

May 16, 2024

VIA FEDERAL eRULEMAKING PORTAL

U.S. Environmental Protection Agency
Office of Land and Emergency Management
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Updated Residential Soil Lead Guidance for CERCLA Sites and RCRA Corrective
Action Facilities – Docket No. EPA-HQ-OLEM-2023-0644

Dear Ms. Lowery and Ms. Burgess:

Thank you for the opportunity to provide comments on the “Updated Residential Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities” (the “Guidance”) issued by the U.S. Environmental Protection Agency (“EPA”) on January 17, 2024. The undersigned organizations include the Superfund Settlements Project (“SSP”),¹ the RCRA Corrective Action Project (“RCAP”),² the National Mining Association,³ and the American Petroleum Institute.⁴ These organizations represent hundreds of major companies from many different sectors of American industry with

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- ¹ The SSP is an association of major companies from many different sectors of American industry. It was organized in 1986 to help improve the effectiveness of the Superfund program by encouraging settlements and program policies so as to achieve site closure with minimum delay and expense. Since its formation, the SSP has provided constructive input to EPA and other federal agencies on critical policy issues affecting the cleanup of contaminated sites; SSP representatives also have testified before Congress on many of these issues.
- ² RCAP is an association of major companies from many different sectors of American industry. RCAP was organized in 1988 following EPA’s first corrective action regulatory proposals with the goal of encouraging cleanup standards and procedures that achieve environmental benefits in a manner that is both risk-based and cost-effective. Since its formation, RCAP has provided constructive input to EPA, Congress, and other regulatory agencies on critical policy issues affecting the cleanup of contaminated sites.
- ³ The National Mining Association (“NMA”) is the only national trade organization that serves as the voice of the U.S. mining industry and the hundreds of thousands of American workers it employs before Congress, the federal agencies, the judiciary and the media, advocating for public policies that will help America fully and responsibly utilize its vast natural resources. The NMA has a membership of more than 280 companies and organizations involved in every aspect of mining, from producers and equipment manufacturers to service providers. America’s mining industry supplies the essential materials necessary for nearly every sector of our economy – from technology and healthcare to energy, transportation, infrastructure and national security. We work to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, national security and economic security, all delivered under world-leading environmental, safety and labor standards.
- ⁴ The API is a national trade association representing member companies involved in all aspects of the oil and gas industry, including exploration, production, refining, transportation, distribution, and marketing of petroleum and petroleum products.

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Sierra Club FOIA Request:

2025-EPA-04193

SC_FOIA_0000810

significant experience remediating lead in soil.

Executive Summary

Cleanup of lead in soils is a complex task for communities, companies, and families as they contend with public health, environmental and resource challenges, and should be based on the best science and actual risk. Below, and as supported by the attachments, we offer our comments that support revisions to the Guidance based on the most up-to-date science, EPA's statutory authority, and the impact of site-specific exposures, as well as suggestions for implementation of the Guidance. We also are providing economic comments that demonstrate the significant economic cost of the Guidance that far exceeds EPA's economic assessment.

Specifically:

- By not seeking public comment prior to issuing the Guidance as final and immediately effective, EPA has essentially imposed what amounts to a regulatory requirement without considering important legal, technical, and implementation concerns. At the very minimum, EPA should prepare a response to comments provided by the public on the Guidance, potentially by way of an implementation memorandum addressing the issues below, including identification of clearer factors to help define how the Guidance, which is largely focused on Regional Screening Levels ("RSLs"), may or may not affect cleanups that are underway with established cleanup standards as well as completed sites.
- The default assumptions used by EPA in the Integrated Exposure Uptake Biokinetic ("IEUBK") model to set the Regional Removal Management Level ("RML") and RSLs in the Guidance are outdated and inconsistent with other EPA programs, resulting in the RML and RSLs being far lower than needed to achieve the desired target blood lead levels. EPA should revise the RML and RSLs in the Guidance using the IEUBK inputs described in Appendix B and should endorse updating modeling with updated and/or site-specific input parameters.
- Using national statistical trends and datasets, including the Centers for Disease Control and Prevention's ("CDC's") reference value for childhood blood lead levels and those identified in EPA's Supplemental Framework to the Guidance, results in overly conservative action levels and numerous implementation issues. Site-specific information regarding exposure and risk is necessary for appropriate and accurate site-specific decision-making. EPA should provide additional guidance on the use of site-specific evaluations when applying the Guidance to a site. A site-specific evaluation should be mandatory, in particular, prior to reopening completed response actions.
- The imposition of two RSLs is confusing, unsupportable, and exceeds statutory authority under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). The lower RSL essentially double-counts sources unrelated to the CERCLA or RCRA release since the IEUBK model accounts for human health risks posed by other sources of lead. Further, the implementation issues are unworkable: for example, it appears that sites may be reopened based on the potential, but not actual, existence of other sources of lead; neighboring properties may be treated differently. EPA should eliminate the multi-source RSL of 100 ppm. If EPA retains the multi-source RSL, it should re-run the IEUBK model zeroing out inputs accounting for other sources of lead and revise the RSL accordingly.

- Because the Guidance sets screening levels at artificially low levels, EPA and responsible parties will be incurring substantial costs to assess lead at numerous properties where removal of soil will have little to no impact on blood lead levels. EPA should provide guidance on using actual blood lead data versus using the screening levels as well as guidance on developing cleanup standards.
- EPA should develop a practicable, scientifically defensible policy regarding how to assess natural and anthropogenic background concentrations of lead in soil.
- Given the enormous number of sites that will be impacted by the Guidance, EPA needs to address implementation issues reasonably and rationally given limited resources. EPA should identify and prioritize sites where there is actual exposure and risk, address sites in a manner that will allow limited resources to be used efficiently and develop incentives for responsible parties to address sources outside EPA's statutory authority to achieve risk reduction most effectively. Stakeholder input, particularly from those actually performing the response actions, should be weighed heavily.
- EPA's economic assessment of the Guidance does not account for significant costs that will result from the Guidance, calling into question the economic basis supporting EPA's decision and the actual cost to communities, governments, and responsible parties. EPA should revise its economic assessment to address these additional costs.

I. EPA Should Revise the Guidance to Incorporate the Most Up-to-Date Science, Base Need for Cleanup on Site-Specific Exposure, and Work Within Statutory Authority

A. The default assumptions for the IEUBK model must reflect the most up-to-date science.

Several of the assumptions used by EPA in the IEUBK model to derive the RSLs are outdated, overly conservative, and inconsistent with those used by other EPA programs. Appendix B demonstrates that when using assumptions that more accurately reflect current scientific knowledge and are consistent with assumptions used by EPA in other programs, the RSLs set by the Guidance are far lower than needed to achieve the desired target blood lead levels. The RSLs should be adjusted to, at the lowest, 435 ppm for soil impacted by a single source of lead and 253 ppm for soil impacted by multiple sources.

Cleanup of lead in soils is a complex task for communities, companies, and families as they contend with public health, environmental, and funding challenges, and should be based on the best science and actual risk. Not updating the input assumptions to use more current study data will result in additional evaluation of potential lead risk in soil via RSL exceedance that, in many cases, will not be a concern, thus wasting valuable resources. By setting the screening levels at levels unsupported by the best science, enormous costs will be incurred without corresponding health benefits. We recommend that EPA revise its guidance consistent with the comments provided in Appendix B.

B. Use of the CDC Reference Value makes screening and cleanup levels a moving target; national statistical trends should not govern site-specific decisions.

The new RML and RSLs in the Guidance are based on the CDC's reference value for childhood blood lead levels. The directions in the Guidance for developing Preliminary Remediation Goals ("PRGs") and cleanup levels for lead also rely on the CDC's reference value. Using the

geographically unrelated statistical-based CDC reference value, however, makes the RMLs, RSLs, and PRGs a moving target without consideration of site-specific information on actual exposure and risk.

Since 1976, national childhood blood lead levels have steadily declined.⁵ EPA credits this trend to the elimination of leaded gasoline, lead-based paints, lead solder in food and drink packaging, and lead in plumbing systems.⁶ EPA's Lead Strategy, however, acknowledges that there are still significant sources of lead exposure to children, especially in older housing with lead-based paint and lead service lines.⁷ As these sources are mitigated as part of EPA's Lead Strategy, the national declining trend in childhood blood lead levels is expected to continue.

In addition, CDC is likely to adjust its reference value in the future when it conducts its periodic reviews of national childhood blood lead data. The CDC analyzes childhood blood lead data every four years from the most recent four years of national data to determine whether its reference value should be updated. Because EPA uses the CDC's statistical-based reference value as the target for its RMLs, RSLs, PRGs, and risk-based cleanup levels, those levels are likely to continue to change as often as every four years. This approach makes the RMLs, RSLs, PRGs, and cleanup levels for residential lead properties a perpetually moving target, creating significant uncertainty about whether a cleanup today will be acceptable to EPA several years later—a result that makes little sense since a cleanup that has been deemed protective on a site-specific basis should not be reopened because of national-level aggregate statistical trends in child blood lead data that are not tied to exposure and risk at any particular site. In its comments on the Lead Strategy, the Colorado Department of Public Health and Environment recognized this risk and urged EPA to provide guidance on how previously remediated sites should be handled "in light of a shifting target for lead cleanup."⁸

Reevaluating residential properties repeatedly based on national statistical trends is not an efficient use of remedial resources. It could also foster mistrust by residential property owners because their property, which was once cleaned up to "safe levels," becomes no longer safe and needs to be addressed again (and again). Rather than targeting the CDC reference value, which is based on statistical trends, EPA should evaluate the release to soil at issue and whether and to what extent it is contributing to increased child blood lead levels, if any. If adequate childhood blood lead data exists for the community where the site is located, that data should be considered when evaluating whether new or additional remedial action is needed. Without relevant, accurate, and reliable site-specific data indicating actual risk, substantial effort, and funds will be spent without corresponding benefit and with a diversion from other projects where benefit could be realized. Aggregate

⁵ See U.S. EPA, "Biomonitoring – Lead," *available at* <https://www.epa.gov/americaschildrenenvironment/biomonitoring-lead> (showing a 96 percent decrease in the median concentration of lead in the blood level of children between the ages of 1 and 5); U. S. EPA, "Report on the Environment: Blood Lead Level" *available at* <https://cfpub.epa.gov/roe/indicator.cfm?i=63>.

⁶ U.S. EPA, EPA Strategy to Reduce Lead Exposures and Disparities in U.S. Communities at 11 (Oct. 2022) ("Lead Strategy"), *available at* https://www.epa.gov/system/files/documents/2022-11/Lead%20Strategy_1.pdf.

⁷ *Id.*

⁸ Letter from Shaun McGrath, Environmental Health and Protection Services Director, Colorado Department of Public Health and Environment, to EPA Docket ID: EPA-HQ-OLEM-2021-0762 (Feb. 28, 2022), *available at* <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0762-0022>.

national statistical data should not drive a requirement for investigation or other response action when site-specific data show that the current level is protective.

This approach was advanced in comments on the Lead Strategy by the Oklahoma Department of Environmental Quality, which stated that evaluation of blood lead levels and identification of lead-based paint should precede any decision to reopen a site.⁹ Moreover, the Environmental Protection Network states, "It is generally a question of whether to remediate additional lead-contaminated properties rather than previously remediated ones. Remedy reviews by and large show that the remediated properties present little to no exposure risk."¹⁰ EPA should revise the Guidance to address reopening sites based on site-specific data demonstrating actual risk rather than RSLs developed based on national statistical trends.

- C. By revising RSLs downward based on the presence of other potential lead sources, the Guidance exceeds EPA's statutory authority under CERCLA and RCRA and poses unacceptable implementation challenges.

Responses under CERCLA may be taken only to address releases or threatened releases from a facility to the environment of hazardous substances or of pollutants or contaminants that may present an imminent and substantial danger to the public health or welfare.¹¹ Furthermore, CERCLA response actions are expressly prohibited to respond to a release or threat of release of a naturally occurring substance in its unaltered form; from products which are part of the structure of, and result in exposure within, residential buildings or other structures; or into public or private drinking water supplies due to deterioration of the system through ordinary use.¹² Similarly, corrective action under RCRA is limited to addressing releases into the environment from facilities that treat, store or dispose of hazardous wastes.¹³

EPA acknowledges in its Questions and Answers (Q&A) to the Guidance that CERCLA limits EPA's ability to address lead from lead-based paints, leaded gasoline, and lead service lines.¹⁴ However,

⁹ Letter from Scott A. Thompson, Executive Director, Oklahoma Department of Environmental Quality, to EPA Docket ID: EPA-HQ-OLEM-2021-0762 (March 2, 2022), *available at* <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0762-0325>.

¹⁰ Environmental Protection Network, Comments on EPA's draft Strategy to Reduce Lead Exposures and Disparities in U.S. Communities Docket Number: EPA-HQ-OLEM-2021-0762 (March 8, 2022), *available at* <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0762-0029>.

¹¹ 42 U.S.C. § 9604.

¹² 42 U.S.C. § 9604(c).

¹³ 42 U.S.C. § 6924(u) and (v); 42 U.S.C. § 6928(h).

¹⁴ *See* OLEM Residential Soil Lead Guidance, Questions and Answers, Question #3 (on file with authors). EPA has not published this document on its website. *See also e.g.* 42 U.S.C. § 9604 (a)(3)(B) ("The President shall not provide of a removal or remedial action under this section in response to a release or threatened release . . . from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures[.]" EPA explains in the Q&A: "Because lead-based paint is part of your building's structure, the Superfund program is prevented from addressing it." EPA also refers to leaded

if these sources are present at a property being considered for soil remediation, the Guidance reduces the RSL to 100 parts per million (ppm) and lowers the lead target for PRGs and cleanup levels from 5.0 ug/dL to 3.5 ug/dL. Requiring a more stringent RSL, PRG, and cleanup level based on lead sources unrelated to the CERCLA or RCRA release results in actions being required under CERCLA or RCRA to address exposure that EPA acknowledges it does not have authority to address. Furthermore, it is not necessary because, as discussed in Appendix B, the IEUBK model already takes into consideration human health risks posed by other sources of lead.

Beyond exceeding its statutory authority, EPA's approach is unworkable in several ways. EPA makes an arbitrary adjustment to the reference level based purely on the existence of a *potential* source of lead, whether there is any evidence of a release or impact from that potential source. For example, if a property has a lead service line, the Guidance would impose a more stringent RSL for that property without showing that the service line actually impacted the soils being remediated or that the service line has impacted the residents. This approach is likely to greatly increase the burden associated with conducting a CERCLA or RCRA remedial action at residential properties, even in cases where the potential non-CERCLA/RCRA sources do not themselves increase risk at all. Such burdens are not solely of concern to the responsible parties implementing the response action, as too aggressive an approach to sites that pose a marginal risk will divert agency and responsible party attention and resources away from other sites presenting greater risk. Rather than address this issue through a rough, arbitrary adjustment to the screening level that appears to have no quantitative justification, this concern should be dealt with on a site-specific basis in the context of risk assessments performed for a particular site that is tailored to the particular conditions of that response action with strict adherence to the bounds of statutory authority.

Furthermore, it would be difficult to implement different RSLs, PRGs, and cleanup levels dependent on single or multiple sources of lead. EPA recommends that the EPA Regions use national data sets and site-specific sources to determine whether there are single or multiple sources.¹⁵ However, the information in national data sets is often too general for determining whether a specific property has single or multiple sources. For example, a national data set may identify the potential for lead-based paint based on the age of housing in a residential area. However, the national data sets do not account for changes to the housing that may have mitigated lead-based paint.

In its Supplemental Framework to the Guidance, EPA indicates that the EPA Regions may apply a single RSL, PRG, or cleanup level to an entire site based on its national data sets. This direction does not account for variations among individual residential properties within the site. For example, properties that have only a single source of lead may still be subject to the lower multi-source RSL, PRG, or cleanup level because the site falls within a community identified in a national data set. This approach is overly burdensome and does not account for actual lead exposure conditions on a property. National data sets still need to be validated and should be used only when site-specific data cannot be generated.

The only accurate way to determine whether a residential property has single or multiple sources of lead is to assess the property for potential sources of lead. A party performing soil remediation

gasoline and paint as contributing to background levels of lead that cannot be addressed by Superfund. See Q&A, Question #25.

¹⁵ U.S. EPA, Supplemental Framework: Selecting a Remedial Screening Level for Residential Soil Lead, available at <https://semspub.epa.gov/work/HQ/100003397.pdf>.

would need to investigate each potentially affected property for natural and anthropogenic sources of lead (e.g., paint sampling, water service line assessment, and leaded gasoline sampling near roadways) in order to determine what standard applies to that property. Some properties may have a single source, while other neighboring properties may have multiple sources. The Guidance provides no direction on how to investigate a property for sources of lead, which is apparently pivotal to what PRG and cleanup level applies even as these sources are not an appropriate target for CERCLA or RCRA responses.

Another implementation concern with the Guidance is how it would be used to determine whether to expand the areal scope of a CERCLA or RCRA site. If a site currently only covers a portion of a residential community, the Guidance would require an evaluation of whether the boundaries of the site should be expanded based on a lower RSL. If some properties outside the current boundaries have multiple sources and others do not, properties could be added on a piecemeal basis. Furthermore, some of the expansion of a site would be based solely on a 100 ppm RSL due to non-CERCLA/RCRA releases. This will result in significant uncertainty on how to establish a site boundary. It could also render determinations of site-specific anthropogenic background difficult or impossible to make—a particularly important consideration since EPA is proposing an approach that might drive cleanup levels for lead to background at many urban sites. Employing the Guidance would require evaluation of properties where background would essentially be the “source” that requires the use of the lower RSL. Responsible parties would incur enormous costs evaluating that property only then for the cleanup level to be set at background which may have been the “source” causing the exceedance in the first place. The lower the RSL and the closer it is to anthropogenic background, the more difficult it will be to establish a scientifically sound approach to defining the boundaries of a particular site. Thus, this may lead to complications that could delay the already challenging process of bringing urban residential CERCLA/RCRA sites to completion.

If EPA continues to base its RSL on the CDC reference value, we recommend EPA revise the Guidance to include a single scientifically defensible RSL that would apply to newly discovered sites. As discussed above, for existing sites undergoing re-evaluation, we urge EPA to revise the Guidance to require site-specific determination of actual risk and an evaluation of background before going down the complicated and arbitrary path that will result from the implementation of the current Guidance.

II. EPA Underestimates the Social Costs of the Guidance

EPA’s economic assessment (EA) fails to provide an accurate social cost estimate. First, EPA does not include all sites that will be affected by this Guidance, instead arbitrarily basing its cost estimate on three limited categories of CERCLA sites. As explained in an economic analysis completed by Policy Navigation Group (PNG), provided in Appendix C, EPA should have included Brownfields and other non-NPL CERCLA sites that are in EPA’s active inventory. EPA has the data to include the active CERCLA sites, brownfields, and federal facility sites. By using an estimate of “zero” for these sites, EPA is not using the best available information and including the full universe of sites affected by this guidance. PNG’s analysis shows that the more accurate number of affected properties is approximately 608,400 as compared to EPA’s midpoint estimate of 469,165 properties. Accordingly, PNG’s analysis estimates that EPA underestimated affected properties by a minimum of 30 percent. By failing to include these key categories, EPA’s analysis significantly understates the costs associated with this Guidance.

Second, EPA underestimates the remediation cost of each site by omitting oversight costs EPA charges private parties, the transaction costs private parties incur to assign liability and to manage

the cleanup, and other construction management costs. EPA's partial analysis of social costs estimates range from an annualized amount (at three percent) of \$190 million to \$580 million per year, with a midpoint range of \$240 million to \$470 million annually. PNG's analysis estimates annualized social costs (at three percent) are between \$6,500 million and \$34,000 million per year (\$6.5 billion per year to \$34 billion per year).

By not accurately accounting for costs, EPA has failed to follow its own economic analysis guidance, its requirements for analysis under statutes, and best economic practices and requirements under the Office of Management and Budget's Circular A-4. In addition, the Small Business Regulatory Enforcement Fairness Act requires that EPA evaluate the impacts on small entities and the alternatives that could accomplish the same objectives. EPA should clarify whether it has considered such effects on small businesses and other organizations and propose options and flexibility for implementation. PNG's analysis further emphasizes that EPA should have subjected this Guidance to public comment prior to issuance.

III. The Guidance Should Be Implemented in a Practical Manner that Balances Resources While Addressing Risk

A. EPA must develop a background policy that reflects realistic, natural, and anthropogenic lead levels.

The Guidance states that a lead cleanup level should not be set below natural or anthropogenic background. However, establishing background for lead is difficult because lead is widely dispersed in soil and background can be from a variety of sources. For example, a site may have varying natural concentrations of lead in soil due to different geologies within the site. Also, residential properties within a site may have varying anthropogenic sources of lead that cannot be addressed under CERCLA or RCRA (e.g., leaded gasoline, lead-based paint, lead service lines). Indeed, even within a single property, natural and anthropogenic sources may vary. It often becomes impossible to speciate the sources of lead to separate what is background and what was contributed by the release driving the need for remedial action. This likely will result in multiple and varied background-based cleanup levels for lead that are property-specific.

EPA should provide additional guidance on establishing background concentrations of lead for sites involving multiple residential properties with varying sources of lead. Indeed, in its comments on the Lead Strategy, the Colorado Department of Health and Environment emphasized the need to develop such a policy.¹⁶ In doing so, we suggest EPA focus on a realistic, rather than a conservative, evaluation of background to help ensure the ability to meet the cleanup goals.

Appendix B demonstrates that anthropogenic soil levels will exceed the new RSLs for any community with older housing. As shown by the U.S. Department of Housing and Urban Development (HUD 2021), the U.S. average soil lead concentration for homes built prior to 1940 is 405 mg/kg, more than double the single-source RSL. Appendix B provides a suggested method for using the HUD data to derive site-specific anthropogenic soil lead values based on house age distribution.

¹⁶ Letter from Shaun McGrath, Environmental Health and Protection Services Director, Colorado Department of Public Health and Environment, to EPA Docket ID: EPA-HQ-OLEM-2021-0762 (February 28, 2022), *available at* <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0762-0022>.

B. EPA must provide guidance when previously remediated properties will need to be subject to additional remediation.

The Q&A associated with the Guidance states that, generally, a residential yard previously cleaned up will not need additional cleanup. However, the Guidance does not identify those circumstances when a residential yard may be identified as needing additional cleanup. Failure to address the myriad issues related to the hundreds of thousands of properties that have been previously remediated and may be subject to re-evaluation fails to provide fair notice to responsible parties and property owners.

As an initial issue, the depth of soil that exceeds a new cleanup level may not be known because the prior extent of contamination investigation targeted a higher level. EPA has provided no guidance on when responsible parties would be required to open an entirely new remedial investigation. One EPA Region stated that companies should follow current orders as written. Another EPA Region signaled that it would be likely that responsible parties will have to redo work required to be done this year under orders negotiated prior to this Guidance. This is the kind of implementation challenge that EPA should have considered and addressed thoroughly before issuing this Guidance with an immediate effective date and must be addressed now.

The Guidance also does not address the situation where “clean” fill approved by EPA or other agencies for use during the prior cleanup exceeds the new cleanup level. For example, our members are in the process of implementing EPA remediation orders requiring the use of backfill that is, for example, less than 100 ppm, yet previously complied with EPA orders that permitted backfill with higher lead concentrations. EPA has provided no guidance on whether companies will need to reassess all those yards where the backfill was more than 100 ppm and even whether companies will need to address the backfill itself. Complicating these issues further is that local fill may contain lead above a new cleanup level, particularly in highly urbanized communities or in communities where there are naturally occurring higher concentrations of lead in soil.

The Guidance further does not address whether new engineering and institutional controls will be required at residential properties previously cleaned up when the deeper soil capped by the clean fill exceeds the new RSL or a new cleanup level. The use of engineering and institutional controls on residential properties can be difficult to implement and enforce because homeowners (especially subsequent owners) usually do not want their property burdened with such controls and may not understand the procedures required to comply with the engineering and/or institutional control.

Consistent with the discussion above, we recommend EPA assess previously remediated properties based on site-specific risk rather than a one-size-fits-all approach based on national data sets. We further recommend that EPA acknowledge the reality of the scarcity of backfill that can meet the standards anticipated by the Guidance and the prior definitions of “clean” backfill, which adds difficulties to present remediation efforts. Furthermore, backfill specifications need to reflect regional background levels.

- C. EPA should re-evaluate previously remediated properties based on site-specific data, including community childhood blood lead data rather than national data sets.

As EPA explains, the RSLs, PRGs, and cleanup levels are driven by the CDC's childhood lead blood reference value and are intended to ensure, through modeling, that prolonged exposure to contaminated soil will not cause more than five percent of children's blood to exceed the CDC value. Most communities already have actual blood lead testing for children that shows that the community's childhood blood levels are below the CDC's reference value. The Guidance does not address how actual childhood blood lead data should be used when evaluating whether a site that includes residential properties needs to be remediated or reevaluated. At a minimum, the Guidance should be revised to state that remediated sites should not be reopened based solely on the new RSLs, PRGs, or cleanup levels unless available childhood blood lead levels or other data clearly indicate the earlier cleanup is no longer adequately protective.¹⁷

- D. The Guidance should be revised to account for the availability of resources for sampling, remediation, and restoration.

Hundreds of thousands of residential properties have been remediated for lead over the past 40 years. EPA estimates in its Economic Assessment of the Guidance that almost a half million residential properties will need to be addressed under the Guidance.¹⁸ This estimate does not account for state-led and voluntary remediation projects. The EPA Regions are encouraged in the Guidance to address these properties as part of their periodic reviews of sites (e.g., a five-year review for CERCLA sites). If the Guidance is implemented using the RSLs developed from the CDC reference value, many of these periodic reviews are likely to result in a determination that additional remedial action may be necessary. Residential property owners are going to expect immediate follow-up. However, there are not enough resources available in the United States to remediate that many properties in a short period of time.

For example, EPA anticipates that there will be strain on the supply of clean fill in some communities. Further, there are a limited number of remediation contractors qualified to perform large-scale residential yard cleanups. The Guidance provides little direction on how these sites will be prioritized and how to manage the public's expectations of getting their residential properties addressed promptly. Further, reopening already-cleaned sites on the basis of the new reference level—particularly where blood lead data shows the remedy to be protective—is likely to delay action at not-yet-investigated sites where lead levels may be higher because of the deployment of limited resources elsewhere.

- E. Given the state of resources, EPA should develop policies that will better use existing resources while appropriately addressing exposure.

As stated above, resources to implement the Guidance will be stretched. EPA should think creatively to address exposure and risk in a manner that will allow those resources to be used in the most efficient manner. Footnote 7 in the Guidance states that "EPA's Federal Facilities Restoration and Reuse Office (FFRRO) works with EPA regions and other federal agencies to

¹⁷ See Letter from Scott A. Thompson, Executive Director, Oklahoma Department of Environmental Quality, to EPA Docket ID: EPA-HQ-OLEM-2021-0762 (March 2, 2022), available at <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0762-0325>.

¹⁸ EPA Economic Assessment, Jan. 2024, Exhibits ES.7 & 4.4 (midpoint count).

develop creative, cost-effective solutions to environmental challenges at Federal Facility Superfund Sites.” EPA should apply this same creativity and focus on cost-effective solutions to private-party sites.

As set forth in Appendix B, we advocate for both the RSLs and site-specific cleanup levels being applied to the average concentrations for a residential yard and should not be considered as not-to-exceeded levels. EPA should provide additional guidance to ensure consistency in the application of the RSLs and site-specific cleanup levels.

When evaluating whether additional remediation is necessary under the Guidance, EPA should also recognize the benefit of existing covers in reducing exposure. EPA has, in fact, noted that even a sod cover reduces exposure effectively.

EPA should also consider soil amendments that can be used to reduce lead bioavailability. To that end, we recommend EPA fast track feasibility studies on amendments, such as provisions for the use of jarosite, which can be used as an alternative to achieve lower action levels with less impact on property owners.

- F. EPA should incentivize cooperating parties to achieve risk reduction in the most efficient manner.

Sources of lead exposure other than soils subject to cleanup under CERCLA or RCRA generally have greater impacts on blood lead levels than what can be addressed through remediation. Indeed, EPA has long recognized that addressing other sources of lead exposure may have a significantly greater beneficial impact than addressing contaminated soil that would be subject to remediation under CERCLA or RCRA.¹⁹ The Guidance should provide for the case where a cooperating party agrees to conduct activities beyond the statutory scope of CERCLA or RCRA. EPA should incentivize such action by allowing the benefits of that work to be reflected in the soil cleanup standards and/or remedy selection. Additional incentives, such as not requiring payment of oversight costs or posting of financial assurance for the work being done outside of CERCLA and RCRA authority as well as reduction in oversight costs or financial assurance requirements for other elements of the selected remedy, should also be considered. Incentives should bear a proportional relationship to the cost of the work and the benefits to the community. In the end, this approach could have significantly greater health benefits to the residents and help preserve scarce resources for either new or previously remediated sites.

IV. EPA Should Have Accepted Public Comment Before Finalizing this Guidance with an Immediate Effective Date

The undersigned organizations are very disappointed that EPA issued the Guidance as final and immediately effective without an opportunity for public comment. Accepting “feedback from the public which may be considered in any future updates to the guidance” is a poor substitute for robust stakeholder input, particularly when EPA refused to address certain comments submitted on its draft Lead Strategy. In particular, SSP and RCAP submitted technical comments in connection

¹⁹ See EPA, Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities, OSWER Directive #9355.4-12, at 8 (August 1994), *available at* <https://semspub.epa.gov/work/HQ/175347.pdf>.

with the draft Lead Strategy.²⁰ Yet, EPA did not respond to these comments. Instead, EPA stated generically in the final Lead Strategy, "Comments the Agency did not respond to generally applied to policy issues outside the purview of research or detailed research issues that were not appropriate for inclusion in a broad strategy document."²¹

Now, EPA has issued this final and immediately effective specific Guidance without first seeking and addressing public comments. Accordingly, EPA has lost opportunities to provide more clear direction to both its own regions and the parties that perform cleanups by learning from and responding to comments regarding highly relevant technical concerns and implementation challenges associated with this Guidance. EPA's failure to address previously submitted comments as EPA finalized this Guidance is indefensible, resulting in a demonstrable absence of clarity in the Guidance. If responding to comments was not appropriate for the Lead Strategy, EPA should have implemented a meaningful public comment opportunity prior to finalizing the Guidance.

We are hopeful, however, that EPA will now fully consider public input, respond to those comments, and revise the Guidance as appropriate. At the very minimum, EPA should prepare a response to comments provided by the public on the Guidance, potentially by way of an implementation memorandum addressing the issues discussed, including more clear direction on how the Guidance may or may not affect cleanups that are underway or complete and specifically stating that it is scientifically valid and acceptable to update the IEUBK modeling with updated and/or site-specific input parameters.

Sincerely,

Superfund Settlements Project
RCRA Corrective Action Project
National Mining Association
American Petroleum Institute

²⁰ SSP & RCAP Comments, Draft EPA Strategy to Reduce Lead Exposures and Disparities in U.S. Communities, to EPA Docket ID: EPA-HQ-OLEM-2021-0762 (Mar. 16, 2022), *available at* <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0762-0321>. These comments are attached as Appendix A. The NMA, SSP, and RCAP also shared these comments and other supporting documentation with the Office of Management and Budget's Office of Information and Regulatory Affairs during an Executive Order 12,866 meeting on Aug. 14, 2023. *See* Meeting 2050-ZA17, *available at* <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2050-ZA17&meetingId=215223&acronym=2050-EPA/OLEM>.

²¹ Lead Strategy at 52.