and how they will establish LSL replacement priorities. The EPA service line inventory requirements include the identification and categorization of certain service lines by material directly associated with lead, including “lead,” “non-lead,” “lead status unknown,” or “galvanized requiring replacement” designations.⁶ The EPA plans to issue guidance, including best practices, case studies, and templates to help develop service line inventories and to assist community water systems with implementation of the LCRR in the near future.⁷ Because DEP is the primacy agency under the federal Safe Drinking Water Act, it will be the responsibility of DEP to interpret and direct all community water systems in the Commonwealth on compliance with the new federal LCRR. Given the importance and scope of this task, the Commission should follow the directive of Section 318 of the Public Utility Code⁸ which mandates that the Commission is to cooperate with DEP in areas concerning the purity of the public water supply. To that end, the Commission should avoid promulgating regulations that may interfere with DEP efforts in an area of DEP primary jurisdiction, namely, the implementation of the federal Safe Drinking Water Act.⁹

² EPA “Lead and Copper Rule Long-Term Revisions” (January 25, 2022), available at [Lead and Copper Rule Long-Term Revisions | US EPA](#).

³ EPA “The New Lead and Copper Rule” (January 25, 2022), available at [Lead Service Line Rulemaking - OneDrive \(sharepoint.com\)](#).

⁴ *Id.*

⁵ Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions, 86 Fed. Reg. 71574 (December 17, 2021).

⁶ 40 C.F.R. § 141.84(a).

⁷ EPA News Release entitled “EPA Announces Intent to Strengthen Lead and Copper Regulations, Support Proactive Lead Service Line Removal Across the Country” (December 16, 2021), available at [EPA Announces Intent to Strengthen Lead and Copper Regulations, Support Proactive Lead Service Line Removal Across the Country | US EPA](#).

⁸ 66 Pa. C.S. § 318.

⁹ The Independent Regulatory Review Commission urged the Commission to seek uniformity between the proposed regulations and LRCC. IRRC Comments at 1-3

Section 65.56. LSLR Plan Requirements.

Approximately two years prior to and independent of the EPA finalization of the LCRR, the Commission issued a Notice of Proposed Rulemaking Order (NOPR) at this docket outlining the main components of how it proposed to implement Act 120. Like the LCRR, the PUC regulation proposed to require an LSL replacement plan, which included service line inventory requirements, public communication and outreach, and planning and replacement prioritization.¹⁰ Specifically, Section 65.56(a) of the proposed regulations required that entities must within five years identify “the material, composition, diameter, and location of each service line connected to its water distribution systems.”¹¹

In response to the Commission’s proposed service line inventory requirements in Section 65.56(a) of the NOPR, stakeholders expressed concern with the proposal to require identification of the material and diameter of each line connected to an entity’s water distribution system. Specifically, Aqua Pennsylvania, Inc. (Aqua) stated that the only “full proof” way to comply with the Commission’s proposal to determine the material type of a customer side service line is an in-person examination of the service line in the customer’s structure.¹² Aqua stated that completing an in-person examination of every customer service line in an entity’s system “would be a significant and costly undertaking that would not likely be completed in five years.”¹³ Rather, Aqua offered that the LCRR-compliant identification of a “not lead” designation should be acceptable for a service line material as the purpose of Act 120 is to find and replace *lead* service lines.¹⁴ Similarly, Aqua noted that pipe diameter information is not particularly relevant as the fundamental question under Act 120 “is whether the customer has a *lead* service line.”¹⁵

In its comments, the Pittsburgh Water and Sewer Authority (PWSA) also supported allowing it to identify the material type of entity-owned and customer-owned service lines as “non-lead” when completing the PUC-required service line inventory because this is consistent with the EPA’s LCRR.¹⁶ PWSA also questioned why the Commission would depart from the EPA parameters for service line inventories without justification.¹⁷ Accordingly, PWSA recommended that the PUC-required service line inventory of Section 65.56(a) be aligned with the requirements in the EPA’s LCRR so that compliance with Act 120 does not require the creation of two separate inventories – “one to comply with the LCRR and one to comply with the Commission’s regulations.”¹⁸

I agree that entities should not be required to identify service line material beyond the categorization required in the EPA’s LCRR. Requiring such information as part of the PUC’s

¹⁰ See Notice of Proposed Rulemaking Order regarding Rulemaking to Implement Act 120 of 2018 at 52 Pa. Code Chapters 65 and 66 (Order adopted September 17, 2020).

¹¹ *Id.* at 12.

¹² Aqua Comments at 7-8.

¹³ Aqua Comments at 7-8.

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.*

¹⁶ PWSA Reply Comments at 3. PWSA states that it currently identifies material type as “non-lead,” consistent with the EPA’s LCRR. *Id.*

¹⁷ PWSA Comments at 10-11.

¹⁸ *Id.*

service line inventory requirements: (1) is not consistent with the intent of nor necessary for compliance with Act 120, (2) is not likely cost-effective, (3) could potentially delay LSL replacements throughout the Commonwealth, and (4) risks the creation of confusion and/or uncertainty with the EPA’s already robust service line inventory requirements and future DEP regulations developed to direct compliance with such federal regulations.

First, requiring water utilities to identify service lines in a manner other than the categories of the EPA’s LCRR does not conform with the intent of and is not necessary for compliance with Act 120.¹⁹ The Pennsylvania Regulatory Review Act requires that Commission regulations both conform to the intention of the Pennsylvania General Assembly and be necessary for compliance. Under Act 120, the General Assembly authorized the Commission to, *inter alia*, coordinate the elimination of LSLs. The Commission’s role under Act 120 with respect to LSLs is to establish certain standards, processes, and procedures under which water utilities may engage in the accelerated replacement of such lines and recover costs associated with replacement. Similar infrastructure legislation implemented by the Commission — the highly detailed Long Term Infrastructure Improvement Plans (LTIP) filed by water utilities — only requires a “general description of the location of eligible property” and a “reasonable estimate of the quantity” of the property to be improved.²⁰ Thus, as to the Commission, the fundamental intent of Act 120 is the *accelerated replacement* of lead service lines, not a granular survey of all materials in use as service lines.²¹ As such, requiring water utilities to identify service lines by material in a manner similar to but not identical with that directed by the EPA is beyond the scope of and is not necessary for compliance with Act 120. It also follows that data like the diameter of a service line is not relevant to whether the service line is a *lead* service line under Act 120.

Second, requiring water utilities to identify service lines other than by the categorization included in the EPA’s LCRR will likely result in significant additional costs for utility ratepayers. The Regulatory Review Act requires that the Commission consider the fiscal impacts of our regulatory requirements and any “adverse effects on prices of goods and *services*, productivity or competition.”²² Similarly, the Public Utility Code mandates that the Commission pursue service that is cost efficient as well as safe and reliable.²³ Under the cost recovery mechanism of Act 120, costs incurred by water utilities in identifying lead service lines will eventually be recovered from utility ratepayers. This means that any unnecessary costs imposed by the regulations as proposed will not serve the goal of lead service line replacement but will ultimately be borne by customers. Accordingly, these requirements should be removed from our regulations in favor of those established by the EPA and directed by DEP.

Third, requiring water utilities to identify service lines other than by the categorization included in the EPA’s LCRR could delay LSL replacement throughout the Commonwealth. As indicated in Aqua’s comments, lead service line installations were widely used across the

¹⁹ See 71 P.S. § 745.5(b).

²⁰ 66 Pa. C.S. § 1352(a)(3)-(4).

²¹ Pennsylvania House of Representatives Co-Sponsorship Memorandum regarding Lead water service lines and replacement of damaged sewer lateral (February 1, 2018).

²² 71 P.S. § 745.5(b) (emphasis added).

²³ 66 Pa. C.S. § 1501.

country until the 1950s.²⁴ The only way to surely know the material and diameter of each existing service line is by in-person examination of all the entity's service lines, which could take years. The Commission should not delay efforts to replace lead lines by mis-directing resources away from identifying those directly associated with lead. Accordingly, such requirements should be removed from our regulations in favor of those established by the EPA and directed by DEP.

Finally, I caution that the Commission should not establish additional service line inventory requirements beyond those required in the EPA's LCRR at this time. The EPA has already developed a robust, science-based service line inventory requirement in the LCRR that does not require identification of water provider service lines by materials not directly associated with lead.²⁵ As previously stated, the EPA service line inventory requirements include the identification and categorization of certain service lines by material directly associated with lead, including "lead," "non-lead," "lead status unknown," or "galvanized requiring replacement."²⁶ The EPA has also indicated that it plans to issue further guidance, including best practices, case studies, and templates to help develop service line inventories and to assist water providers with implementation of the LCRR in the coming months. Further, DEP, the primacy agency charged with enforcing the EPA's LCRR in the Commonwealth, has yet to develop Pennsylvania-specific regulations and/or guidance regarding service line inventories. Because the EPA and DEP are still developing their materials on service line inventory requirements, the Commission should not at this time establish service line inventory requirements which are not lock-step with the EPA's LCRR requirements.

Regarding public notice, the LCRR requires that a service line materials inventory must be publicly accessible, and that water systems serving greater than 50,000 persons must make the inventory available online. The LCRR specifies that the inventory must include a location identifier such as a street address associated with each service line requiring replacement.²⁷ In addition, the LCRR also provides for extensive public outreach and public education regarding the results of the service line materials inventory.²⁸ It is therefore unnecessary to duplicate this effort or run the risk of promulgating regulations that compete or conflict with those of DEP or that confuse the public.

For these reasons, the Commission should adopt the service line inventory and public notice requirements contained in the EPA's LCRR at 40 C.F.R. § 141.1 - 143.20, as may be enforced by the DEP. Adopting the EPA's service line inventory requirements is the prudent step for the Commission to take at a time when the EPA and DEP are still in the process of developing guidance, best practices, and templates regarding such requirements.²⁹ Because the EPA and DEP are still working to develop such materials, the Commission should also include

²⁴ Aqua Comments at 8.

²⁵ 40 C.F.R. § 141.84(a).

²⁶ 40 C.F.R. § 141.84(a).

²⁷ 40 C.F.R. § 141.84(a)(8).

²⁸ 40 C.F.R. § 141.85

²⁹ I note that the Commission is permitted to amend its regulations based on future EPA and/or DEP guidance regarding service line inventories should the need arise. I also note that the Commission can request additional information (including non-lead material type or diameter) regarding a specific water utility's service lines, as may be necessary for ratemaking purposes, through the LTIP process, or by rate case parties through data requests.

language in our regulations to ensure automatic adoption of any future changes to the EPA's LCRR. Such automatic adoption language has been most recently used by the Commission in our pole attachment regulations at 52 Pa. Code § 77.4(a), which adopted certain federal telecommunications regulations "inclusive of future changes as those regulations may be amended."³⁰

Section 65.59. LSLR Program Reports.

Section 65.59(b) of the NOPR proposed that utilities identify certain reportable data, including the number, length, pipe diameter, material, and costs of LSL replacements, "by county." PWSA expressed concerns with reporting this data on a county basis.³¹ PWSA stated that county-by-county data "is not a figure that is easily determined."³² Based on these comments, I find that requiring utilities to report information by county will present additional challenges which may result in increased costs and/or delay associated with LSL replacements. To avoid additional costs and delay, utilities should report LSL replacement data by "water system." Reporting LSL replacement data by water system not only reduces the risks of increased costs and delay, but is also likely readily available to utilities and is consistent with accepted ratemaking principles and practices.

Section 66.36. DWSL Plan Requirements.

Section 66.36(b)(1)(iv) of the NOPR proposed that utilities provide customers with copies of as-built drawings, ostensibly of a customer's building lot, that indicate the location of the customer-owned portion of the DWSL. In response, Aqua commented that it would not be in possession of such as-built drawings.³³ Based on this comment, it is apparent that the proposed regulation would require at least some utility companies to perhaps survey a property to prepare new as-built drawings for each customer's sewer lateral upon a DWSL replacement. The preparation of each new as-built drawing will result in additional costs, time, and resources. To avoid the potential delay of DWSL replacement and the associated increased costs to customers, as-built drawings for each customer's sewer lateral should only be required if already available to the particular utility.

Section 66.39. DWSL Program Reports.

As with LSLRs, Section 66.39(b) of the NOPR proposed that utilities must identify certain reportable data, including the number, length, pipe diameter, material, and costs of DWSL replacements, "by county." For the reasons explained with respect to Section 65.59 (LSLR program reports) above, utilities should report DWSL replacement data by "wastewater system."

Section 66.39(b)(5) of the NOPR proposed that utilities must provide monthly average flow data for DWSL project areas. PWSA commented that requiring monthly average flow data

³⁰ 52 Pa. Code § 77.4(a).

³¹ PWSA Comments at 18.

³² *Id.*

³³ Aqua Comments at 21.

at the intervals proposed in the NOPR “could be cost prohibitive.”³⁴ Specifically, PWSA asserted that it incurs approximately \$2,500 per meter for every month of flow monitoring it is required to do.³⁵ Additionally, PWSA provided that in areas where a DWSL is replaced due to public health and safety issues, flow rates would more than likely not be observable.³⁶ Similarly, Section 66.39(b)(16) of the NOPR proposed that utilities conduct and report a comparison of the cost of DWSL replacement work to the observed post-installation benefits.

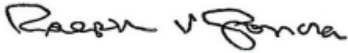
I note that while collecting and interpreting monthly flow data at certain time intervals could help determine whether certain investments will improve the efficiency of the system, Act 120 does not authorize or require the Commission to make such determinations vis-à-vis its implementation of Act 120. Similarly, Act 120 does not require as a part of its program review and approval process a substantiation to the Commission that the proposed benefits of replacing certain DWSLs have been achieved. Because Act 120 does not expressly require prudence reviews or cost-benefit determinations, it follows that the significant additional costs presented by requiring such utility reporting should not be imposed on customers as a routine matter. Rather, benefit analysis regarding measurable cost savings, system capacity increases, reductions in service interruptions, and/or reductions in observed wastewater overflows is the type of analysis that is appropriate for rate case review whereby utilities must demonstrate how these improvements fit into just and reasonable rates overall.

Accordingly, Sections 66.39(b)(5) and Sections 66.39(b)(16) should be removed from the rulemaking.

THEREFORE, I MOVE THAT:

1. The Pennsylvania Public Utility Commission adopt the Final Rulemaking Order and Annexes at Docket No. L-2020-3019521, as well as the associated Annexes, as modified by this Motion and attached Annexes.
2. The Law Bureau, in conjunction with the Bureau of Technical Utility Services, prepare a Final Rulemaking Order and Annexes consistent with this Motion and attached Annexes.

DATE: February 24, 2022


Ralph V. Yanora, Commissioner

³⁴ PWSA Comments at 28.

³⁵ *Id.*

³⁶ *Id.*