

Date Signed: September 16, 1988

MEMORANDUM

SUBJECT: Policy on Regional Response to a State Which
Decides to Accept the Five Percent Reduction
in its PWSS Program Grant

FROM: Michael B. Cook, Director (signed by Michael B. Cook)
Office of Drinking Water

TO: Richard L. Caspe, Director
Water Management Division

This responds to your request, made in your May 2, 1988, memorandum which provided comments on the 1989 PWSS Enforcement Agreement Guidance, for a statement of the Office of Drinking Water's official position on the response a Region should make if a State elects to accept a five (5) percent reduction in its PWSS program grant. This reduction would be imposed as a penalty for not enforcing a lead ban and/or the lead public notification requirements as mandated by Section 1417 of the Safe Drinking Water Act (SDWA or the Act). We have considered this question and our position is described below.

Section 1417(b) of the SDWA requires States to enforce the lead ban and the lead public notification requirements. It is important to note that the SDWA does not require a State to enact a lead ban. Rather, the Act requires a State to enforce the SDWA ban on the use of lead through any means a State believes is appropriate. A State law would ensure that all areas within the State would be uniformly covered and would make State-wide enforcement much easier than if each local jurisdiction were to have its own rules or codes; however, EPA cannot require a State-wide law or regulations.

Section 1417(c) specifies the penalty a State faces for not complying with 1417(b); that is, EPA may withhold up to five (5) percent of that State's PWSS program grant. We have developed guidance for the Regions on the withholding of five (5) percent of a State's grant. This guidance should be issued in final version [or form] shortly. The situation you describe would arise after EPA has withheld five (5) percent of the grant and the State informs EPA that it has no plans to enforce a State-wide lead ban and/or the lead public notification requirements, despite the loss of the Federal funding for its PWSS programs.

You are correct in your statement that the Region may not initiate primacy withdrawal for failure to enforce the lead ban and/or lead public notification requirements. Section 1413 of the SDWA, which sets forth the requirements for State primary enforcement responsibility ("primacy"), requires a State to have "adopted drinking water regulations which are no less

stringent than the national primary drinking water regulations in effect under Sections 1412(a) and 1412(b) and to have adopted," and be implementing "adequate procedures for the enforcement of such State regulations." The lead ban is not a national primary drinking water regulation promulgated under the authority of Section 1412(a) or 1412(b) of the SDWA; rather it is contained in Section 1417. Therefore, it is not a requirement for primacy.

Even though the enforcement of the lead ban and lead public notification provisions is not a requirement for primacy, it is ODW's position that these provisions of the SDWA are of high priority. The Regions should, therefore, do as much as possible to convince a State to enforce a State-wide lead ban, to promote and enforce local lead bans, and to enforce the lead public notification provisions. There are several options open to the Region for doing this. One would be to meet with the State directors, State legislators, and the members of the governor's staff to try to work through the issue. Another option would be to issue press releases or write newspaper articles informing the affected communities of the health effects of lead and that their State officials have not acted in accord with the SDWA to protect their health. The Region could also encourage local environmental or other civic groups to become involved in the lead ban issue.

Thus, although there may be no direct mechanism to force a State which does not wish to do so to enact and/or enforce a lead ban and lead public notification provisions, there are options available to the Region to deal with the situation. Regions should thoroughly plan any course of action and I would appreciate it if you would inform Headquarters of your plans before proceeding.

In your May 2, 1988, memorandum, you had also asked for a legal opinion on the use of the emergency provisions of the SDWA (Section 1431) to enforce the lead ban. We have been working with the Office of Enforcement and Compliance Monitoring and the Office of General Counsel on this issue and should be able to provide you with guidance shortly.

I hope this is responsive to your question. Should you wish to discuss this further, please call me.

cc: Water Management Division Directors
Water Supply Branch Chiefs