

Date Signed: September 24, 1998

MEMORANDUM

SUBJECT: Enforcement and Implementation of Section 1417 of
the Safe Drinking Water Act

FROM: Brian J. Maas, Director
Water Enforcement Division
Office of Regulatory Enforcement

Robert J. Blanco, Director
Implementation and Assistance Division
Office of Ground Water and Drinking Water

TO: Water Division Directors, Regions I-X
Regional Counsels, Regions I-X
Enforcement Division Directors, Regions I, II, VI, and VIII

The office of Enforcement and Compliance Assurance and the Office of Water have received many questions from Regional staff, the States and industry representatives relating to the interpretation and enforcement of section 1417 of the Safe Drinking Water Act ("SDWA"). This memorandum provides the Agency's answers to questions relating to this section. OECA and OW have worked closely with the Office of General Counsel, which concurs in this memorandum.

I. Background

The lead ban provisions contained in section 1417 of the SDWA were enacted by Congress to address the problem of lead contamination of drinking water that is caused by materials used in public water distribution systems, plumbing of private residences and water coolers used at schools and businesses. Lead causes adverse developmental effects in children (slows cognitive development) and hypertension in adults. It is also a probable human carcinogen. Congress recognized that the principal source of lead in drinking water is the plumbing (services lines, pipes, fittings and coolers) that carries and stores water between the water main and the tap. S. Rep. No. 169, 104th Cong., 1st Sess. 94 (1995).

The 1986 Amendments to the SDWA included a ban on the use of pipe, solder and flux that are not lead free in public water supplies and residential and nonresidential plumbing intended to provide water for human consumption that are connected to public water systems. The 1996 Amendments extended this ban to include plumbing fittings and fixtures, which include faucets, and to apply to any facility providing water for human consumption, even if not connected to a public water system. The 1996 Amendments also defined "lead free" for fittings and fixtures to include compliance with any standard established under section 1417(e). EPA

recognized the establishment of such a voluntary standard in the consensus standard developed by the NSF International, NSF 61, section 9. See 62 Fed. Reg. 44684-44685, August 22, 1997. A copy of this Federal Register notice is attached as Attachment "A." Those products specifically listed in NSF 61, Section 9 are required to meet the NSF Standard as well as the maximum 8.0 percent lead content requirement in section 1417(d)(2) of the SDWA. The products subject to NSF 61, Section 9 include kitchen and bar faucets lavatory faucets, water dispensers, drinking fountains, water coolers, glass fillers, residential refrigerator ice makers, supply stops and endpoint control valves.

Besides expanding the ban on the use of lead materials in public water systems, the 1996 Amendments to the SDWA banned the introduction into commerce of any pipe, or any pipe or plumbing fittings and fixtures, that are not lead free, after August 6, 1998, except for pipe used in manufacturing or industrial processes. The 1996 Amendments also added a prohibition on the sale of solder or flux containing lead at businesses engaged in selling plumbing supplies and a prohibition on the introduction into commerce of any lead solder or flux, unless the solder or flux is labeled to prohibit use in plumbing providing water for human consumption. The Agency interprets "introduce into commerce" as used in section 1417 of the SDWA to cover not only the initial offering of products for sale but also the sale or distribution from an inventory of products. Thus, retailers or wholesalers cannot sell those products which would violate section 1417(a)(3). This prohibition did not go into effect until two years after the 1996 Amendments, giving retailers and wholesalers a two year grace period. (See the EPA memorandum dated December 10, 1996 attached hereto as Attachment "B.")

II Enforcement of Section 1417

Regions and industry groups have asked for clarification of State enforcement responsibilities under section 1417 and EPA's jurisdiction to bring civil or administrative actions to address violations of the lead ban. The following questions and answers summarize these issues.

A. Can U.S. EPA Enforce Section 1417 of SDWA?

Under section 1414(b)&(g) of the SDWA, EPA may bring a civil action or issue an order to require compliance with section 1417 of the SDWA, including section 1417(a)(3). Prior to 1996, section 1414(b) of the Act stated that EPA could issue orders or bring a civil action to "require compliance with a national primary drinking water regulation." As a result, it was unclear whether EPA could take enforcement actions for significant violations of the SDWA other than violations of national primary drinking water regulations or exemptions or variances from such regulations.

The 1996 Amendments to the SDWA, however, amended the SDWA to clarify EPA's authority to enforce "any applicable requirement," of the Act, which includes the requirements of section 1417. See 1414(b) and (i). The legislative history indicates that the amendment was intended to clarify EPA's enforcement authority for "enforcement action[s] for some significant

violations, such as a violation of the prohibition against the sale of leaded water fixtures." S. Rep. No. 169, 104th Cong., 1st Sess. 80-81 (1995).

Section 1414(b) specifically authorizes the Administrator to bring a civil action to require compliance with any applicable requirement of the SDWA and seek civil penalties of not more than \$25,000 for each day of violation (now increased to \$27,500 per day pursuant to the Debt Collection Improvement Act of 1996).¹ Section 1414(g) authorizes the Administrator to require compliance with any applicable requirement and seek civil penalties through an administrative order. Accordingly, sections 1414(b)&(g) provide EPA with authority to enforce all the provisions of section 1417, including section 1417(a)(3), against any person, including entities other than public water systems.

B. Which provisions in section 1417 are States required to Implement?

Section 1417(b) requires States to enforce section 1417(a)(1), which prohibits the use of non-lead-free products in the installation or repair of public water systems or of any plumbing in a residential or nonresidential facility providing water for human consumption. As specified in section 1417(b)(1), State enforcement would be through State or local plumbing codes, or such other means of enforcement as the State may determine to be appropriate. The definition of "lead free" appears in section 1417(d), and includes compliance with NSF Standard 61, Section 9, a voluntary standard adopted in accordance with the 1996 Amendments to SDWA. Therefore, States must enforce use restrictions in section 1417(a)(1), including NSF 61, Section 9 or face the prospect of withholding grant funds.

EPA encourages the States to develop independent State enforcement authority or use the citizen suit provisions within section 1449 of SDWA to enforce section 1417(a)(3). Section 1449 of the Safe Drinking Water Act authorizes suits by "any person," which is defined in section 1401 to include a State. Therefore, section 1449 is a mechanism available to the States and citizens to enforce section 1417(a)(3). Enforcement of section 1417(a)(3) would complement implementation of the lead drinking water regulations, ensuring that the States will have a comprehensive State program to effectively address lead contamination in the drinking water supply. Enforcement of these provisions should be used to supplement enforcement of sections 1417(a)(1) and the lead and copper rule. Through State enforcement of section 1417(a)(3), the States and EPA will move closer to our common goal of protecting public health

¹Where the Agency is contemplating bringing an enforcement action against a public water system for violating section 1417, the Agency must comply with certain procedural requirements, which differ depending on whether the system is located in a State with primacy. See §1414(b) (requiring that the Agency only bring an enforcement action against a public water system after having followed the procedures specified either in section 1414(a)(1) or (2) or 1414(b)(2)). These procedural requirements would not apply where the Agency is bringing an enforcement action against an alleged violator that is not a public water system.

from lead contamination in the nation's drinking water. EPA envisions that primary responsibility for enforcement of section 1417 will reside with the States.

III Businesses prohibited under section 1417 (a) (3) (B) from selling solder and flux that are not lead free

Effective August 6, 1998, section 1417(a)(3)(B) of the SDWA prohibits:

any person engaged in the business of selling plumbing supplies, except manufacturers, to sell solder or flux that is not lead free. . . .

For the purpose of solder and flux, lead free is defined under section 1417(d)(2) as solder and flux containing not more than 0.2 percent lead.

The Agency interprets "engaged in the business of selling plumbing supplies" as used in section 1417(a)(3)(B) to apply to any person who is primarily engaged in selling plumbing supplies intended for use in facilities providing water for human consumption.² Businesses subject to this prohibition include, but are not limited to, plumbing retail stores, plumbing contractors, plumbers and specialty stores selling primarily plumbing fixtures and fittings. Wholesalers, including retailers who may act as wholesalers, cannot sell solder or flux that is not lead free to retailers, contractors, or others that are primarily engaged in the plumbing supply business. However, wholesalers and retailers may sell solder or flux that is not lead free to electrical, suppliers or other retail businesses or contractors that are not primarily engaged in the plumbing supply business.

Retail stores that are primarily engaged in the business of selling general building materials or general retail goods, which may also sell plumbing supplies, are not, in EPA's view, subject to the prohibition in section 1417(a)(3)(B), except when acting as a wholesaler selling to businesses primarily engaged in selling plumbing supplies. General hardware stores and large retail home centers may sell solder or flux that is not lead free, provided the solder or flux is clearly labeled with a statement that it is prohibited to use the lead solder or flux in the installation or repair of any plumbing providing water for human consumption. The sale, by *any* person or business, of solder or flux that is not lead free and is not properly labeled is prohibited under section 1417 (a) (3) (c) of the SDWA.

Enforcement of the lead ban provisions is imperative to our efforts to protect children's health and provide safe drinking water to the citizens of our country. EPA Headquarters is committed to support Regional and State enforcement activities relating to the lead ban or any other drinking water requirement. Please do not hesitate to contact Richard Alonso, OECA

² The terms "Plumbing" and "Plumbers" as used in this memorandum are limited to products and those persons providing services relating to plumbing intended to provide water for human consumption.

(202/564-6048), Judith Fraser, OGWDW (202/260-0941) or Steven Neugeboren, OGC (202/260-6596) if you have any questions about this memorandum.

Attachments

cc: Susan Lepow, OGC
Joel Gross, DOJ

Attachment "A"

Federal Register/Vol. 62, No. 163/Friday, August 22, 1997/Notices pp. 44684-44685
 Environmental Protection Agency, *Interpretation of New Drinking Water Requirements Relating to Lead Free Plumbing Fittings and Fixtures; Notice*

ENVIRONMENTAL PROTECTION
 AGENCY

[FRL-5880-2]

Interpretation of New Drinking Water
 Requirements Relating to Lead Free Plumbing
 Fittings and Fixtures

AGENCY: Environmental Protection
 Agency (EPA).

ACTION: Notice

SUMMARY: Section 1417(a)(3) of the Safe Drinking Water Act (SDWA), as amended makes it unlawful for any person to introduce into commerce after August 6, 1998 any pipe, or any pipe or plumbing fitting or fixture that is not lead free. In section 1417(e) as added by the 1996 SDWA Amendments, Congress directed EPA to provide assistance for the development of voluntary standards and testing protocols for the leaching of lead from new plumbing fittings and fixtures relating to drinking water. This notice confirms EPA's position that performance standards for the leaching of lead from new plumbing fittings and fixtures have been established, as directed by the SDWA.

The SDWA requires that, if a voluntary standard for the leaching of lead from new plumbing fittings and fixtures is not established by August 1997, then EPA must promulgate regulations setting a performance based standard for lead leaching from such components. The National Sanitation Foundation (NSF) established a voluntary standard, NSF Standard 61, section 9, governing the leaching of lead from new plumbing fittings and fixtures in September 1994. EPA participated in the development of the NSF Standard because the Agency felt that, rather than promulgating a regulation, limiting the amount of lead leaching from brass and other alloys into drinking water would be best achieved through a voluntary standard, which is fully protective on a health basis and technologically achievable by industry in a reasonable period of time. In the Agency's view, NSF Standard 61, section 9 satisfies the requirement of section 1417(e), that a voluntary standard be established. Thus, the obligation to issue regulations is

not triggered. See S. Rep. 104-169 ``104th Cong.), at 95." Copies of NSF Standard 61, and the listings of products meeting this standard may be obtained from NSF International, 3475 Plymouth Road, PO Box 130140, Ann Arbor, MI 48113-0140. The telephone number is 313-769-8010.

FOR FURTHER INFORMATION

CONTACT: Peter Lassovszky, Office of Ground Water and Drinking Water (4607), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC. For further information, call the U.S. EPA Safe Drinking Water Hotline between 8:30 am and 5 pm Eastern Time, Monday through Friday excluding Federal holidays, by telephoning toll-free 1-800-426-4791 nationwide.

Dated: August 13, 1997.
 Robert Perciasepe,
 Assistant Administrator, Office of Water.
 [FR Doc. 97-22360 Filed 8-21-97; 8:45 am]
 BILLING CODE 6560-50-P

Attachment “B”

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC. 10, 1996

OFFICE OF WATER

Mr. Craig W. Selover
Vice President - Engineering
Delta Faucet Company
55 East 111th Street
P.O. Box 40980
Indianapolis, IN 42680

Dear Mr. Selover:

This is in response to your letter dated October 11, 1996, which posed two questions related to lead problems associated with pipes and plumbing fixtures.

First, you requested that the Environmental Protection Agency (EPA) clarify the requirements in Section 1417(a)(3) of the Safe Drinking Water Act (SDWA) , as amended, which makes it unlawful for any person to introduce into commerce any pipe, or any pipe or plumbing fitting or fixture that is not lead free after August 6, 1998. You indicated that your interpretation of the phrase “introduce into commerce” means the time when the manufacturer first offers a product for sale into the distribution system. In your view, this interpretation would prevent discontinuity in the distribution channels, where the bulk of the products pass through and into installation fairly quickly, but many slow moving items remain in the wholesalers’ inventories for years.

The Agency interprets Section 1417(a)(3) to mean that no one, including the manufacturer or the distributor, may distribute any pipe or plumbing fitting or fixture that is not lead free after the August 6, 1998 deadline. The statute makes no distinction between wholesale or retail sales of these materials. Thus, we believe this provision covers not only initial offering of products for sale but sale or distribution from an inventory of the products referred to in Section 1417(a)(3) after August 6, 1998, except for manufacturing or industrial processes. Allowing the sale of inventoried, non lead-free materials several years after the statutory deadline would not be in compliance with Section 1417(a)(3). The two year grace period provided by the law allows the industry time to phase in this requirement while preventing discontinuity in the distribution channels.

In your second request, you asked that the EPA formally recognize National Sanitation Foundation (NSF) Standard 61, Section 9 as a standard which meets the requirements of the SDWA. You indicated that, although there may be other standards developed in the future, NSF Standard 61, Section 9 is the only one which has been developed to date. In further support of your request, you note that EPA played an instrumental role in the consensus process that developed the standard.

EPA participated in the development of the NSF Standard because the Agency felt that limiting the amount of lead leaching from brass and other alloys into drinking water would best be achieved through a voluntary standard, which is fully protective on a health basis and technologically achievable by industry in a reasonable period of time. In amending the SDWA requirements, Congress directed EPA in Section 1417(e) to provide assistance for the development of voluntary standards and testing protocols for the leaching of lead from new plumbing fittings and fixtures related to drinking water. In the Agency's view NSF Standard 61, Section 9 meets the requirement of Section 1417(e).

I hope this information adequately responds to your questions. If you have any further questions regarding this matter, please contact me at (202)260-5543.

Sincerely,

Original Signed by

Cynthia C. Dougherty
Director
Office of Ground Water and Drinking Water