

**Fahey Schultz
Burzych Rhodes**

EXPERT COUNSEL  REAL SOLUTIONS

Lead And Copper Rule Changes – What do we do Now?

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New Rules!



Copper

- There are notification requirements for elevated levels.
- The notice of testing results must now include copper as well as lead.
- Otherwise, the changes are really the “Lead Rule.”



Action Level

- Copper action level remains at 1.3 parts per million.
- Current action level for lead is 15 parts per billion (ppb) at the 90th percentile.
- Beginning January 1, 2025, the 90th percentile for lead must be below 12 ppb.





If sampling indicates that the supply exceeds the lead action level after implementing corrosion control, the replacement of lead service lines is accelerated to 7% per year.

Public education materials with statutorily required language to customers are required.

All customers and other at-risk groups or individuals must be provided with public education materials that have been approved by the MDEQ before distribution.

Exceeding the Action Level

Sampling Protocol

- After the first liter is drawn, a second sample of the fifth liter will now be required at sites served by lead service lines.
- Tier 1 and Tier 2 sample site criteria have been modified to exclude copper pipes soldered with lead. They must now either contain lead pipes or be served by a lead service line.
- The three-year sampling cycle will be harder to obtain, as the water supply must have no lead service lines or have 90th percentile lead at 5 ppb (and copper at 650 ppb) for three consecutive years.

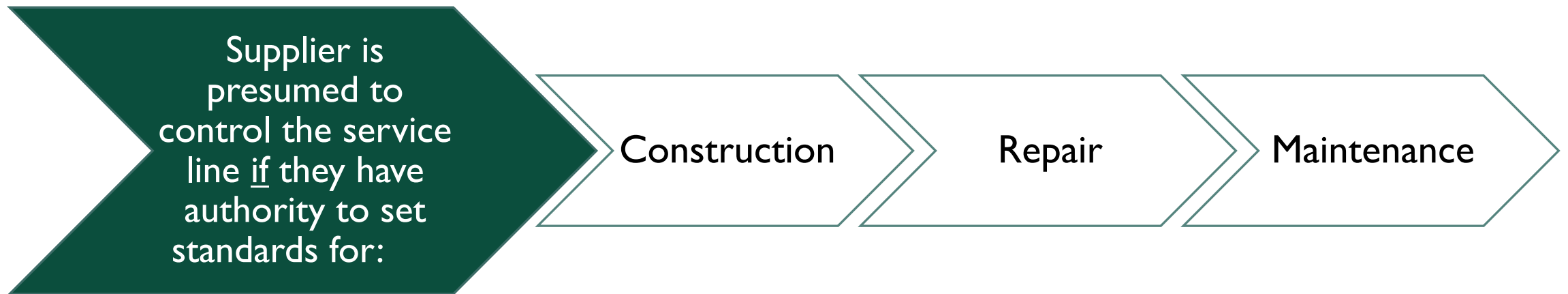


Service Line

- The definition of a “service line” has been expanded from beyond the curb stop.
- Now, the service line is defined to extend to the first shut-off valve inside the building or 18 inches, whichever is shorter.
- Updates to the rules regarding “control” of the service line also place additional requirements on suppliers.
- This significantly expands the impact on private property.



Control of the Service Line



Lead Service Line

- A “lead” service line is also expanded. Not only does the new definition of “service line” expand where a “lead” service line can be located to include the portion on customer property, but it also expands the definition to goosenecks or fittings.
- A lead service line means *either* a service line which is made of lead or any lead pigtail, lead gooseneck, or other lead fitting that is connected to the service line.
- Replacement beginning in 2021

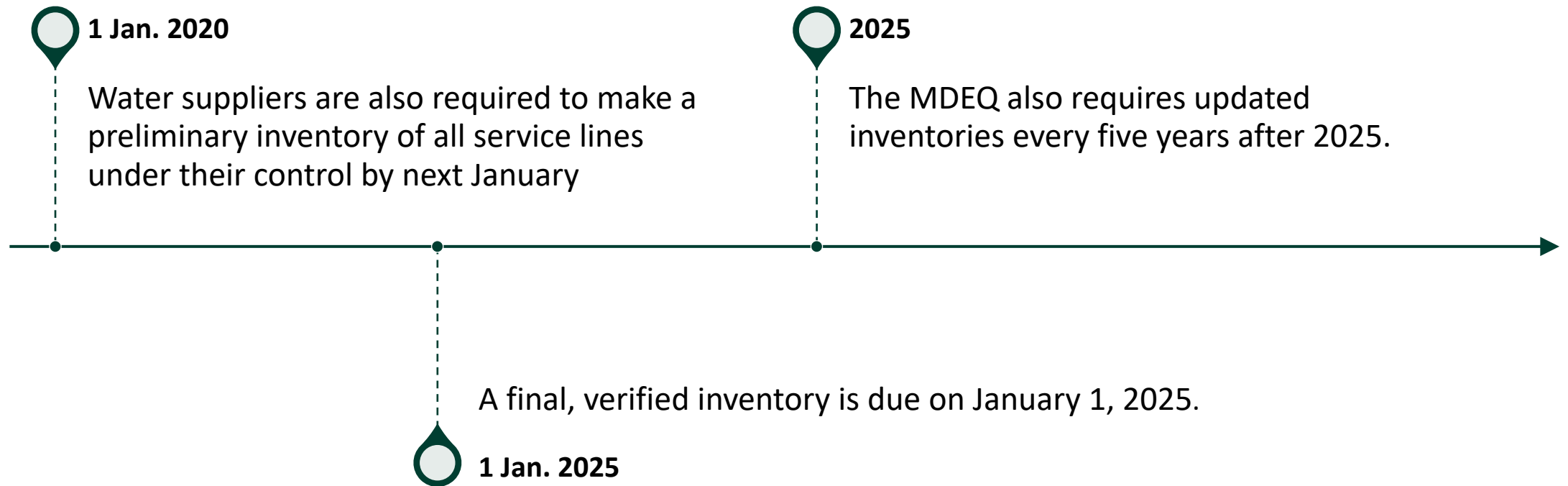




Required Replacement

- Previously, replacement of service lines was only required if the water supply exceeded the action level.
- Under the present rules, five percent (5%) of the lead service lines must be replaced each year regardless of the action level.
- Galvanized service lines must be replaced if they are now or where ever connected to a lead service line.
- The MDEQ may approve individual replacement plans in conjunction with an asset management plan (AMP).
- Annual status reports on replacement must be submitted to the MDEQ.

Inventory Requirements



Consumer Notices

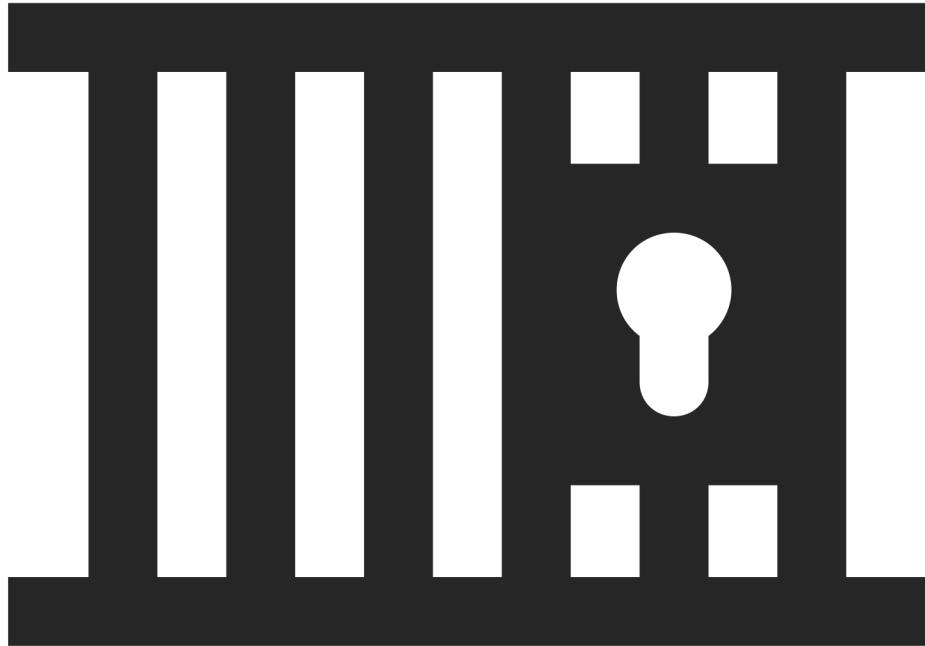
- All water suppliers must deliver a consumer notice of the lead and copper tap water monitoring results.
- If the action level is exceeded, then it must issue a public advisory.
- Education material must be available as standalone printed publications.
 - They must emphasize not only health problems, but also impacts on child development
 - The materials must be submitted to MDEQ prior to delivery.



Water System Advisory Councils

- A statewide council was created to assist with public awareness campaign materials.
- Local Advisory Councils are required if the supply serves more than 50,000 people.
- They are tasked with awareness, assistance, and collaboration. One goal is to help convince property owners to allow the supplier to replace their portion of the service line.





Penalty

- Failure to comply with the rules (or other provisions of the Safe Drinking Water Act) are subject to an injunction requiring compliance and a civil penalty of \$5,000 per day. MCL 325.1022.
- Violations may also be prosecuted as a misdemeanor with one-year jail terms and \$5,000 per day fines. MCL 325.1021(1).

Legal Challenges

Declaratory Ruling

- Several water suppliers challenged the rules at the administrative level.
- They requested a declaratory ruling that the rules exceeded the scope of the MDEQ's authority.
- The department denied the request, stating that it did not have the authority state law to review the challenges proposed.



Court of Claims



- In December 2018, the rules were also challenged in the Michigan Court of Claims—the court with jurisdiction for suits against the state or its departments.
- The parties challenged the rules on the following grounds:
 - I. Violation of the Administrative Procedures Act
 - II. Rules are Arbitrary and Capricious & Beyond the Scope of the Safe Drinking Water Act.
 - III. Violation of State Constitution Art. 9, § 18 – The State shall not grant its credit to a private person.
 - IV. Violation of State Constitution Art. 7, § 26 – Municipalities are prohibited from giving free services or goods.
 - V. Replacement of private service lines violates the Revenue Bond Act as a free service to private property.



Practical Considerations

MDEQ Guidance



- The MDEQ is working to provide guidance and get answers to everyone “as soon as they can.” Unfortunately, as of early March, much hoped for guidance remains in development.
- *Asset Management Plans (AMP)*. It is unclear what the MDEQ is accepting as appropriate asset management plans and what lead and service line replacement rates result from those plans.
- *Inventory Forms*. The MDEQ has not provided a specific inventory form as of early March.
- *Sampling Guidance*. MDEQ issued a sampling infographic as well as instructions in mid-March 2019.



Funding

Communication

Inventory

Sampling

Replacement

Replacement Notice

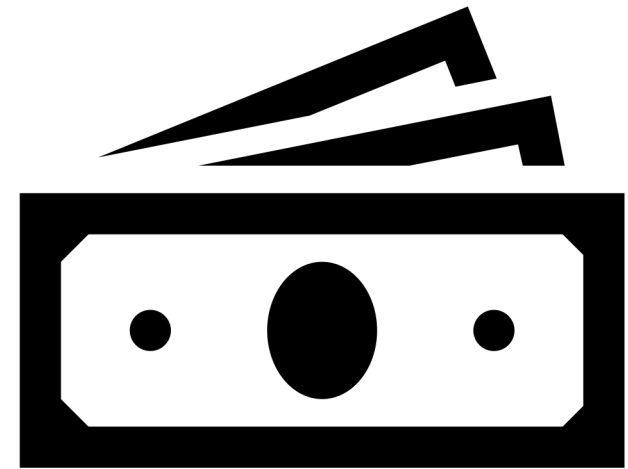
Customers that Refuse Replacement

**Who should own the service line after
installation?**

Other Practical Challenges

Funding

- How do I pay for it?
 - Many water suppliers are introducing capital charges to pay for the improvements
 - Litigation may shed light on available funding mechanisms.
 - Currently special assessments are viewed as incompatible with the rule's requirement that the lead service line be replaced at the water suppliers' cost
 - Bonds may be available under various statutes as well as grants and other types of state or federal assistance.



Communication

- The water supplier should develop a communication plan:
 - General brochures; workers taking inventory should always have them available
 - Special brochures for schools, day cares, pediatrician offices, and other specially affected populations
 - Insert materials with supply bills
 - Place notices on supply and municipality websites
 - Host special meetings and community events
 - Contact local media outlets
 - If/As neighborhoods are identified for replacement work, consider neighborhood meetings
 - Develop FAQs
 - Prepare for customer response: hotlines, website information, dedicated point staff for concerns





Refusing Replacement

- If the homeowner refuses permission to replace the private portion of the service line, a partial replacement (from the watermain to the curb stop) is not permitted.
- Water Advisory Councils may help explain the importance and requirements of the service line replacement to reluctant citizens.

Replacement

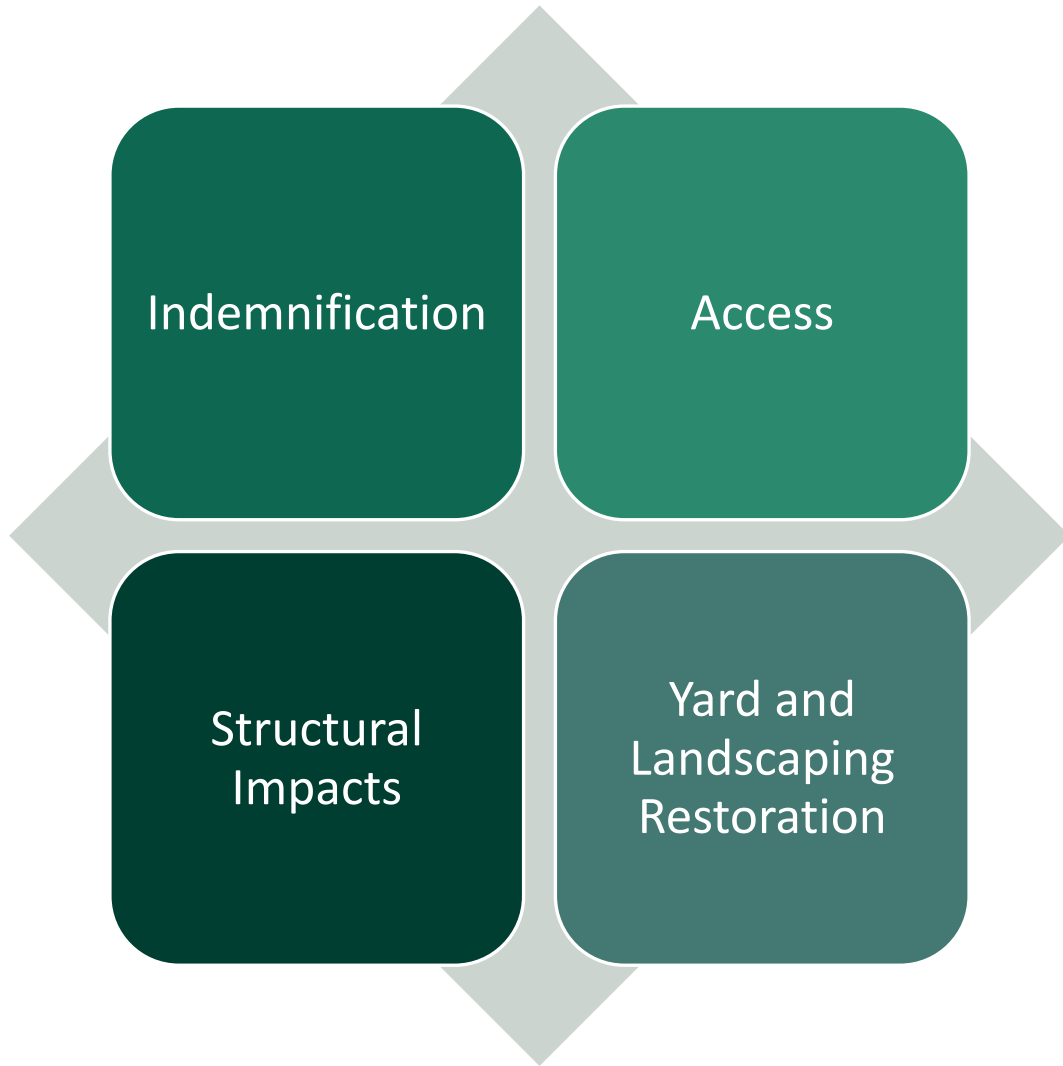
- The first replacements beginning in 2021 may not be problematic, depending on the quality of records available to the water supply and the amount of support received from customers.
- You should consider prioritizing sensitive populations, including LSLs identified at schools, day care centers, pediatrician offices, senior or elderly populations, dialysis centers, or other sensitive populations in the community.
- Costs may be reduced with coordination with other street projects and work. Utilize your asset management plan, if possible.
- Replacements of service lines will need to be completed on a same-day basis to ensure continued service.
- Organizing replacement work in adjacent blocks may reduce crew mobilization costs.



Replacement Notice

- At least 45 days prior to replacing service lines, the water supplier must provide notice to residents of the buildings served that they may experience a temporary increase in lead levels and guidance to minimize exposure to lead.
- Generally, the notice will be mailed, but multifamily buildings may be posted in a high traffic location; MDEQ may provide for additional methods of notice.





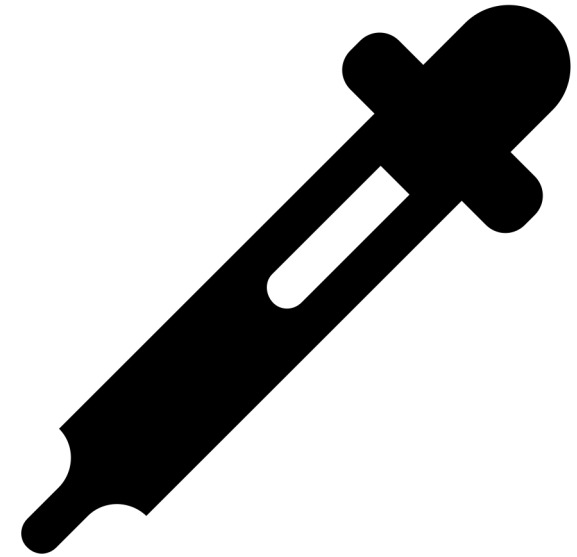
Hurdles to Consider

- Even though the rules require the supply to replace the private portion of the service line and even enter the home, a best practice may return those capital investments to the property owner.
- If the physical items are not owned by the property owner, then they might constitute a trespass or inverse condemnation of the private property.
- Each water supply should consider who should own the private portion of the service line.
- The ownership should be included in the waivers, easements, consent forms, and other documents presented to the citizens.

Who Owns the Service Line?

Sampling

- Homes previously used for sampling may not qualify as Tier I sites any longer; additional sites may need to be identified.
- MDEQ has provided guidance on sampling site selection.
- Additional sampling protocols are more detailed.
- Many water supplies prefer to have their own employees collect the samples due to the technical process.





Questions

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