



STATEMENT OF NEED AND REASONABLENESS

In the Matter of Proposed Changes to Permanent
Rules Governing Drinking Water Protection
4720.9020 Public Health Priority Points.

Revisor ID No. 04693, OAH Docket No. 23-9000-
39191

Environmental Health Division
Drinking Water Protection Section

May 2023

General information:

- 1) Availability: The State Register notice, this Statement of Need and Reasonableness (SONAR), and the proposed rule will be available during the public comment period on the Agency's Public Notices website:
<https://www.health.state.mn.us/communities/environment/water/rules/prioritypoints.html>
- 2) View older rule records at: [Minnesota Rule Statutes https://www.revisor.mn.gov/rules/status/](https://www.revisor.mn.gov/rules/status/)
- 3) Agency contact for information, documents, or alternative formats: Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, braille, or audio. Written comments, questions, and requests for more information on these possible rules should be directed to: Anna Schliep at Minnesota Department of Health Minnesota Department of Health, P.O. Box 64975, 625 North Robert Street St., Paul, MN 55164-0975; email: anna.schliep@state.mn.us; phone: 651-201-4700; Fax: 651-201-4701. Comments may also be submitted online at <https://www.health.state.mn.us/communities/environment/water/rules/prioritypoints.html>
- 4) How to read a Minnesota Statutes citation: Minn. Stat. § 999.09, subd. 9(f)(1)(ii)(A) is read as Minnesota Statutes, section 999.079, subdivision 9, paragraph (f), clause (1), item (ii), subitem (A).
- 5) How to read a Minnesota Rules citation: Minn. R. 9999.0909, subp. 9(B)(3)(b)(i) is read as Minnesota Rules, chapter 9999, part 0909, subpart 9, item B, subitem (3), unit (b), subunit (i).

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Acronyms

CFR	Code of Federal Regulations
DWRF	Drinking Water Revolving Fund
HBV	Health-Based Values
HRL	Health Risk Limits
MDH	Minnesota Department of Health
Minn. R. pt	Minnesota Rules part
Minn. Stat.	Minnesota Statutes
MMB	Minnesota Management and Budget
MN	Minnesota
MORS	MN Office of the Revisor of Statutes
OAH	Office of Administrative Hearings
PFA	Public Facilities Authority
SONAR	Statement of Need and Reasonableness
US EPA	United State Environmental Protectional Agency

Introduction and overview

Introduction

Projects submitted to Drinking Water Revolving Fund (DWRF) are prioritized utilizing Public Health Priority Points to ensure that funding priority goes to projects that:

- protect public health;
- provide adequate water supply; and
- assist communities with financial needs.

The proposed revisions would allow Public Health Priority Points to be assigned for projects relating to the removal of lead service lines and addressing contaminants of emerging concern when concentrations exceed a health advisory level. The proposed changes would protect public health by reducing the public's exposure to harmful contaminants and assist communities with financial needs to remove or provide treatment to reduce contaminants.

Statement of General Need

The proposed amendment would better allow MDH to prioritize resources to communities disadvantaged by the presence of harmful chemicals in their water. Drinking water regulations often lag behind health advisories to keep consumers safe. This proposed amendment would add criteria to include lead service line replacement projects, and projects addressing contaminants of emerging concern when awarding priority points to applications submitted by public water systems for funding support.

Scope of the proposed amendments:

The following chapters of Minnesota rules are being affected by the proposed changes: Minnesota Rules, part 4720.9020, establishes criteria for awarding priority points to applications submitted by public water systems for funding.

Background

The Drinking Water Revolving Fund is administered by the Minnesota Department of Health and the Minnesota Public Facilities Authority. The proposed Minnesota rule changes would allow projects replacing lead service lines to be eligible for priority ranking through the Drinking Water Revolving Fund. These changes would allow principal forgiveness grants to be awarded to water systems to replace privately owned portions of lead service lines.

Lead is a hazardous neurotoxin. According to the Centers for Disease Control and Prevention (CDC) there is no safe level of lead exposure.¹ Children are the most vulnerable to lead exposure. Babies, children under six years, and pregnant women are at the highest risk.² Exposure to lead can damage the brain,

¹ Centers for Disease Control and Prevention, Lead in Drinking Water (<https://www.cdc.gov/nceh/lead/prevention/sources/water.htm>)

² Centers for Disease Control and Prevention, Childhood Lead Poisoning Prevention Children, (<https://www.cdc.gov/nceh/lead/prevention/children.htm>) and Pregnant Women, (<https://www.cdc.gov/nceh/lead/prevention/pregnant.htm>)

kidneys, and nervous system.³ In children, lead can also slow development or cause learning, behavior, and hearing problems.⁴ A 2019 Minnesota report, *Lead in Minnesota Water: Assessment of Eliminating Lead in Minnesota Drinking Water* (Minnesota Lead Report) found that for every \$1 spent on addressing lead in drinking water, we would see at least \$2 in benefits from an increase in population IQ and lifetime productivity.⁵

The Minnesota Lead Report documented that the greatest source of lead in drinking water comes from lead service lines connecting water mains to homes. The report also estimates that there are approximately 100,000 lead service lines in Minnesota homes and that replacement of lead service lines can cost more than \$3,000 per service line.⁶ Lead service lines are found in older communities. The report found lead service lines are known to be present in Duluth, Minneapolis, Rochester, St. Paul and may be found in other communities.⁷

The federal Lead and Copper Rule⁸ requires water systems to inventory and develop plans to replace lead service lines. Water systems will need funding to be able to replace lead service lines to meet the federal requirements. Existing funding options are loan-based, which may not be affordable for cities or residents.

The MDH rule changes will allow systems that have exceeded the health advisory level for emerging contaminants of concern to be awarded public health priority points. Health Advisories are established by the US EPA under authority provided to it under the Safe Drinking Water Act.⁹ Health advisories are based on non-cancer health effects for different lengths of exposure (one day, ten days, or lifetime). Health advisories provide technical guidance to the US EPA and other public health officials and are not used to regulate public water supplies. Health-Based Values (HBVs) and Health Risk Limits (HRLs) are developed by toxicologists at MDH using the best science and public health policies available at the time of their development (learn more about health risk guidance at: <https://www.health.state.mn.us/communities/environment/risk/guidance/gw/index.html>). An HBV or HRL is the level of a contaminant that can be present in water and pose little or no health risk to a person drinking that water. HBVs and HRLs are developed to help protect sensitive or highly exposed populations.

³ Centers for Disease Control and Prevention, *Childhood Lead Poisoning Prevention Children*, (<https://www.cdc.gov/nceh/lead/prevention/children.htm>) and *Pregnant Women*, (<https://www.cdc.gov/nceh/lead/prevention/pregnant.htm>)

⁴ Centers for Disease Control and Prevention, *Childhood Lead Poisoning Prevention Children*, (<https://www.cdc.gov/nceh/lead/prevention/children.htm>) and *Pregnant Women*, (<https://www.cdc.gov/nceh/lead/prevention/pregnant.htm>)

⁵ Minnesota Department of Health and University of Minnesota, *Lead in Minnesota Water: Assessment of Eliminating Lead in Minnesota Drinking Water*, March 2019, (<https://www.health.state.mn.us/communities/environment/water/docs/leadreport.pdf>)

⁶ Minnesota Department of Health and University of Minnesota, *Lead in Minnesota Water: Assessment of Eliminating Lead in Minnesota Drinking Water*, March 2019, (<https://www.health.state.mn.us/communities/environment/water/docs/leadreport.pdf>)

⁷ Minnesota Department of Health and University of Minnesota, *Lead in Minnesota Water: Assessment of Eliminating Lead in Minnesota Drinking Water*, March 2019, (<https://www.health.state.mn.us/communities/environment/water/docs/leadreport.pdf>)

⁸ 40 CFR 141.80 – .93.

⁹ See, e.g., 42 USC § 300G-1(b)(1)(F) (“The Administrator may publish health advisories (which are not regulations) or take other appropriate actions for contaminants not subject to any national primary drinking water regulation.”)

This proposed rule change will assign points for projects where health advisory levels have been recently exceeded, which will help address issues where health advisory levels exist for contaminants of emerging concern, but no primary federal Safe Drinking Water Act maximum contaminant level has been established. This will allow water systems to have more funding options when addressing contaminants like the forever chemical PFAS and naturally occurring contaminants, like manganese.

Public participation and stakeholder involvement

Prior to noticing its request for comment, MDH met with water systems, Minnesota Public Facilities Authority, and the Lead Service Line Replacement Collaborative to discuss needs and challenges regarding lead service line replacement. This topic is also discussed during water system training across MN in both in-person and virtual formats.

MDH has published a request for comment in the State Register and developed a web page to receive public comment.

<https://www.health.state.mn.us/communities/environment/water/rules/prioritypoints.html>. We have notified the public utilizing an automated delivery service to send this information to over 3,000 individuals and organizations that include:

- Water System Operators;
- City Administrators;
- Minnesota Rural Water Association; and
- MN American Water Works Association.

Anyone may opt-in to receive information about rulemaking processes by subscribing to Drinking Water Protection Rulemaking Topic <https://www.health.state.mn.us/news/subscribe.html>. In addition to electronic notifications, MDH also maintains a list of individuals that have specifically requested to receive hard copy documents about rule making.

MDH also collaborates with the Public Facilities Authority, and it sent a copy of our notice through its electronic delivery service as well.

Notice Plan

The Minnesota Department of Health intends to send an electronic notice with a hyperlink to electronic copies of the Notice, SONAR, and the proposed rule amendments to the Drinking Water Protection Rulemaking list which includes:

- Public water systems;
- Cities, townships, counties;
- Professional organizations for water operators, engineers, and other water industry professionals;
- Environmental groups;
- GovDelivery notification lists;
- MDH Waterline publication; and
- Other state agencies.

The current list includes over 3,000 participants. We will ask partners to share and distribute to their

lists of stakeholders as well. In addition to email notification, we will include notice in the DWP Waterline publication on information about rulemaking. MDH will also send this information to legislators and individuals that have notified MDH of the need to receive a paper copy of the notification.

This notice plan will adequately provide notice of this rulemaking to persons interested in or regulated by these rules and satisfies the requirements of Minnesota Statutes, section 14.14, subdivision 1a.

Statutory authority

Minnesota Statutes, section 446A.081, subdivision 12, authorizes the Department to adopt rules relating to the procedures for the administration of the department's duties under the Minnesota Public Facilities Authority Act (Act), Minnesota Statutes, chapter 446A. One of MDH's duties under the Act is to approve applications meeting the criteria of the federal Safe Drinking Water Act, and Minnesota Statutes, section 446A.081.¹⁰ MDH has traditionally used its rulemaking authority under the Act to, among other things, establish a priority points system for Drinking Water Revolving Fund applications to direct funding to projects prioritized under the Act.¹¹ Section 446A.081 provides for funding of various public drinking water protection projects, including loans to replace lead service lines.¹² In its guidance to states regarding their management of DWRF funds, moreover, EPA emphasizes the "exceptional flexibility inherent in the DWSRF program" to fund various projects that protect the public health consistent with the goals of the SDWA.¹³

Rule-by-Rule Analysis

A Revisor's Draft of the proposed rules change can be found at:

<https://editwww.web.health.state.mn.us/communities/environment/water/docs/rd4693.pdf>

Proposed change to Minnesota Rules: 4720.9020, subpart 1:

This subpart is updated to include references to proposed subparts 4a and 4b in its list of subparts governing the assignment of priority points.

Proposed change to Minnesota Rules: 4720.9020, subpart 2:

Proposed change to item B to be consistent with the Code of Federal Regulations definition of the nitrate/nitrite maximum contaminant level. Proposed change to items B, D, and E to be updated to correct reference in the Code of Federal Regulations. References to *total coliforms* are replaced with references to *E. coli* because there is no total coliform maximum contaminant level, systems receive violations for *E. coli*. Items B, D, and E's, citations to 40 CFR 141.32 are proposed to be updated to the correct citations in the CFR, as part 141.32 is no longer effective.

Proposed change to Minnesota Rules: 4720.9020, subpart 4a:

¹⁰ Minn. Stat. § 446A.081, subd. 6.

¹¹ Minn. R. 4720.9020.

¹² *Id.* at subd. 9(11).

¹³ EPA, Drinking Water Eligibility Handbook at 5, 12 ("In general, unless a project is expressly prohibited by statute or regulation, it is likely eligible for DWSRF assistance as long as it addresses present or prevents future violations of health-based drinking water standards.") (*available at*: https://www.epa.gov/sites/default/files/2017-06/documents/dwsrf_eligibility_handbook_june_13_2017_updated_508_version.pdf).

The proposed change creates subpart 4a. This subpart would assign fifteen priority points if a confirmed health advisory level has been exceeded within the last 36 calendar months and the proposed project addresses this concern. This proposed change is justified due to the need for water systems to address the public health consequences for contaminants of emerging concern with health advisory levels that have not yet been regulated under the federal Safe Drinking Water Act with a maximum contaminant level such as PFAS or manganese.

Proposed change to Minnesota Rules: 4720.9020, subpart 4b:

The proposed change creates subpart 4b. If adopted this will assign fifteen priority points if the project results in the replacement of lead service lines. Documentation of the number of lead service lines in the projected area must be provided. The project must include replacing all portions of the water service line downstream of any lead components. This proposed change is justified due to federal requirements under the Lead and Copper Rule which require more systems to conduct lead service line replacement projects to reduce exposure to lead from drinking water.¹⁴ Lead is not regulated using the maximum contaminant approach and is left out of the current definition of contaminants in the existing language.

Proposed change to Minnesota Rules: 4720.9020, subpart 5, item B:

The proposed change to item B would include special well construction areas established by the Minnesota Department of Health when considering contaminated private well projects. Special well construction areas are areas designated as requiring additional attention to water quality because groundwater contamination has or may result in risks to the public health. The proposed focus on these areas for funding of projects to address contamination is thus consistent with the focus on preserving safe drinking water. More information about these areas and how they are designated can be found on the department's website at <https://www.health.state.mn.us/communities/environment/water/wells/swbca/index.html#why>.

Regulatory analysis

A. Description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The amendment to the rules would positively affect public water systems submitting projects for DWRP funding consideration. Customers of these systems would be affected positively due to reduced exposure to contaminants.

B. The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

This rule will change how we prioritize grant applications. By itself this rule will not cause a need for additional staffing or enforcement activities. If this rule is adopted, it will increase the number of projects eligible for funding through the DWRP.

C. A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

There is no cost to MDH associated with this proposed rule. There is no change to the costs to water

¹⁴ 40 CFR 141.84

systems to apply for funding. Costs that water systems would incur due to the application process are not changed by this rule. It is voluntary for water systems to use this program.

D. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Agency and the reasons why they were rejected in favor of the proposed rule.

No alternatives were considered as the purpose of the rule is to direct funds to priority projects, and experience administering the fund has demonstrated that the point system already in place under the rule provides the most effective means of achieving that purpose.

E. The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

This is a voluntary program for water systems. MDH would not directly be interacting with businesses or individuals. If a water system chooses to use this program, it will positively reduce costs for individuals/cities who own lead service lines by helping to reduce the cost they would cover on replacement.

F. The probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

If this proposed rule is not adopted, projects related to lead service line removal, PFAS, and other contaminants with health advisory levels will not receive equitable consideration for placement on the priority points list. Public health may be at risk if water systems cannot get funding to reduce risk of exposure to their customers. If this program is not available, more people may drink contaminated water or pay out-of-pocket to reduce their risk of exposure creating unequitable health outcomes based on income. A typical single-family home may require between \$2,000 - \$8,000 per service line depending on the length of service line. In addition to the replacement cost, additional costs to repair yards and concrete or other construction that needs to be repaired due to the replacement may be incurred. Without access to funds made available by the proposed amendments, these costs will be borne by the homeowner, or they may risk lead exposure by doing no repairs if they cannot afford the costs. Water systems may miss the opportunity to take advantage of currently available federal programs to reduce lead exposure using grants or combination grant/loan program.

G. An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

The proposed changes do not conflict with any current federal rule requirements; instead, they allow our rules to better compliment relevant federal regulations. EPA allows DWRF dollars to be used for lead service line replacement projects, but current state rules do not include lead service line for priority placement. Federal dollars through other programs such as the Water Infrastructure eFinance and Innovation Act can also be used for lead service line replacement programs.

H. An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

Water systems are required to take action to reduce exposure to chemicals regulated by the Safe Drinking Water Act. Changes to the federal rules governing lead in drinking water will mean that water systems are required to inventory and remove lead service lines. The DWRF priority points

system provides one mechanism for funding that would allow water systems to address contaminants causing health impacts to Minnesotans that drink water. The priority points must reflect current regulatory needs or water systems will be unable to keep up with increasing federal demands.

Environmental Justice and Health Equity Policy

MDH has a mission to provide safe and sufficient drinking water for all Minnesotans. Unfortunately, all water in Minnesota is not equally free of contamination. Lead is a hazardous neurotoxin. According to the Center for Disease Control there is no safe level of lead exposure. Children are the most vulnerable to lead exposure. Babies, children under six years, and pregnant women are at the highest risk. Exposure to lead can damage the brain, kidneys, and nervous system. In children, lead can also slow development or cause learning, behavior, and hearing problems. The Minnesota Lead Report found that for every \$1 spent on addressing lead in drinking water, we would see at least \$2 in benefits from an increase in population IQ and lifetime productivity.

The greatest source of lead in drinking water comes from lead service lines connecting water mains to homes. The Minnesota Lead Report estimates that there are approximately 100,000 lead service lines in Minnesota homes. Replacement of lead service lines can cost more than \$3,000 per service line. Lead service lines are found in older communities. Lead service lines are known to be present in Duluth, Minneapolis, Rochester, St. Paul and may be found in other communities. A Minnesota Rural Water Association survey showed that cities are much more likely to replace lead service lines if grants are available.

Lead service lines are more prevalent in underserved communities where homes may be older, have more deferred maintenance, and house the most vulnerable populations.

The proposed changes also address chemicals of emerging concern where health risk guidance has been developed. MDH has several contaminants of emerging concern such as PFAS where extensive monitoring is being done to find and educate people on the health risks of exposure to these chemicals. The priority points must be flexible to be updated so that Minnesota's drinking water can be protected from these chemicals when sufficient information allows us to know there is a public health risk.

The proposed changes to the rule would allow us to improve health equity by reducing exposure to those most at risk by prioritizing funding to communities with proven health risk concerns from their drinking water.

Performance-based rules

Minnesota Statutes, section 14.002, requires state agencies, whenever feasible, to develop rules that are not overly prescriptive and inflexible, and rules that emphasize achievement of the MDH regulatory objectives while allowing maximum flexibility to regulated parties and to the MDH in meeting those objectives.

This proposed amendment would modify an existing rule and would not change the regulatory objectives of that rule but would add additional flexibilities by providing additional prioritization of funding to water systems to provide safe, clean drinking water to all Minnesotans. Using DWRP for infrastructure funding is optional for water systems.

Consult with MMB on local government impact

As required by Minnesota Statutes, section 14.131, MDH has consulted with Minnesota Management and Budget (MMB). We sent copies of the proposed rule and SONAR before we published the *Notice of Intent to Adopt Rules Without a Hearing*.

Impact on local government ordinances and rules

Minnesota Statutes, section 14.128, subdivision 1, requires an agency to make a determination of whether a proposed rule will require a local government to adopt or amend any ordinances or other regulation in order to comply with the rule. Water systems are not required to adopt or change ordinances to comply with the proposed amendment. These priority points are assigned by MDH upon receiving applications for funding and are not addressed in or affected by local ordinances. MDH has determined that the proposed amendments will not directly have any effect on local ordinances or regulations.

Costs of complying for small business or city

Minnesota Statutes, section 14.127, subdivision 1 requires an agency to:

determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”

This rule applies to a voluntary grant and loan program. MDH has determined that the proposed amendments will not cause small businesses or cities to take on additional costs. Costs to water systems related to preparation and submittal of plans for review are not changed by this proposed amendment.

Conclusion

In this SONAR, the agency has established the need for and the reasonableness of each of the proposed amendment to Minnesota Rules, chapter 4720. The agency has provided the necessary notice and documented its compliance with all applicable administrative rulemaking requirements of Minnesota statute and rules.

Based on the forgoing, the proposed amendments are both needed and reasonable.

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