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Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street, SW
Room 10276
Washington, DC 20410-0001
Submitted electronically through www.regulations.gov

Re: Docket No. FR-6086-P-01 Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE)

The following comments are submitted on behalf of the National Housing Law Project (NHLP) and Earthjustice regarding the Department of Housing and Urban Development's Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE) (Docket No. FR-6086-P-01).

The National Housing Law Project (NHLP) is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income residents and homeowners; and increasing housing opportunities for underserved communities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. Also, NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 1,500 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and residents' rights for low-income families.

Earthjustice is a national nonprofit environmental law organization dedicated to protecting precious places and to defending the right of all people to a healthy environment. Along with the Shriver Center on Poverty Law and other partners, Earthjustice co-authored the report entitled [Poisonous Homes](#) which focuses on the close proximity of Superfund sites to federally-assisted housing, which highlights the concerns of exposure to environmental harms that sit outside people's homes.¹

¹ Earthjustice & Shriver Center on Poverty Law, POISONOUS HOMES: THE FIGHT FOR ENVIRONMENTAL JUSTICE IN FEDERALLY ASSISTED HOUSING (2020), <https://www.povertylaw.org/report/poisonoushomes/>.

HUD SHOULD EXTEND THE COMMENT PERIOD OR OPEN A NEW COMMENT PERIOD FOR SPECIFIC CONSIDERATION OF THE OUTSIDE ENVIRONMENT AND ENVIRONMENTAL JUSTICE

Pursuant to the January 20, 2021 Regulatory Freeze Pending Review memorandum from Ronald A. Klain, Assistant to President Biden and White House Chief of Staff, (“Klain memo”) which was published in the federal register on January 28, 2021,² we ask that these proposed regulations be delayed until such time as there can be further consideration of environmental justice issues and the impact of the outdoor environment on the residents who live in HUD-assisted housing.

Congress has passed multiple statutes to require that HUD-assisted housing be decent, safe, sanitary, and in good repair.³ But those statutes and implementing regulations have largely failed to address the common environmental risks present in the outdoor environment surrounding HUD-assisted housing, unless an environmental review has been triggered under the National Environmental Policy Act.⁴

On February 21, 2021, HUD’s Office of Inspector General (HUD OIG) issued a report, *Contaminated Sites Pose Potential Health Risks to Residents at HUD-funded Properties*.⁵ In this report, HUD OIG found that HUD’s current approach to identifying and addressing contaminated sites has resulted in federally-assisted housing residents experiencing prolonged exposure to toxic contamination, including dangerously high level of lead and proximity to Superfund sites that continue to present significant risks to human health. However, the proposed regulations are silent on the issue of inspecting the outdoor environment at HUD-assisted sites, including inspecting adjacent soil or the proximity of the housing to Superfund sites. Even before the HUD OIG report, *Poisonous Homes* exposed how tens of thousands of families live on or near dangerously contaminated land, including thousands of families participating in HUD’s programs.⁶ But the proposed regulations remain silent on virtually all of the issues raised in that report, including the ongoing failure of HUD inspections to address the toxic exposure these families endure.

Pursuant to the Klain memo, HUD has the authority to delay consideration of the proposed regulations so that HUD can consider questions of law, fact, or policy raised by the rules. The HUD OIG report as well as the Biden administration’s stated commitment to environmental justice further warrant reconsideration of the proposed regulations. If HUD elects not to delay consideration of the proposed rule, we ask that HUD extend the comment period or open a new comment period to specifically address some of the issues uncovered in the HUD OIG report.

² Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (Jan. 28, 2021).

³ See e.g., the United States Housing Act of 1937, 50 Stat. 888 (1937).

⁴ 42 U.S.C. 4321 et. seq. (1969); see also Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE), 86 Fed. Reg. 2582, 2585 (Jan. 13, 2021) (reinforcing HUD’s intention to prioritize reviewing the effects of the built environment in its decent, safe and healthy assessment without serious consideration of the impact of the outdoor environment).

⁵ Office of Inspector Gen., U.S. Dep’t of Housing & Urban Dev., Audit Rep. No. 2020-CH-004, *HUD’s Oversight of Lead in the Water of Housing Choice Voucher and Public Housing Program Units* (Aug. 21, 2020).

⁶ *Supra* note 1.

BACKGROUND

HUD has previously expressed a need for a new physical inspection model that is “well-aligned to the livability and the residential use” of the assisted housing.⁷ HUD has noted its current inspection protocols have largely remained the same since its inception, has relied heavily on individual judgment, does not incorporate technology advances, and does not place an adequate amount of focus on the living condition of units.⁸ Additionally, the current physical inspection process does not include resident engagement, despite statutory and regulatory law recognizing the importance of resident participation to the success of HUD’s programs, in particular, to the proper maintenance of the property.⁹

We applaud HUD for revising its physical inspection protocol and for its ongoing conversations with stakeholders about the changes. While HUD has made some important changes to its protocols, some of the changes are concerning and have the potential to exacerbate the harms done to assisted families. In particular, the prohibition of second- and third-party beneficiary status for residents; no clear structure of how HUD will meaningfully engage residents as part of the oversight and assessment of property’s health, and; no consideration of the impact of surrounding environmental hazards, including but not limited to exposure to lead, unsafe drinking water, and radon, to families’ health. Also, the notice does not discuss HUD’s enforcement of its condition standards, which is an important aspect of keeping properties in compliance.

PART A: AMENDMENTS AND ADDITIONS TO 24 CFR PART 5

In part A of the notice, HUD makes substantive and organizational changes to 24 CFR part 5 and other regulations describing HUD’s physical conditions standards. HUD seeks to centralize and harmonize the physical condition standards for its housing programs, improve the reliability of the physical inspection protocols, and improve its programmatic oversight. However, some of the proposed changes are concerning and may exacerbate the current issues with the physical inspection process.

Section 5.703— National Standards for the Condition of HUD Housing.

HUD clarifies its obligation to provide safe and habitable housing, synchronizing previous terms and definitions. HUD indicates the use of “health” is intended to capture an assessment of a broader range of impacts.¹⁰ The changes to the inspection protocol have shifted the inspection’s focus from building damages to the effects of housing conditions on the health and safety of residents.¹¹

⁷ Notice of Demonstration To Assess the National Standards for the Physical Inspection of Real Estate and Associated Protocols, 84 Fed. Reg 43,536, 43538 (Aug. 21, 2019); Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE), 86 Fed. Reg. 2582-83 (Jan. 13, 2021).

⁸ 86 Fed. Reg. at 2583.

⁹ 12 U.S.C. § 1715z-1b(a); 24 C.F.R. §§ 964.11, 245.5.

¹⁰ 86 Fed. Reg. at 2585.

¹¹ 86 Fed. Reg. at 2585.

However, in its assessment of properties, HUD must specifically consider hazards created by the outside environment and their effects on subsidized properties and most importantly, on the low-income tenants who reside in these developments or are eligible to live there. For the reasons stated above, the comment period should either be extended, or a new comment period opened to specifically consider these important factors.

HUD Question # 4. HUD should include 24 CFR § 982.401(l) in the regulations, as well as 24 CFR § 982.401(h), and other environmental hazards considerations. Including these considerations lines up with HUD’s stated goal of assessing if a property is “free of health and safety hazards.”¹² While owners only have authority over their property, HUD can require owners to take steps to mitigate the environmental threats to families’ health and safety. HUD already includes an assessment of the water, a utility provided by a third-party, in the inspection protocol. HUD should consider the proximity of the property to large polluters and transportation infrastructure, toxins in the soil and water, and the area’s air quality. HUD can add these considerations to the list of items to be assessed in the already listed inspectable areas or can create an additional inspectable area for these considerations.

24 CFR §5.703(b)—Inside

HUD reduces the number of inspectable areas from five to three. The proposed rule describes the areas to be considered when inspecting the inside inspectable area of an assisted property. ***The final rule should add text requiring common areas and mailboxes (inside) to be ADA compliant.***

24 CFR §5.703(c)—Outside

HUD reduces the number of inspectable areas from five to three. The proposed rule describes the areas to be considered when inspecting the outside inspectable area of an assisted property. ***The final rule should add text requiring certain components such as mailboxes, parking lots, play areas, disposal areas, and walkways to be ADA compliant.***

24 CFR § 5.703(d)—Units.

The proposed rule continues to require HCV and PBV units to have at least one bedroom or living/sleeping room for each two persons. ***The final rule should explicitly state that families with a member who experiences a disability should not be forced to use the living areas as a bedroom in lieu of granting the family's reasonable accommodation request for a larger voucher.*** These policies were frequently used during sequestration as a budgetary strategy. However, these policies penalize families for requesting a reasonable accommodation and are a violation of the Fair Housing Act and Section 504.¹³

¹² 86 Fed. Reg. at 2585.

¹³ Huynh et al. v. Harasz et al, Case No. 14-CV-02367-LHK, (N.D. Cal. Sep. 15, 2016) (requiring a family member sleep in the living room in lieu of granting a reasonable accommodation request for an additional bedroom is a violation of the Fair Housing Act because it was akin to a punishment for requesting the accommodation).

HUD Question #2. HUD Must Develop a New Approach to Ensure Residents of HUD-Supported Housing Have “Safe and Potable” Water. HUD manages housing stock for over 3.2 million households that live in public housing or use subsidized housing voucher programs.¹⁴ It also oversees the largest mortgage insurer in the world: the Federal Housing Administration.¹⁵ HUD offers assistance to very low-wealth households, consisting largely of elderly individuals and families with children under the age of eighteen.¹⁶ These demographic groups are even more susceptible than the general population to significant health risks from drinking contaminated water.¹⁷ Given that HUD provides or supports housing for many of our Nation’s most disserved residents, HUD has an obligation to ensure that the water provided to residents in HUD-supported housing is safe and potable.

HUD MUST ESTABLISH A COMPREHENSIVE AND PROTECTIVE DEFINITION OF SAFE AND POTABLE WATER. The Proposed Rule properly recognizes that our national housing standards must reflect that each “unit must have hot and cold running water, including an adequate source of safe and potable water.”¹⁸ HUD has indicated that it will develop rules that specify what “safe and potable” water means and seeks comments related to how it should determine whether water is “safe and potable.”

HUD should define safe as having “reasonable certainty that no harm will result,” as it has been defined in other federal statutes.¹⁹ “Safe” should be further defined to mean that “there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the conditions of its intended use.”²⁰ Safe drinking water is particularly important to protect those at greatest risk of waterborne diseases and contamination, such as young children, pregnant women because of the risk to their fetuses, those who are debilitated and elderly, and those living in unsanitary conditions.²¹

“Potable” means more than just safe. Potable water is water that can be used for drinking, cooking, bathing, and other household needs. To meet these uses, “the water must meet the required (chemical, biological and physical) quality standards at the point of supply to the

¹⁴ Office of Inspector Gen., U.S. Dep’t of Housing & Urban Dev., Audit Rep. No. 2020-CH-004, *HUD’s Oversight of Lead in the Water of Housing Choice Voucher and Public Housing Program Units*, at 4–5 (Aug. 21, 2020) (“HUD OIG Report”).

¹⁵ HUD – About Housing, HUD, https://www.hud.gov/program_offices/housing/hsgabout (last visited Mar. 9, 2021).

¹⁶ Nat’l Low Income Hous. Coal., *Who Lives in Federally Assisted Housing?*, Housing Spotlight, at 1 (Nov. 2012), <https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf>.

¹⁷ *Water-Related Diseases and Contaminants in Public Water Systems*, CDC (last updated Apr. 7, 2014), https://www.cdc.gov/healthywater/drinking/public/water_diseases.html.

¹⁸ Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE), 86 Fed. Reg. 2582, 2595 (Jan 13, 2021).

¹⁹ See, e.g., 21 U.S.C. § 346a.

²⁰ See 21 C.F.R. § 170.3(i).

²¹ WHO, *Guidelines for Drinking-Water Quality* 1–2 (4th ed. 2011).

users.”²² For example, “water should be of an acceptable colour, odour and taste for each personal and domestic use.”²³

SAFETY: HUD Cannot Rely on Compliance with the Safe Drinking Water Act to Ensure Residents Have Safe Drinking Water in Their Homes. HUD asked whether a public water system’s compliance with the Safe Drinking Water Act (“SDWA”) is an appropriate way to determine that the drinking water is safe. The answer is no. SDWA compliance does not ensure that individual homes have safe water for which there is “a reasonable certainty” that the water is not harmful “under the conditions of its intended use” in the home, such as drinking, cooking, and washing. Rather, SDWA is designed to measure a water system’s compliance with federal standards. In some instances, those standards do not reflect the standard of “reasonable certainty that no harm will result,” and do not even purport to. For example, compliance with federal lead standards is not designed to, and does not, reflect whether the drinking water in an individual home is safe. For other contaminants, EPA has failed to set enforceable limits for many pollutants and chemicals known to be harmful, including PFAS. Further, many maximum contaminant levels (“MCLs”) under SDWA are out of date and do not reflect latest scientific evidence regarding what levels of a contaminant cause harm. Finally, some dangerous contaminants like *Legionella* can be present in water within homes even though the water provided by the water system was free of the bacteria, because the bacteria grows in water tanks in residences.

1. The Lead and Copper Rule of SDWA Is Not Designed to, and Cannot Be Relied Upon to, Keep People Safe from Lead in Drinking Water in Individual Homes

Lead is a potent neurotoxin that is known to cause severe health impacts at very low doses, especially to children, formula-fed infants, and fetuses. Indeed, experts from the Centers for Disease Control and Prevention (“CDC”), the World Health Organization (“WHO”), the American Academy of Pediatrics, and HUD itself have all concluded that there is no safe level of lead exposure.²⁴ EPA, however, has not set a health-based MCL for lead. Rather, EPA’s Lead and Copper Rule (“LCR”) is a program under which a *small* sample of sites are tested for lead, and a water system is deemed in violation of the law only if a certain percentage of those tested locations exceeds a *non-health based* “lead action level” of 15 parts per billion.²⁵ Individual residences, including the ones sampled, can have significant amount of lead in their

²² Megersa Olumana Dinka, *Safe Drinking Water: Concepts, Benefits, Principles and Standards*, in *Water Challenges of an Urbanizing World* (Matjaž Glavan ed., 2018).

²³ Doug Donoho, *Some Critical Thinking About a Human Right to Water*, 19 ILSA J. Int’l & Compar. L. 91, 100 n.37 (2012), quoting Comm. on Econ., Soc. & Cultural Rights, *General Comment 15*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), at 4.

²⁴ See, e.g., *Basic Information about Lead in Drinking Water*, EPA (last updated Aug. 4, 2020), <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water>; *Lead in Drinking Water*, CDC (last updated Nov. 18, 2020), <https://www.cdc.gov/nceh/lead/prevention/sources/water.htm>; *Lead Poisoning and Health*, WHO (Aug. 23, 2019), <https://www.who.int/news-room/fact-sheets/detail/lead-poisoning-and-health>; Press Release, Am. Acad. Pediatrics, With No Amount of Lead Exposure Safe for Children, American Academy of Pediatrics Calls For Stricter Regulations (June 20, 2016), <https://services.aap.org/en/news-room/news-releases/aap/2016/no-amount-of-lead-exposure-safe-for-children-stricter-regulations/>; HUD OIG Report at 7.

²⁵ See, e.g., *Basic Information about Lead in Drinking Water*, EPA (last updated Aug. 4, 2020), <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water>.

drinking water, yet the system could still be deemed in compliance with SDWA.²⁶ Indeed, a recent HUD Office of the Inspector General report concluded that HUD has failed to protect residents from lead in drinking water precisely “because HUD relied on [EPA] to ensure that public water systems provided water that was safe to drink.”²⁷

2. SDWA Does Not Regulate All Contaminants Known to Be Unsafe in Drinking Water.

SDWA does not regulate all chemicals known to be present in drinking water and linked to adverse health effects. For example, there are no enforceable limits under the SDWA for any per- or polyfluoroalkyl substances (“PFAS”), a class of thousands of man-made chemicals. Human exposure at very low concentrations to several well-studied and widely produced PFAS has been linked to a variety of adverse health effects, including cancer, elevated cholesterol, obesity, immune suppression, pre-eclampsia, impaired liver and kidney function, and endocrine disruption.²⁸ As the federal government’s own scientists have recognized, the entire class of PFAS is comprised of structurally similar compounds that scientists can “reasonably expect to act through the same pathways and have similar effects.”²⁹

PFAS are commonly found in drinking water. Scientists estimate that up to 110 million Americans could have PFAS-contaminated drinking water.³⁰ According to one senior CDC official, the presence and concentration of PFAS in U.S. drinking water presents “one of the most seminal public health challenges for the next decades.”³¹ Yet, as mentioned above, SDWA does not regulate any PFAS. HUD should protect residents from exposure to PFAS in their drinking water. There is scientific support for setting the MCL at 2 parts per trillion of PFAS in the drinking water for any PFAS that can be measured reliably to that level.³² At a minimum, HUD should review state laws to identify MCLs for contaminants which have not yet been

²⁶ See 40 C.F.R. § 141.80.

²⁷ Office of Inspector Gen., U.S. Dep’t of Housing & Urban Dev., Audit Rep. No. 2020-CH-004, *HUD’s Oversight of Lead in the Water of Housing Choice Voucher and Public Housing Program Units*, at 5 (Aug. 21, 2020) (“HUD OIG Report”).

²⁸ Agency for Toxic Substances & Disease Registry (ATSDR), U.S. Dep’t Health & Hum. Servs., *Toxicological Profile for Perfluoroalkyls: Draft for Public Comment* (June 2018), <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf>.

²⁹ Hearing on “Examining the Federal response to the risks associated with per- and polyfluoroalkyl substances (PFAS)” Before the S. Comm. on Env’t & Pub. Works, 1, 4 (2019) (Testimony of Linda S. Birnbaum, Director, Nat’l Inst. Env’t Health Sci. & Nat’l Toxicology Program Nat’l Ins. Health); see also Zhanyun Wang et al., *A Never-Ending Story of Per- and Polyfluoroalkyl Substances (PFAS)?*, 51 ENV’T SCI. & TECH. 2508 (2017), <https://pubs.acs.org/doi/10.1021/acs.est.6b04806>.

³⁰ EWG’s Tap Water Database, *PFAS*, ENV’T WORKING GRP. (Oct. 2019), <https://www.ewg.org/tapwater/reviewed-pfas.php>; Eric D. Olson, *Broken Safe Drinking Water Act Won’t Fix PFAS Crisis*, NAT. RES. DEF. COUNCIL (Sept. 12, 2019) <https://www.nrdc.org/experts/erik-d-olson/broken-safe-drinking-water-act-wont-fix-pfas-crisis>.

³¹ Pat Rizzuto et al., *CDC Sounds Alarm on Chemical Contamination in Drinking Water*, Bloomberg Env’t (Oct. 17, 2017), <https://news.bloombergenvironment.com/environment-and-energy/cdc-sounds-alarm-on-chemical-contamination-in-drinking-water>.

³² See EU Directive 98/83/EC (which calls for the adoption by the end of 2020 of a limit value of 0.1 µg/L for a sum of 20 individual PFAS listed in Annex III, as well as a limit value of 0.5 µg/L for total PFAS concentration); see also NRDC, *Scientific and Policy Assessment for Addressing Per- and Polyfluoroalkyl Substances (PFAS) in Drinking Water*, (2019), <https://www.nrdc.org/sites/default/files/assessment-for-addressing-pfas-chemicals-in-michigan-drinking-water.pdf>.

regulated under SDWA, and adopt standards to ensure “reasonable certainty that no harm will result.”³³ As HUD develops an appropriate standard, it should also coordinate closely with EPA and regularly review data prepared by public water systems for unregulated contaminants as required by EPA’s Unregulated Contaminant Monitoring Rule.³⁴

3. SDWA Does Not Regulate All Aspects of Drinking Water That Can Make Such Water Unsafe.

HUD’s definition of safe drinking water must go beyond standards issued and contaminants regulate by SDWA because SDWA’s purview does not cover the universe of what can make residential water unsafe. SDWA applies only to public water systems, meaning the system for providing water to the public for human consumption through pipes and the like.³⁵ But drinking water can be unsafe from issues outside of a public water system’s distribution of water. For example, *Legionella* is a water-borne bacterium that can grow and multiply in building water system components. When exposed to *Legionella* via drinking water, people can develop a dangerous form of pneumonia called Legionnaires’ disease.³⁶

4. Some of SDWA’s Maximum Contaminant Levels Are Outdated and Do Not Reflect the Scientific Evidence of Levels at Which There is Reasonable Certainty of No Harm.

There is often a regulatory lag in setting safe limits for toxic chemicals under SDWA, which has caused many states to adopt stricter standards to ensure public safety.³⁷ Given the age demographics and people living in HUD assisted housing, HUD should not rely on potentially outdated national MCLs. Rather, to meet the “reasonable certainty that no harm will result” test and safeguard the health of HUD-supported households, HUD standards should require compliance with the strictest applicable MCLs in the nation for chemicals regulated under SDWA.

POTABILITY: “Potable” Water Is Safe Water That Is Also Free of Objectionable Odor, Taste, Color, or Cloudiness and Within Reasonable Limits of Temperature.

HUD must ensure that water in HUD-supported buildings is potable. Not only must the water be safe, but it must be free of foul smells or objectionable taste. The water should also not be discolored or turbid. In New York City’s public housing, residents complained of water as dark as coffee coming from their tap water source. The source of this water discoloration was

³³ For instance, several states have adopted MCLs for PFAS: Michigan, New York, New Jersey, New Hampshire, California, Connecticut, North Carolina Minnesota, Vermont, and Massachusetts. See Association of Drinking Water Administrators website, <https://www.asdwa.org/pfas/>.

³⁴ See *Final Rule: Revisions to the Unregulated Contaminated Monitoring Rule (“UCMR 4”)*, 40 CFR § 141.40 (2016); see also *Proposed Revisions to the Unregulated Monitoring Rule (“UCMR 5”)*, 86 Fed. Reg. 13846 (March 11, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-03920.pdf>.

³⁵ See 42 U.S.C.A. §§ 300f, 300g-1.

³⁶ *Legionella - Causes, How It Spreads, and People at Increased Risk*, CDC (last updated Jan. 15, 2020), <https://www.cdc.gov/legionella/about/causes-transmission.html>.

³⁷ See Annie Snider, *What Broke the Safe Drinking Water Act?*, POLITICO (last updated May 11, 2017), <https://www.politico.com/agenda/story/2017/05/10/safe-drinking-water-perchlorate-000434/>.

traced back to unsanitary rooftop water tanks.³⁸ Likewise, in the Johnson Down Housing Project in Los Angeles, over 90% of residents routinely have muddy water in their taps that stays murky even after running the water for several hours.³⁹ If people will not drink water because it smells or tastes foul or is dark in color or cloudy, it may not qualify as “potable.” It is critical to address these issues because if residents cannot trust the water in their unit to be safe and potable, they may avoid using the water for necessary drinking, cooking, and hygiene purposes. If residents do not trust the water from the tap in HUD-supported housing and are forced to buy bottled water, HUD has failed to supply them with potable water.

HUD MUST CONDUCT ITS OWN MONITORING OF HOUSEHOLDS’ TAP WATER TO ENSURE THAT THE WATER IS SAFE AND POTABLE.

The recent Inspector General’s Report discussed earlier determined that HUD lacks “sufficient policies, procedures, and controls” to assure residents have a “sufficient supply of safe drinking water.”⁴⁰ For example, it concluded that HUD did not have policies or procedures that require a public housing agency “to take action” in response to the potential for or determined presence of lead in drinking water.⁴¹ HUD must establish such monitoring and remedial policies immediately to ensure that housing it supports provides safe and potable water to its residents.

HUD Must Monitor Water in Each Unit to Ensure It Is Providing "Safe and Potable" Water.

To ensure that it is providing safe and potable water in each HUD-supported unit, HUD must establish requirements for periodic monitoring of every unit for lead; PFAS and other unregulated yet harmful contaminants; *Legionella*; and, objectionable smell, taste, color, or clarity. Each unit should be tested for lead on a regular basis. Monitoring and sampling should be done in accordance with the best science to achieve accurate results.⁴²

1. Lead

Lead can leach into water at various points on its path from a water treatment facility to a unit, including through pipes or fixtures within a building or unit. These are points where the owner, including HUD, retains responsibility for repairs. Lead levels are highly variable.⁴³ Thus, HUD should test water in each unit for lead on a regular basis. HUD should also require sampling to be

³⁸ Frank Runyeon, *Inspectors Reported Contamination in Water Tanks, NYCHA Had It Erased*, CITY & STATE N.Y. (July 31, 2018), <https://www.cityandstateny.com/articles/politics/new-york-city/nycha-contamination-water-tanks>.

³⁹ Lena Nozizwe, *The LA Water Residents Don't Dare Drink*, DEUTSCHE WELLE (Apr. 7, 2017), <https://www.dw.com/en/the-la-water-residents-dont-dare-drink/a-39533478>.

⁴⁰ HUD OIG Report at 10.

⁴¹ *Id.* at 1, 5.

⁴² *See generally* Report to the President: Science and Technology to Ensure the Safety of the Nation’s Drinking Water, Office of the President (Dec. 2016); *see also* Joshua Kesin & Shaun A. Goho, *Detecting Lead in the Household Tap Water: Sampling Procedures for Water Utilities*, EMMETT ENVTL. L. & POLICY CLINIC (2017) (describing the best ways to monitor and test for lead).

⁴³ *See* Sheldon Masters et al., *Seasonal Variations in Lead Release to Potable Water*, 50 ENV’T SCI. & TECH. 5269 (2016), <https://pubs.acs.org/doi/abs/10.1021/acs.est.5b05060>.

done in accordance with the best available science to produce the most accurate results, including explicitly banning pre-stagnation flushing and the removal or cleaning of faucet aerators prior to collecting lead samples that mask or dilute tested lead concentrations.⁴⁴ HUD should also systematically search all buildings and units for lead-containing laterals, pipes, or fixtures.

2. PFAS and Other Harmful Yet Unregulated Contaminants

HUD should work with EPA to develop a protocol for monitoring and identifying PFAS and other emergency contaminants in the tap water in HUD-supported buildings.⁴⁵ For PFAS, HUD should require the use of Total Oxidizable Precursors (TOP) Assay or Total Organic Fluorine (TOF) assay methods of testing for PFAS, and other developing tools that would provide a more comprehensive picture of the total PFAS present in a sample.⁴⁶

Other unregulated contaminants are known to be harmful but have not been regulated under the SDWA. For example, 1,4 dioxane has been classified as a “probable” human carcinogen as far back as 1992, but does not have an MCL under SDWA.⁴⁷ Perchlorate has been shown to prevent the thyroid from absorbing iodine, which is critical for brain development and especially dangerous for pregnant women and young children,⁴⁸ yet EPA has declined to regulate perchlorate under SDWA.⁴⁹ Because of the danger these and some other unregulated contaminants pose to human health, HUD should work with EPA to develop protocols for monitoring them.

a. Legionella

Because *Legionella* can grow in water tanks, HUD should proactively assess the susceptibility of all HUD-supported units to *Legionella* issues and should take steps to prevent outbreaks. HUD should also require every HUD-supported building and associated water infrastructure, such as storage tanks, to be tested on a regular basis to ensure no home contains *Legionella* in its drinking water.

⁴⁴ Joshua Kestin & Shaun A. Goho, Emmett Env’t Law & Pol’y Clinic, *Detecting Lead in Household Tap Water: Sampling Procedures for Water Utilities* 13, 17 (2017).

⁴⁵ Because PFAS would not be added to water after the water leaves the water treatment facility, PFAS testing would likely be unnecessary in every unit of multi-unit buildings.

⁴⁶ See, e.g., Leah Burrows, *Uncovering Hidden Chemicals*, HARVARD GAZETTE (Mar. 5, 2021), <https://news.harvard.edu/gazette/story/2021/03/new-tool-finds-pfas-compounds-on-cape-cod/>. HUD should test for at least those PFAS for which monitoring methods exist, including PFOA, PFOS, PFNA, PFHxS, and GenX. While those PFAS may be tested under the UCMR, the threshold levels for certain contaminants do not necessarily reflect the level at which those PFAS are harmful. See Alissa Corder et al., *Guideline Levels for PFOA and PFOS in Drinking Water: The Role of Scientific Uncertainty, Risk Assessment Decisions, and Social Factors*, 29 J. EXPOSURE & SCI. ENV’T EPIDEMIOLOGY 157, 167 (2019).

⁴⁷ EPA, *1,4-Dioxane (1,4-Diethyleneoxide): Hazard Summary* (last updated Jan. 2000), <https://www.epa.gov/sites/production/files/2016-09/documents/1-4-dioxane.pdf>, at 1; see also Oliver Twaddell et al., *Unregulated, Uncertain and Ubiquitous: Environmental Pitfalls of PFAS and 1,4-Dioxane*, For the Defense (2018), at 2 (explaining that 1,4 dioxane is a likely human carcinogen).

⁴⁸ Annie Snider, *What Broke the Safe Drinking Water Act?*, POLITICO (last updated May 11, 2017), <https://www.politico.com/agenda/story/2017/05/10/safe-drinking-water-perchlorate-000434/>.

⁴⁹ *Perchlorate in Drinking Water: Final Action*, EPA (last updated Feb. 11, 2021), <https://www.epa.gov/sdwa/perchlorate-drinking-water>.

b. Potability

When testing for lead, *Legionella*, and PFAS, inspectors should also look for objectionable odor, taste, color, or clarity.

HUD must respond to tenant concerns and complaints about drinking water quality.

HUD does not have an effective system for responding to tenants' complaints and concerns about drinking water. HUD must institute such a system to in order to effectuate the rights guaranteed in their lease and/or guaranteed in each HUD-assisted program. HUD must create a transparent process to handle tenant complaints that provides real-time information on HUD's receipt of a complaint, its inspection schedule for the individual apartment, and the repair schedule for correcting the drinking water impairment.

HUD'S WATER MONITORING PROGRAM MUST BE TRANSPARENT.

HUD Must Immediately Notify Residents of Unsafe or Unpotable Water, What Is Being Done to Rectify the Condition, and When the Condition Has Been Resolved.

Residents cannot protect themselves from drinking water contamination unless they are given accurate information in a timely manner. In practice, HUD, private owners, and public housing authorities infrequently inform residents of these potential drinking water risks. HUD must require prompt notification to affected tenants when: (1) any lead or *Legionella* is discovered; (2) HUD learns of violations of SDWA or other applicable regulatory programs; and, (3) HUD learns of other conditions, such as the presence harmful contaminants such as PFAS, that prevents a conclusion of "reasonable certainty that no harm will result." HUD must also provide tenants with information on how HUD intends to remove the contaminant and the timeline for doing so.

Tenants are not in a position to determine whether unsafe and/or unpotable water has been remedied. HUD must fulfill its obligations to provide decent, safe, and sanitary housing by notifying residents once the water is safe and potable so they can feel safe in drinking and using it.

HUD Must Make Inspection Data Available Online and Available to Tenants in Written Form.

Drinking water contamination is a significant public health concern. HUD must centralize this information and disseminate it to tenants in written form as well as publish it online. HUD should also require each public housing complex to maintain a physical record of inspections on-site to allow tenants to review these documents upon request. Disseminating this information widely and putting it into accessible formats will empower tenants and improve public health.

HUD Must Require Annual Reports from Housing Providers Reflecting the Testing Done, the Results, and Any Repairs or Modifications Made to Support “Safe and Potable” Water Within Each Unit.

HUD must set up a consistent and uniform process for public housing agencies and owners of buildings to confirm that water is safe and potable. Local public housing agencies and owners should be required to fill out an inspection report to submit to HUD on an annual basis that tracks complaints, response time to complaint, local municipal public water system safety reports, and remediation actions signed off by the individual tenant when appropriate. HUD should create a methodology to measure each public housing agency and owner’s compliance with HUD’s new inspection requirements. When the local housing authority violates these requirements, it should be placed under a federal monitor until it corrects the errors.

HUD MUST IMMEDIATELY RECTIFY ANY WATER FOUND TO BE UNSAFE OR NOT POTABLE BY HUD OR WATER SYSTEM MONITORING OR TESTING.

To ensure it is providing safe and potable water, HUD must develop standards requiring all housing providers of HUD-supported housing to immediately remedy any problems with lead, PFAS and other unregulated harmful contaminants, *Legionella*, taste, odor, color or clarity that make the water unsafe and/or unpotable for household-related activities including drinking, cleaning, bathing, and cooking. All problems must be addressed within thirty days. If the problem cannot be fixed within twelve hours, moreover, HUD must, at no cost to the tenant, also provide an emergency alternative water source for the residents until the issue can be fully addressed.

For example, because there is no safe level of lead in water, HUD must ensure that residents in its supported units are not drinking lead-contaminated water. Where lead is detected, HUD should require implementation of a faucet filter installation and maintenance program, and the provision of free bottled water to affected residents immediately and until lead is no longer present. HUD should work with EPA to develop similar remedial provisions to guarantee safe and potable drinking water after *Legionella*, unsafe levels of PFAS or other contaminants, or other unpotable characteristics are detected.

HUD must also be proactive to uphold its duty to ensure residents have safe and potable drinking water. For example, it should require replacement of pipes and fixtures that contribute to lead contamination and commit to replacing them all within five years.

24 CFR § 5.703(e)—Health and Safety Concerns.

HUD’S INSPECTION SCHEME SHOULD UPDATE LEAD INSPECTION REQUIREMENTS.

HUD’s proposed rule sets the standard that “[t]he inside, outside and unit must be *free* of health and safety hazards that pose a danger to resident.”⁵⁰ However, HUD’s current lead inspection

⁵⁰ 86 Fed. Reg. at 2595.

rules allow lead hazards to persist in HUD-supported housing. The current rules have failed our most vulnerable children. For instance, kids in New York City were lead-poisoned after the New York City Housing Authority had declared the whole building “lead free” and stopped inspecting for lead hazards.⁵¹ HUD’s current lead inspection and abatement regime is failing and must be improved. Our children and families deserve better. Further, lead poisoning is a critical issue of environmental justice. Black children living below the poverty line are *twice* as likely to have elevated levels of lead in their blood as poor white or Hispanic children.⁵²

HUD’s requirements must focus on primary prevention efforts to prevent lead poisoning rather than environmental remediation after a child has an elevated blood lead level.

Experts agree that addressing lead hazards after children present with an Elevated Blood Lead Level is a failure to our children. There is no safe level of lead in blood, and the effects of lead exposure are irreversible. Further, the rates of regular blood lead testing of children are dismal. Even among children covered by Medicaid, who are mandated to be tested at 12 months and 24 months of age, fewer than half of those children eligible are actually tested. For these reasons, HUD must design its policies to implement primary prevention practices that identify and eliminate all lead hazards *before* children are exposed.

1. HUD’s lead inspection program should be at least as stringent as the best local lead inspection programs.

The proposed rule recognizes that “[t]he standards for the condition of HUD housing in this section do not supersede State and local housing codes.”⁵³ However, the proposed rule exempts Housing Choice Voucher and Project Based Voucher housing from compliance with state and local rules; “State and local code compliance is not part of the determination whether a unit passes the standards for the condition of HUD housing under this section for the [Housing Choice Voucher] and [Project Based Voucher] programs.”⁵⁴ HUD’s new rule should require that *all* HUD-supported housing comply with state and local codes that are more stringent than HUD’s rules in order to comply with the “standards of condition for HUD housing.”

Further, communities across the country are adopting lead inspection requirements in an effort to prevent their children from being poisoned by lead. Several of these programs have more stringent requirements for lead inspection than HUD’s regime. For example, Cleveland recently adopted a proactive rental inspection program beginning in March 2021 requiring every rental unit to be inspected for lead every two years and to receive a lead-safe clearance. This program covers all rental units, not just those where children under age 6 reside. Detroit’s lead inspection program requires annual inspections.⁵⁵ Philadelphia and Buffalo, other lead poisoning hot spots,

⁵¹ Greg B. Smith, *Kids Poisoned After Lead Turns Up in Apartments Declared “Lead-Free” by NYCHA*, THE CITY (Feb. 21, 2021) <https://www.thecity.nyc/2021/2/22/22296330/nycha-lead-poisoning-bumpurs-bronx-new-york-city>.

⁵² Deniz Yeter, *Disparity in Risk Factor Severity for Early Childhood Blood Lead among Predominantly African-American Black Children: The 1999 to 2010 US NHANES*, INT. J. ENVIRON. RES. PUBLIC HEALTH 2020, 17(5), 1552; <https://doi.org/10.3390/ijerph17051552>

⁵³ 86 Fed. Reg. at 2595.

⁵⁴ *Id.*

⁵⁵ Christine MacDonald, *Rental enforcement lags in Detroit’s lead hot spots*, DETROIT NEWS (May 16, 2018) <https://www.detroitnews.com/story/news/local/detroit-city/2018/05/16/detroit-lead-paint-scrutiny-poison-hot-spots/35000365/>.

have also adopted more rigorous lead inspection programs for rental units in order to identify and address lead risks. HUD's lead inspection requirements should be at least as stringent as the most stringent local program in the country.

2. HUD's regulation should close the Lead Based Paint Disclosure Loophole and require housing providers to affirmatively look for lead hazards.

The Lead-Based Paint disclosure rule only require disclosure of known lead hazards.⁵⁶ The rule has acted as a perverse incentive for landlords to actively avoid testing for lead paint in an effort to avoid the costs of addressing the hazards and to maintain a plausible deniability that they did not "know" of lead hazards on their property in order to limit liability for lead-poisoned kids.⁵⁷ HUD should use its regulations to fix this loophole by creating an affirmative duty for any owner or operator of housing accepting public funds to actively look for and identify lead hazards.

3. HUD should undertake a systematic risk assessment of all publicly-funded housing to identify all lead risks.

HUD should provide equal protection to all residents of HUD-assisted housing instead of having various levels of protection depending on what HUD subsidy program families are a part of.

a. Risk Assessment should use XRF on indoor painted surfaces and on porches.

HUD should no longer allow visual inspections to suffice as a valid way to assess lead risks. Best practices for identifying lead paint on painted surfaces involves using a portable x-ray fluorescence tool, or XRF gun. Visual inspection for peeling or cracking paint misses the presence of lead dust, which can be inhaled and pose a risk to all occupants of the housing. Visual assessments, on their own, are "incapable of identifying lead hazards that result in lead poisoning and are not the preferred method of inspection."⁵⁸ Risk assessments must occur both at regular inspection intervals and prior to units being leased to HUD assisted households or approved for HUD assistance.

b. Risk Assessment should look for all possible means of lead exposure

HUD should clarify that a risk assessment must look at all possible avenues for exposure to lead, not just for lead paint. In practice, risk assessments done when a child has an elevated blood lead level often look for lead paint in the home, and if it is identified, there is no additional assessment. This means there may be additional risks of lead in the soil, lead dust from tracked-in soil, or in the water in the home or risks in the paint, water, or soil at day care, school, or other places where the child spends time that go unnoticed and unaddressed. HUD should close this loophole by requiring thorough risk assessments of all potential sources of lead exposure.

⁵⁶ See Katrina Korfmacher and Michael Hanley, *Are Local Laws the Key to Ending Childhood Lead Poisoning?*, J. HEALTH POLIT POLICY LAW, 38(4): 757-813 (Aug 2013).

⁵⁷ See Anu Paulose, *Economic Hazards of Environmental Justice for Lower-Income Housing Tenants*, WILLIAM & MARY ENVIRONMENTAL LAW AND POLICY REVIEW, Vol. 39 at 515 (Feb. 2015) <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1625&context=wmelpr>.

⁵⁸ Emily Benfer et al, *Health Justice Strategies to Eradicate Lead Poisoning: An Urgent Call to Action to Safeguard Future Generations*, YALE JOURNAL OF HEALTH POLICY, LAW AND ETHICS, 19:2 at 19 (2020).

c. Risk Assessment should include identifying potential sources of lead in water.

Under the current rules, “[t]esting of drinking water for the presence of lead is permitted as an optional component of a complete Lead Inspection/Risk Assessment.”⁵⁹ HUD issued this guidance that testing water for lead was optional in October 2016, as a horrified nation watched Flint, Michigan reckon with a crisis of lead in their water. The crisis in Flint was detected primarily because a smart, attentive doctor noticed a spike in the number of children with elevated blood levels. It’s possible that had HUD required regular lead testing in HUD-supported housing, the Flint crisis could have been identified and addressed before children were poisoned. In order to implement an effective primary prevention program that identifies and addresses lead hazards before children are poisoned, HUD should require testing of drinking water in the home for presence of lead during a risk assessment, and on a regular basis. Drinking water sampling and monitoring is discussed in more detail to our comments to HUD’s question 2, *supra*.

d. Risk assessment should occur in all units, not just in units where children younger than 6 will reside.

While children under the age of 6 are at high risk for permanent damage from lead poisoning, they are not the only at-risk populations. Lead in a pregnant woman’s blood has the risk of transferring lead to the fetus, leading to negative developmental and health outcomes once the child is born. Limiting lead inspections to units where children under 6 reside also leave in place lead hazards at units of grandparents, neighbors, and relatives of young children where the children might visit or stay for childcare purposes. Further, limiting lead requirements could incentivize landlords not to rent to families with children under 6. In 2019, the Massachusetts Fair Housing Center sued the Massachusetts Department of Health alleging that the state’s lead poisoning law discriminates against families with young children by incentivizing landlords not to rent to them. Massachusetts’ lead law requires landlords to de-lead an apartment before renting to a family with a child under age 6. The lawsuit claims that instead of removing lead hazards, some landlords instead refuse to rent to families with young children.⁶⁰

4. HUD should lower the definition of lead-based paint.

HUD’s proposal to “make[] no substantive changes to the lead-based paint requirements” of its current regulations misses a critical opportunity to make long-overdue updates to outdated lead standards. Congress delegated to HUD the authority to lower the definition of lead-based paint on all ‘target housing,’ a broad category that covers “any housing constructed prior to 1978” with limited exceptions.⁶¹ HUD has *never* exercised this authority, so Congress’s original, outdated, and dangerous definition remains in place today. This definition allows paint with lead concentrations of up to 1.0 mg/cm² or 0.5% (by weight) to be considered lead-free – these are

⁵⁹ HUD, POLICY GUIDANCE 2016-02—CLARIFICATION ON IDENTIFYING AND ADDRESSING LEAD IN DRINKING WATER (Oct. 26, 2016), <https://www.hud.gov/sites/documents/PGI-2016-02.PDF>.

⁶⁰ Shira Schoenberg, *Lawsuit: Massachusetts lead paint law discriminates against families with young children*, *Mass Live* (Nov. 27, 2019), <https://www.masslive.com/news/2019/11/lawsuit-massachusetts-lead-paint-law-discriminates-against-families-with-young-children.html>

⁶¹ “Target housing” is defined as “any housing constructed prior to 1978, except housing for the elderly or persons with disabilities or any 0-bedroom dwelling (unless any child who is less than 6 years of age resides or is expected to reside in such housing).” 15 U.S.C. § 2681(9), (17).

levels of lead over *fifty-five* times higher than what the Consumer Product Safety Commission allows in paint on new products.⁶²

The levels of lead in paint that HUD currently allows were not even considered safe in the 1970's, when the medical community assumed that it was safe for children to have blood lead levels up to 30 or 40 µg/dL⁶³ – levels that may require bowel decontamination under current CDC guidance, and are unacceptable given the current scientific consensus that no level of lead in children's blood is safe.⁶⁴ The statutory levels that HUD uses are *not* health-based; they were levels requested by industry in the 1970's and 1980's based on what was considered detectable by the technology of the time.⁶⁵ But modern technology can measure lead at levels that are orders of magnitude lower than the current standard,⁶⁶ so there is no reason for HUD to continue to leave children exposed to unacceptable risk by failing to lower the definition of lead-based paint.

5. HUD must also take this opportunity to update its dust-lead and soil-lead hazard standards and clearance levels.

HUD regulations require the use of dust-lead and soil-lead hazard standards and clearance levels that are “at least as protective as those promulgated by the EPA at 40 CFR 745.227(h).”⁶⁷ But EPA's standards allow dangerous levels of lead in dust and soil. EPA's current soil-lead hazard standards and its dust-lead clearance level for window troughs were set in 2001 at levels that would result in a child to have a blood-lead level of 10 µg/dL – a level considered safe at the time but now universally recognized to be unsafe.⁶⁸ And while EPA's dust-lead hazard standards and clearance levels were more recently lowered, EPA's own analysis shows that even these updated levels would result in a 32% chance that a child would lose 2 or more IQ points.⁶⁹ Nor does EPA have *any* hazard standards or clearance levels for porches – an area of the home that HUD recognizes has “high levels of lead dust after lead hazard control work in the home.”⁷⁰ While HUD Policy Guidance for Lead-Based Paint Hazard Control and Lead Hazard Reduction Demonstration Grantees do partially address these issues by requiring lower window trough and porch clearance levels than what EPA requires, these levels apply only to a subset of HUD housing, and still continue to use dangerously high clearance levels for floors and window sills.⁷¹ HUD must proactively lower its hazard standards and clearance levels to ensure that all housing

⁶² Compare 15 U.S.C. § 2681(9) with 16 C.F.R. § 1303.1(a).

⁶³ See Mar. 1972 Hearings on Senate Subcommittee for Health of PL 93-151, at 28-29.

⁶⁴ Centers for Disease Control and Prevention, Recommended Actions Based on Blood Lead Level, <https://www.cdc.gov/nceh/lead/advisory/acclpp/actions-blls.htm>.

⁶⁵ See Mar. 1972 Hearings on Senate Subcommittee for Health of PL 93-151, at 28-29; PL 100-242 § 566(c).

⁶⁶ EPA, Office of Pollution Prevention & Toxics, Definition of Lead-Based Paint Considerations 7-10 (May 2019) [EPA-HQ-OPPT-2018-0166-0447].

⁶⁷ 24 C.F.R. §§ 35.1320(b)(2), 35.1340(d).

⁶⁸ Lead; Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1205, 1206, 1217, 1223 (Jan. 5, 2001).

⁶⁹ EPA, OFFICE OF POLLUTION PREVENTION & TOXICS, TECHNICAL SUPPORT DOCUMENT FOR RESIDENTIAL DUST-LEAD HAZARD STANDARDS RULEMAKING 131 (June 2019) [EPA-HQ-OPPT-2018-0166-0574 at 131].

⁷⁰ HUD, Policy Guidance Number: 2017-01 Rev 1, *Revised Dust-Lead Levels for Risk Assessment and Clearance; Clearance of Porches*, at 2 (Feb. 16, 2017).

⁷¹ HUD, Policy Guidance Number: 2017-01 Rev 1, *Revised Dust-Lead Levels for Risk Assessment and Clearance; Clearance of Porches*, at 1 (Feb. 16, 2017).

under its jurisdiction is under the most health-protective standards possible. HUD should also work with EPA to ensure that the most health-protective standard is applied across all federal programs. These policy changes should include timely written notification of lead in the home and soil to the assisted households and applicants for the unit.

6. HUD should require permanent abatement of all identified lead paint hazards in public housing and publicly-supported housing rather than allow interim measures to address lead hazards.

HUD's current approach of using interim measures to address lead hazards until a building is modernized is a poor solution where ongoing maintenance looks for the interim measures to fail before correcting them. This puts children at risk of lead poisoning in the time between when the interim measures fail and the next round of maintenance occurs. Further, failure of interim measures varies from unit to unit, depending heavily on the unit's condition and the residents' use of the property. This means placing units on a regular schedule for maintenance may still expose children to lead hazards if the interim measures fail quicker in their unit than on average. HUD should identify all the lead risks in HUD-assisted housing and quantify the costs of permanent abatement, then seek the funding from Congress for full abatement of all lead hazards in all HUD-assisted housing. This is the only way to seek equity and address the environmental injustice of lead poisoning.

When abatement occurs, PHAs and project owners must relocate tenants and cover the expense of relocation and temporary displacement. Any abatement program must be subject to HUD approval and oversight.

7. Where interim measures are permitted, HUD should provide lead-specific cleaning instructions to tenants and must provide cleaning supplies so that tenants can safely maintain the unit.

As long as HUD's policy allows the use of interim measures to address lead hazards, HUD should help residents understand the risks left in their units and how best to maintain the property to keep their family safe. There are specific cleaning instructions for lead dust—such as no dry dusting and frequent cleaning of children's toys—that should be conveyed to residents where there are lead hazards in the unit that have not been abated.⁷² Some local lead poisoning programs have taken to giving residents cleaning supplies in an attempt to reduce lead exposures in homes. For example, Erie County, New York provides free interior and exterior visual inspections upon request. During those inspections, the staff will identify any potential lead hazards, “provide cleaning supplies and [suggest] strategies for avoiding lead hazards.”⁷³ If HUD knows that a unit has lead hazards and it will not fully abate those hazards, it must provide the

⁷² See *Cleaning Up Sources of Lead in the Home*, MINNESOTA DEPARTMENT OF HEALTH, <https://www.health.state.mn.us/communities/environment/lead/fs/cleaningup.html>; *Tips for Cleaning Lead Dust*, CONNECTICUT DEPARTMENT OF PUBLIC HEALTH, https://portal.ct.gov/-/media/Departments-and-Agencies/DPH/dph/environmental_health/lead/preventlead/Tipsforcleaningleaddustfinalpdf.pdf; *How to Clean Up Lead Dust*, MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.maine.gov/dhhs/mecdc/environmental-health/eohp/lead/documents/leadtipsheet2.pdf>.

⁷³ *Lead Poisoning Primary Prevention Program*, ERIE COUNTY DEPARTMENT OF HEALTH, <https://www2.erie.gov/health/index.php?q=node/36>.

residents with cleaning supplies and specific instructions on how to protect their family from lead exposures.

8. HUD must identify all lead water lines and fixtures in publicly supported housing and replace all lead lines and fixtures within 5 years.

Lead exposure from water comes not only from the water lines owned by the water utility, but also from laterals, water lines, and fixtures within a building or unit that are the responsibility of the property owner. Therefore, HUD cannot rely on water utilities to ensure that the water coming out of the tap in each unit is lead-free. HUD must do a complete assessment to identify all lead laterals, lines, and fixtures within all HUD-assisted units and replace each identified item within 5 years.

9. HUD should require public housing agencies and private owners to notify EPA and the state when conducting activities subject to the renovation, repair, and painting (RRP) rule so EPA can coordinate RRP compliance inspection.

Renovations, repair and painting activities provide a pathway for lead exposure unless lead-safe practices are observed. In most states, EPA is responsible for enforcing compliance with the RRP rules, but 14 states enforce their own lead-safe practices programs. However, there are generally no requirements to notify the enforcing agency (be it EPA or the state) that RRP activities are being undertaken. Without notice, there is little chance that inspectors will be available to ensure that lead-safe practices are being observed to protect residents and their neighbors. HUD should require any time an PHA or owner of HUD-assisted housing is doing an RRP activity, that the enforcing agency (EPA or the state) be notified at least a week in advance of that activity. This will provide the enforcing agency an opportunity to inspect the job site to ensure that lead-safe work practices are being observed.

10. HUD should adopt safeguards to address the potential falsify lead results.

A recent joint probe by EPA and New York City discovered that “[t]he New York City Housing Authority falsely certified hundreds of lead abatement reports over a five-year period ending in 2018, demonstrating a ‘total disregard ... for the well-being of NYCHA residents.’”⁷⁴ HUD also discovered that the Alexander County Housing Authority had failed to conduct lead-based paint inspections despite certifications that it had completed those inspections.⁷⁵ Similarly, the City of Rochester discovered that a number of the private clearance firms were found to be falsifying dust wipe tests. In response, the City of Rochester suspended several clearance providers from doing dust wipe tests for a year. The city also developed an auditing system to ensure results were not being falsified. HUD must develop an auditing process, and there should be severe

⁷⁴ *NYCHA Falsely Certified Lead Abatement Reports for Years, City/Federal Review Finds*, NBC NEW YORK, <https://www.nbcnewyork.com/news/local/nycha-falsely-certified-lead-abatement-reports-for-years-city-federal-review-finds/2772684/> (last updated Dec. 10, 2020)

⁷⁵ Molly Parker, *HUD: Alexander County housing officials failed to test for lead-based paint*, THE SOUTHERN ILLINOISAN, https://thesouthern.com/news/local/hud-alexander-county-housing-officials-failed-to-test-for-lead-based-paint/article_e9f3d1a6-713f-5be7-85f8-f2dcb05eb521.html (updated Jun. 17, 2017)

consequences—including civil and criminal liability—for those found falsifying results relating to lead testing and abatement.

24 CFR § 5.703(f)(2)-(3)—Compliance with State and local codes. In the proposed rule, HUD excludes the application of state and local condition standards to Housing Choice Vouchers (HCV) and Project-based Vouchers (PBV) units.⁷⁶ The inapplicability of state and local housing code to HCVs and PBVs units is in opposition of the statute and HUD’s historical practices.⁷⁷ State and local codes should be taken into consideration when determining compliance with the federal regulations for all housing programs. Further, HCV and PBV units should not pass inspection if the unit doesn’t comply with federal, state, and local codes. Participating owners must abide by more onerous state and local law in other contexts, such as notice of entry laws. Voucher families should be able to benefit from using state and local laws to improve their housing conditions. State and local code violations are often identified first and enable families to more quickly have their housing conditions improved by reach out to their local code enforcement departments for assistance, without the risk of their losing their subsidies. This balance of federal, state, and local codes acts to the benefit of assisted families by improving their housing conditions and accountability from housing providers. The included revision runs contrary to HUD’s obligation to provide decent, safe, and sanitary housing and of its stated goal of creating an inspection protocol that is responsive “to the changing needs of an evolving housing portfolio.”⁷⁸ To the extent HUD is concerned that state and local codes are being used to target and exclude voucher holders, HUD could clarify that local and state code violations cannot result in the termination of the subsidy or used in a manner to penalize the tenant household. ***HUD must allow for state and local codes to apply to all of its housing programs, including HCV and PBV units.*** As such, the text should be revised to read (revised language underlined in italics):

“(2) All HUD housing *other than units assisted under the HCV and PBV programs* must comply with State or local housing code in order to comply with this subpart.

(3) State and local code compliance is not part of the determination whether a unit passes the standards for the condition of HUD housing under this section for the HCV and PBV programs (except in accordance with § 5.705(a)(3)).”

HUD Question # 13. HUD asks for comments regarding deficiencies that should be codified in the final rule. HUD notes its intension to publish a proposed rule concerning a requirement to install carbon monoxide detectors in HUD-assisted and HUD-insured housing. HUD must move quickly to require the installation of carbon monoxide detectors in HUD-assisted and HUD-insured housing. Given that most local codes require the presence of carbon monoxide detectors, there is no need for delay.

⁷⁶ 86 Fed. Reg. at 2595 (to be codified at 24 CFR § 5.703(f)(2)-(3)).

⁷⁷ 42 USC § 1437(o)(8)(B)(ii)(I); HUD, Housing Choice Voucher Guidebook 7420.10G, Housing Search and Leasing § 9.3 (2020); HUD, Housing Choice Voucher Guidebook 7420.10G §§ 10.3, 17.2(2001) (referencing the use of local code standards during HQS inspections and inspections of SROs).

⁷⁸ 86 Fed. Reg. at 2588.

Section 5.705—Inspection Requirements.

24 CFR § 5.705(b)—Entity Conducting Inspections, Exceptions. In the proposed 24 CFR § 5.705(b)(2), the citation to the Voucher regulations should cite to 24 CFR 982.352(b)(1)(iv). ***HUD should amend the text*** to read “A PHA-owned unit receiving assistance under section 8(o) of the 1937 act must be inspected by an independent entity as specified in § 982.352(b)(1)(iv) of this title” (revised language is underlined in italics).

24 CFR § 5.705(c)—Timing of Inspections. Currently, the timing of inspections for the housing programs is tied to the previous inspection date.⁷⁹ The proposed rule ties the timing of future inspections with the property’s anniversary date.⁸⁰ During the transition from the current timing protocol to the proposed timing protocol, ***HUD should require the inspection to take place on the earliest of the two date rather than delaying the inspection.*** Residents who live in troubled properties and the advocates who support them rely on HUD to timely inspect the property in order to document the physical defects at the property. To delay the inspection would unduly exacerbate the harmful effects of housing defects and delay the process of bringing non-compliant properties back into compliance.

HUD Question # 14. HUD also proposes to allow “certain qualifying properties” to be inspected every five years.⁸¹ ***HUD should not adopt this change in the inspection protocol.*** This change is not reflective of HUD’s desire to improve its oversight of assisted properties.⁸² HUD has previously noted its inspection models “sometimes provide inaccurate and inconsistent results and can prevent HUD from effectively evaluating housing across programs.”⁸³ HUD does not know if the proposed protocol will reliably and consistently capture an accurate picture of the conditions of properties. Extending inspection frequency beyond three years only increases and exacerbates the current harm families experience. As previously mentioned, residents who live in properties with poor conditions and the advocates who support residents rely on HUD to timely inspect the property to document the physical defects at the property and to begin the process of bring non-compliant properties back into compliance. Additionally, dramatic changes in conditions can happen in between inspections as a result of natural disasters, changes in management or maintenance staff, or insufficient yearly maintenance. Extending the frequency of inspections will likely prolong the property’s non-compliance, harm families, and jeopardize the housing subsidies.

Although HUD believes requiring PHAs and owners to complete annual self-inspections will decrease the likelihood of threats to residents’ health and safety, this new requirement may also contribute to the concealment of threats to residents’ health and safety. The proposed rule also allows for changes in the inspection protocol to happen three years after implementation of previous changes to the inspection protocol.⁸⁴ Coupling five-year inspections with changes in the

⁷⁹ See 24 CFR § 200.855.

⁸⁰ 86 Fed. Reg. at 2596 (to be codified at 24 CFR § 5.705(c)).

⁸¹ 86 Fed. Reg. at 2596 (to be codified at 24 CFR § 5.705(c)(2)).

⁸² 86 Fed. Reg. at 2582.

⁸³ 86 Fed. Reg. at 2583.

⁸⁴ 86 Fed. Reg. at 2597 (to be codified at 24 CFR § 5.709(a)(1)).

inspection protocol may result in a property being inspected under different protocols, calling into question the reliability of the assessment of the property’s physical health.

24 CFR 5.705(d)—Inspection Costs. Proposed 24 CFR § 5.709(d) permits the inspecting entity to assess fines on owners for reinspection where a deficiency cited in the previous inspection was not repaired.⁸⁵ In the preamble, HUD indicates PHAs can also be charged reinspection fees, but does not include PHAs in the amended regulatory language.⁸⁶ ***In light of HUD’s expressed desire to provide regulatory clarity, the language should be amended to include PHAs.*** As such, the text should be revised to read (revised language underlined in italics):

“...except that a reasonable fee may be required of the PHA or owner of a property for a reinspection if the PHA or ~~an~~ owner notifies the entity responsible for the inspection that a repair has been made or the allotted time for repairs has elapsed and a reinspection reveals that any deficiency cited in the previous inspection that the owner is responsible for repairing was not corrected....”

24 CFR 5.705(e)—Access to Property for Inspection. Proposed 24 CFR § 5.705(e)(2) explicitly mandates PHAs give HUD “full and free access to all facilities in its projects” for inspection.⁸⁷ The property access requirements for inspection as described in proposed 24 CFR § 5.705(e) are only applicable to PHAs. ***However, owners of HUD-assisted and HUD-insured housing should also be subject to the same access requirements.***⁸⁸ HUD Notice H 2019-04 requires a zero (0) score to be recorded if the owner or owner’s agent is at fault for an incomplete inspection within seven calendar days of the initial scheduled inspection date. Withholding full and free access to the inspectable areas would be owner or owner’s agent action that would lead to an incomplete inspection.⁸⁹

HUD Question #15. HUD asks for comments on how to involve tenants in identifying poor performing properties. Although HUD’s regulations consistently cite the identification of poor physical conditions and maintenance concerns as an area in which active resident participation is critical,⁹⁰ HUD has continuously excluded residents from participating in the physical inspection process. REAC previously used customer satisfaction surveys as part of the physical inspection process but discontinued its use. REAC has expressed interest in reinstating resident surveys as part of the physical inspection process.⁹¹ ***HUD should reinstate the use of customer satisfaction surveys as an assessment tool to identify residents’ opinions of the building’s physical condition and to identify other areas of concern.*** The resident survey should be readily accessible to residents, taking into consideration language access needs, residents’ access to and ability to use digital products, and accessibility for those who experiences a disability. As such, the survey should not exclusively be a digital product and should be available in various languages. The survey should include questions about water leaks, mold, bedbugs, lead-based

⁸⁵ 86 Fed. Reg. at 2596 (to be codified at 24 CFR § 5.705(e)(2)).

⁸⁶ 86 Fed. Reg. at 2587.

⁸⁷ 86 Fed. Reg. at 2596 (to be codified at 24 CFR § 5.705(e)(2)).

⁸⁸ See HUD, Notice H 2019-04 Standardization of REAC Inspection Notification Timelines 2 (Feb. 19, 2019).

⁸⁹ *Id.*

⁹⁰ 24 C.F.R. §§ 245.5, 964.11.

⁹¹ *NSPIRE Resident Engagement Imitative*, HUD,

https://www.hud.gov/program_offices/public_indian_housing/reac/nspire/drei (last visited Mar. 11, 2021).

paint, smoke detectors, carbon monoxide detectors, radon, and other environmental hazards. The survey should also include questions about management performance and treatment of tenants regarding their rights, including the right to organize and their ability to complain about housing conditions and have them redressed in a timely and proper manner.

During the NSPIRE demonstration, resident organizations, if present, can identify additional dwelling unit to be inspected.⁹² Unfortunately, HUD does not plan to include the data gathered from the additional units in the NSPIRE advisory score.⁹³ ***HUD should allow the residents and resident organizations, where there is one, to submit additional units to be inspected during the physical inspection. The data gathered from those units should be included in the scoring of the property. HUD should also allow residents and the resident organization, if there is one, to meet with the inspector beforehand and to allow a representative of the resident group to shadow the inspector during the inspection.***

PHAs and Owners must provide advance notice of the inspection and notice of the completion of the inspection to residents and any tenant organization. Prior notice must be given at least 48-hours beforehand or within the greater time period as proscribed by state and local law. The notice must include the name of the responsible Field Office staff, their direct phone number, and direct email address (not general office number or “info” email address), along with a plain language explanation describing the reason for and nature of the inspection and the outcome of the inspection. The notice should meet families’ language access and accessibility needs, and posted in the owner’s management office and on any bulletin boards in all common areas.

HUD must continue to require PHAs and owners make reports, such as physical inspection reports, self-inspection reports, Public Housing Assessment System (PHAS) reports and Management and Occupancy Reviews (MORs), available to residents for review and copy. These reports should be available to residents at no cost. HUD should remove the 60-day limit on residents’ access to review and copy.

HUD must create an appeal process allowing residents to report conditions and operation issues not captured in REAC inspection reports, the Management and Occupancy Reviews (MORs), Public Housing Assessment System (PHAS) reports, the PHA/owner self-certification, and, or self-inspection reports. In a July 8, 2019 memorandum to owners, HUD encourages residents to submit to the HUD Field Offices comments on all the information provided by the owner.⁹⁴ HUD should codify the notice and comment appeal right for tenants that are afforded to owners. HUD, either through its Field Offices or through contract administrators, must collect and document residents’ comments regarding physical inspection reports, self-inspection reports, self-certification of compliance with programmatic requirements, PHAS reports and, or MORs. And where HUD determines, based on residents’ comments and,

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Memorandum from Brian A. Murry on Working with Owners and Residents at Department of Housing and Urban Development Multifamily Housing Properties to Multifamily Regional Directors, Satellite Office Directors, Owners and Management Agents (Jul. 8, 2019) [hereinafter “Murry Memo”]. In the public housing program, HUD has committed itself “to exploring resident satisfaction, self-sufficiency, and participation measures in” the final PHAS rule. Public Housing Evaluation and Oversight: Changes to the Public Housing Assessment System (PHAS) and Determining and Remediating Substantial Default; Interim Rule, 76 Fed. Reg. 10136, 10139 (Fe. 23, 2011).

or local code violations, that the self-certification or self-inspection reports were flawed or presents false information, HUD must take immediate enforcement action to pursue the housing provider for the false certification and, or reporting and to bring the property into compliance.⁹⁵ Where it has not been conducted, a MOR should be initiated.

Finally, HUD should prioritize enforcement of the right to organize and meaningfully fund resident organizing activities. Locally, collective tenant action is a necessary tool to resolve systematic issues at assisted properties. It has been the efforts of residents and advocates that have resulted in the preservation of properties and better housing conditions for families. However, tenants often face harassment or retaliation for organizing or standing up for their rights. Most states do not protect tenants from retaliation for organizing their fellow tenants. While residents in public housing and the housing programs have a right to organize, there is no such right in the voucher program.⁹⁶ Additionally, HUD must investigate and take enforcement action were residents report harassment and retaliation by housing providers and their agents. Lastly, HUD must provide funding for resident organizing activities and for developing residents' capacity. HUD must increase the funding for tenant participation activities in Public Housing and allocate up to \$10 million per year in Section 514 funding.⁹⁷

Section 5.707 Uniform Self Inspection Requirement and Report

The proposed rule includes a mandate that PHAs and owners conduct and submit to HUD annual self-inspection reports. ***HUD should not adopt self-inspections by PHAs and owners.*** Allowing self-inspections as described in the proposed rule is concerning in light of some of the current veracity issues with housing providers falsely self-certifying compliance with lead-based paint certification and the remediation of defects.⁹⁸ If HUD adopts an annual self-inspection mandate, HUD must couple the obligation with an auditing process to verify the veracity of self-inspection reports, create a process allowing residents to contest the self-inspection report's findings, and commit to taking enforcement action when it is determined the self-inspection was flawed or presents false information. Additionally, given PHAs and owners' interest to be fiscally conservative, it is critical that annual inspections be conducted by a neutral third-party. The scheduling of a neutral third-party inspection often motivates PHAs and owners to finally address long overdue maintenance. Self-inspections will completely disincentivize that accountability and risk further deterioration of HUD-assisted properties.

⁹⁵ See Murry Memo at 2.

⁹⁶ 24 CFR pts. 964, 245.

⁹⁷ HUD currently funds PHAs receiving operating subsidies \$25 per occupied unit for resident participation activities (24 C.F.R. Sec. 990.190(e)). However, HUD's "\$25/unit rule" was enacted in 2001 and did not account for any inflation; twenty years later, PHAs still receive funding according to the \$25/unit rule. If the \$25 per unit per year funding for tenant participation had kept up with inflation, PHAs would now receive \$37.44 per occupied unit per year for tenant participation activities. See Interim Instructions on Distribution and Use of Operating Subsidy Funds Received for Resident Participation Activities, Notice PIH 2001-03 (Jan. 18, 2001); Value of 2001 US Dollars Today, INFLATIONTOOL (Mar. 8, 2021, 1:10 PM), <https://www.inflationtool.com/us-dollar/2001-to-present-value?amount=25>. Under the amended Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA), Congress allows HUD to allocate up to \$10 million per year for tenant groups and nonprofit organizations to provide capacity building and technical assistance to tenants in HUD properties facing issues with housing conditions, contract restructuring, or other threats to long-term affordability.

⁹⁸ See *supra* notes 74-75.

PHAs and Owners must provide advance notice of inspections and notice of the completion of the inspection to residents and any present tenant organization. Prior notice must be given at least 48-hours beforehand or within the greater time period as proscribed by state and local law. The notice must include the name of the responsible Field Office staff, their direct phone number, and direct email address (not general office number or “info” email address), along with a plain language explanation describing the reason for and nature of the inspection. The notice should meet families’ language access and accessibility needs. Additionally, the self-inspection process should require PHAs and owners to make the self-inspection report and other relevant documents available to residents for review and copy at no cost to residents. Residents should have the opportunity to submit comments challenging the information in the self-inspection report or about the conditions not captured in the self-inspection report. And where HUD determines, based on residents’ comments and, or local code violations, that the self-inspection report was flawed or presents false information, HUD must take immediate enforcement action.

An alternative to self-inspections is the submission of state and local code reports and enforcement records. And if HUD chooses to move forward with mandating self-inspections, the submission of state and local code reports and enforcement records should also be required. In communities without agencies engaged in code enforcement, HUD should also accept complaints by local legal aid offices, public health officers, or other entities who have observed poor housing conditions or potential violations of state or local code violations. In the NSPIRE demonstration, local code violations must be reported to HUD by participants. HUD should incorporate this practice into the regulations. However, instead of only submitting local code violations, PHAs and owners should be required to upload all local code enforcement reports, in their entirety, and any letters or other communication received by the PHA or owner from the local code enforcement agency. This would ensure HUD has a fuller understanding of the local code enforcement’s impression of the property. Additionally, the inclusion of this information enables the inspection protocol to evolve by allowing HUD to observe which considerations are commonly included in local code enforcement inspections throughout the country.⁹⁹ This type of evolution would help HUD achieve its goals of quickly responding to the changing landscape,¹⁰⁰ protecting residents by addressing health and safety hazards, and would increase accountability and consistency.

Section 5.709 Administrative Process for Defining and Revising Inspection Criteria

The language regarding emergency revisions allows the Secretary to publish a final notice without public comment in order to protect federal financial resources or the health or safety of residents of public housing properties. ***HUD should include the consideration of the health and safety of all HUD-assisted residents.*** The text should be amended to read (revised language is underlined in italics):

⁹⁹ An example is the requirement to have carbon monoxide detectors. Roughly, half of the states require the use of carbon monoxide detectors; however, HUD has not previously included functioning carbon monoxide detectors as part of its physical inspection standards. Collecting data on which safety considerations are becoming increasingly more important to local jurisdictions will allow HUD to determine if those considerations should be included in its physical inspection protocol.

¹⁰⁰ 86 Fed. Reg. at 2588, 2596-97.

“...(2) Emergency Revisions. The Secretary may publish a final notice without 30 days of public comment in the case of an emergency to or the health or safety of residents of ~~public housing projects assisted by HUD programs~~, after HUD makes a documented determination that such action is warranted due to:...”.

Section 5.711 Scoring, Ranking Criteria, and Appeals

24 CFR § 5.711(a)—Applicability. One of HUD’s stated goals for the revisions to 24 CFR part 5 is to “increase clarity and ease ... compliance” with the applicable condition standards regulations.¹⁰¹ ***In 24 CFR § 5.711(a), HUD should include a cross-reference to the Section Eight Management Assessment Program regulations.***

24 CFR § 5.711(c)—Inspection Report Requirements. ***In the proposed rule, HUD should state the party responsible for the physical inspection will provide the owner and PHA with the physical inspection report.*** Similar to the language currently in 24 CFR § 200.857(c)(1), the text should be revised to read (revised language is underlined in italics):

“(1) HUD’s Real Estate Assessment Center (REAC), or the appropriate entity either as described in § 5.705(b), or as identified in the regulatory agreement or contract for the property as described in § 5.705(b)(1), will provide the owner or PHA or owner’s representative with the entire physical inspection report (electronically through the internet or by mail), which provides the physical inspection results and other information relevant to the inspection, including all deficiencies... (2) Severe health or safety deficiencies. Upon completion....”

In the preamble, HUD states it will require PHAs and owners to address severe health and safety (SHS) life threatening conditions within 24 hours and to correct all other non-life threatening SHS deficiencies within 30 days.¹⁰² However, the text of 24 CFR § 5.711 only includes the cure period for life-threatening SHS deficiencies, which must be “mitigated” within 24 hours.¹⁰³ And the proposed 24 CFR § 5.711(c)(2) does not include the cure period for the correction of non-life threatening SHS deficiencies.¹⁰⁴ ***HUD should mandate all non-life threatening SHS defects be corrected within thirty (30) calendar days. Additionally, HUD should use “corrected or “resolved or sufficiently abated” instead of the term “mitigated” when describing how to address life-threatening SHS defects.***

24 CFR § 5.711(d)—Technical Review of Inspection Results. In the proposed rule, HUD increases the time period in which an owner can request a technical review—from 30 calendar days to 45 calendar days following the release of the physical inspection report.¹⁰⁵ ***HUD should not extend the time period for submitting a request for a technical review.*** The increased time period to submit a request for a technical review will unduly delay the remediation of deficiencies at properties. Particularly so in light of HUD not including a time period for which a

¹⁰¹ See 86 Fed. Reg. at 2588.

¹⁰² 86 Fed. Reg. at 2588.

¹⁰³ 86 Fed. Reg. at 2597 (to be codified at 24 CFR §5.711(c)(1)).

¹⁰⁴ 86 Fed. Reg. at 2597 (to be codified at 24 CFR §5.711(c)(2)).

¹⁰⁵ Compare 24 CFR §§ 200.857(e), 200.857(d), 902.68(a)(2) with proposed 24 CFR § 5.711(d).

PHA or owner must complete its survey of the property and remediation any non-life threatening SHS defects.¹⁰⁶ ***Additionally, HUD should define what day will be considered the “day of release” of the physical inspection report.***

Further, HUD should include “PHA” in 24 CFR § 5.711(d)(3) in light of HUD’s expressed desire to provide regulatory clarity.¹⁰⁷ As such, the text should be revised to read (revised language is underlined in italics):

“(3) Burden of proof that error or adverse conditions occurred rests with the owner *or PHA*. The burden of proof rests with the owner *or PHA* to demonstrate that an objectively verifiable and material error (or errors) or adverse conditions occurred in the REAC’s inspection through submission of evidence, which if corrected will result in a significant improvement in the property’s overall score. The REAC will apply a rebuttable presumption that the inspection was conducted accurately. To support its request for a technical review of the physical inspection results, the owner *or PHA* may submit photographic evidence, written material from an objective source with subject matter expertise that pertains to the item being reviewed such as a local fire marshal, building code official, registered architect, or professional engineer, or other similar evidence.”

In the proposed rule, HUD describes the basis for requesting a technical review. The proposed text states there are four types of errors for which a technical review can be requested.¹⁰⁸ The text describing material errors is written as an umbrella category, but the structure of the proposed rule does not include the list of the three types of material errors.¹⁰⁹ Currently, the other error types—building data error, unit count error, non-existent deficiency error—are types of material error.¹¹⁰ ***HUD should indicate that the basis for a technical review is a material error associated with the physical inspection score, and that building data errors, unit count errors, and non-existent deficiency errors are types of material errors.***

24 CFR § 5.711(e)—Independent HUD Review. In 24 CFR § 5.711(e), HUD describes the instances where HUD will review and adjust, where appropriate, physical inspection scores without a request for a technical review. The language in the proposed text mirrors 24 CFR § 200.857(e)(1); however, the proposed language does not include “owners.” Through its regulatory consolidation and realignment, HUD intends to centralize and harmonize the physical condition standards for its housing programs.¹¹¹ ***HUD should include “owners” in the proposed language along with PHAs to ensure clarity that both are eligible for an independent HUD review.*** As such, the text should be amended to read (revised language underlined in italics):

“(e) Independent HUD Review. Under certain circumstances, HUD may find it appropriate absent a PHA *or owner* request for technical review to...”

¹⁰⁶ 86 Fed. Reg. at 2597 (to be codified at 24 CFR § 5.711(c)(2)). Even if HUD amends 24 CFR § 5.711(c) to include a mandate that all non-life threatening SHS deficiencies be corrected within thirty (30) days, families will have to live with uncorrected defects for almost a quarter of the year.

¹⁰⁷ 86 Fed. Reg. at 2597 (to be codified at 24 CFR § 5.711(d)(3)); 24 CFR § 902.68(a)(1).

¹⁰⁸ 86 Fed. Reg. at 2597 (to be codified at 24 CFR § 5.711(d)(4)).

¹⁰⁹ 86 Fed. Reg. at 2597 (to be codified at 24 CFR § 5.711(d)(4)(i)).

¹¹⁰ See 24 CFR §§ 200.857 (d)(3), 902.68(b)(6).

¹¹¹ 86 Fed. Reg. at 2584.

Additionally, paragraph (e) does not include the process for requesting an adjustment to the physical inspection score.¹¹² ***HUD must include the process and timing for requesting a score adjustment in the final rule to achieve HUD’s expressed goal of providing regulatory clarity.***

24 CFR § 5.711(g)— Issuance of final score and publication of score. Paragraph (g) describes when a property’s score is considered final. ***The reference to (c) should be a reference to (e).*** The text should be amended to read (revised language is underlined in italics):

“(g) Issuance of final score and publication of score. (1) The score of the property is the final score if the owner or PHA files no request for technical review, as provided in paragraph (d) of this section, or for other adjustment of the physical condition score, as provided in paragraph ~~(e)~~ (e) of this section. If the owner or PHA files a request for technical review or score adjustments in accordance with paragraphs ~~(e) and (d)~~ and (e) of this section, the final inspection score is the score issued by HUD after any adjustments are determined necessary and made by HUD at the conclusion of these processes.”

24 CFR § 5.711(h)—Responsibility to notify residents of inspection; and availability of documents to residents. ***HUD must mandate PHAs and owners give residents at least 48-hours prior notice or the greater time period as proscribed by state and local law.*** In a July 2019 memorandum to owners, HUD reminds owners of their obligation to give residents notice “of any planned physical inspections of their units or the housing development generally.”¹¹³ HUD states that families should receive 24-hour notice, unless state or local law requires more than 24-hour notice.¹¹⁴ During the physical inspection, inspectors, and often management, enter the residents’ unit. A resident may want to have additional notice time in order to make their unit “presentable” in the way they perceive that term, would like an opportunity to ask for their unit not to be used in the inspection, or to take time off from work to be present during the inspection. The current recommended notice period does not provide residents enough time to exercise these options. Residents’ dignity and personal space must be respected throughout this process. Additionally, principles of fairness weight in favor of giving resident more notice time. Owners and PHAs receive a 14-day notice prior to a REAC physical inspection, and owners and PHAs choose the date of their own inspections. In both instances, owners and PHAs can provide notice to residents soon after learning of the inspection date.¹¹⁵ As such, HUD should require at least a 48-hour notice to residents and mandate all notices comply with state and local law. The text should be amended to read (revised language is underlined in italics):

“(h) Responsibility to notify residents of inspection; and availability of documents to residents--(1) Notification to residents. *An PHAs and owners must give at least 48-hour notice to notify* its residents of any planned inspections of their units or the housing development generally. *All notices must comply with state and local law requirements, including greater notice periods.*”

¹¹² Compare 24 CFR §§200.857(e)(2)-(4), 902.24(b) with proposed 24 CFR § 5.711(e).

¹¹³ Murry Memo at 1 (citing 24 CFR 200.857(g)).

¹¹⁴ *Id.*

¹¹⁵ HUD, Notice PIH 2019-02/H 2019-04 Standardization of REAC Inspection Notification Timelines (Feb. 22, 2019).

The notice must include a plain language explanation describing the reason for and nature of the inspection, and inform residents that they may be present during the inspection and have the ability to point out problem areas. The notice should also include the name of the responsible Field Office staff, their direct phone number, and direct email address (not general office number or “info” email address). The notice should meet families’ language access and accessibility needs.

Finally, ***HUD should remove the 60-day limit on residents’ access to review and copy the REAC report and associated documents.*** HUD should remove the time limitation because resident should have ongoing access to the documents. Congress and HUD have recognized active resident participation in the operation of HUD-subsidized properties as essential to the success of assisted properties.¹¹⁶ Residents and resident organizations have played a vital role in highlighting systematic condition issues at assisted properties. Having access to the physical condition reports and the associated documents allows residents to supplement their advocacy with HUD’s inspection reports. As such, the text should be amended to read (revised language is underlined in italics):

“(h)...(2)...(iii) The owner must maintain the documents related to the inspection of the property, as described paragraphs (i) and (ii) above, for review by *residents for a period of 60 days from the date of submission to the owner of the inspection score for the property in which the residents reside.*”

24 CFR § 5.711(i)—Administrative review of properties. ***HUD should set a stationary scoring threshold to be used to refer properties to the Departmental Enforcement Center (DEC) and retain HUD’s ability to send properties scoring higher than the stationary threshold to DEC.*** Setting a stationary scoring threshold sets clear expectations for the owner, residents, and advocates regarding what will trigger HUD’s enforcement action. HUD’s current enforcement practices for specific properties are often inaccessible or unknown to residents and advocates. Making HUD’s enforcement actions known to residents and advocates facilitates partnership in developing a plan that is mutually beneficial to all parties. Coupling the stationary scoring threshold with the discretion to refer properties scoring above the threshold allows HUD to set the clear expectation while also having the flexibility to send properties of concern to DEC. The stationary scoring threshold should not be lower than 30. HUD should also consider if properties scoring at the specified threshold generally have numerous life-threatening SHS deficiencies, have difficulty correcting the defects within the HUD given timeframe, have difficulty substantially raising their score in the subsequent inspection, and have numerous state or local code violations.

Secondly, in addition to notice to the owner regarding the transfer of the property file to DEC, ***residents should also receive notice and DEC should be obligated to consult residents when evaluating the property.*** Often it has been the efforts of residents and advocates that have resulted in the preservation of assisted properties and improved housing conditions for families. When residents and advocates are meaningfully engaged by HUD, mutually beneficial solutions are created. The notice must include a plain language explanation describing the nature and process of DEC’s evaluation and enforcement. The explanation must explicitly state the transfer

¹¹⁶ 12 U.S.C. § 1715z-1b(a); 24 C.F.R. §§ 964.11, 245.5.

of the file does not mean the subsidy will be terminated but is a process to redress concerns and to bring the property into compliance. The notice should also include the name of the responsible DEC and Field Office staff, their direct phone number, and direct email address (not general office number or “info” email address). The notice should meet families’ language access and accessibility needs. As such, the text should be amended to read (revised language is underlined in italics):

“(1) Notification to owner and residents of submission of property file to the DEC. The Department will provide for notification to the owner and residents that the file on the owner's property is being submitted to the DEC for evaluation. The notification will be provided at the time the REAC issues the inspection report to the owner or at such other time as a referral occurs.

- (i) The notice to residents must include a plain language explanation describing the nature and process of DEC’s evaluation and enforcement. The explanation must emphasize DEC’s process is intended to redress concerns and to bring the property into compliance and explicitly state the transfer of the property file to DEC does not mean the subsidy will be terminated and explicitly making clear that residents should not move.
- (ii) The notice must include the name of the responsible DEC and Field Office staff, their direct phone number, and direct email address (not general office number or “info” email address).
- (iii) The notice should meet families’ language access and accessibility needs.

(2) Evaluation of the property. During the evaluation period, the DEC will perform an analysis of the property, which ~~may will~~ include input from tenants; and may include HUD officials, elected officials, and others as may be appropriate. Although program offices will assist with the evaluation, the DEC will have primary responsibility for the conclusion of the evaluation of the property after taking into consideration the input of interested parties as described in this paragraph ~~(h)(i)(2)~~. The DEC's evaluation may include a site visit to the owner's property.

...

(4) Enforcement action. Except as otherwise provided by statute, if, based on the DEC’s evaluation and in consultation with residents of the property and Housing, the DEC determines that enforcement actions are appropriate, it may take those actions for which the DEC has delegated authority and/or make recommendations to Housing with respect to resolving identified physical deficiencies and owner noncompliance.”

Third, the proposed rule does not incorporate important language about DEC’s compliance and enforcement.¹¹⁷ ***This language should be retained in the final rule.*** In particular, the language regarding the owner providing DEC with supporting and relevant information and documentation, and the development of a compliance plan.

Finally, HUD should make information regarding enforcement actions taken by HUD publicly available. Critical to advancing housing justice is elevating the voices of tenants. Indeed, “when a narrative is rooted and created in community and local leadership, and then is adopted and

¹¹⁷ See 24 CFR § 200.857(h)(2), (i).

amplified by multisector partners – including government – policy design and implementation itself is more equitable.”¹¹⁸ Proactive residents and local advocates are essential to the type of efficiency HUD says it is seeking. As such, ***HUD must publicly provide property-level information regarding conditions, mortgage maturity dates, housing assistance payment contract expiration dates, and HUD’s actions to enforce its programmatic requirements.***

Section 5.713 Second- and Third-party Rights

In the proposed rule, HUD prohibits second and third-party beneficiary status for residents. ***HUD should not include this change in the final rule.*** There is no need to include this language in 24 CFR part 5 because the ability to assert second- or third-party beneficiary status is already prohibited because many, if not all, of the regulatory agreements and subsidy contracts already include a clause disclaiming third-party beneficiary status to residents.

HUD states the changes in the regulations “signal to the public HUD’s clear intent to change its business approach.”¹¹⁹ However, removing second- and third-party beneficiary status in part 5, and other changes in Part A of this notice, are just a continuation of HUD’s “old” business approach. HUD’s clients are the families assisted through these programs. Statutory and regulatory law has consistently included the identification of poor physical conditions and maintenance concerns as an area in which active resident participation is critical.¹²⁰ However, HUD continues to hamper residents’ ability to be a partner to HUD and housing providers by making HUD’s enforcement actions opaque to residents, and by limiting residents’ rights that they normally should have as direct beneficiaries of the contracts between HUD and its housing providers. In light of the slow pace in which HUD often holds PHAs and owners accountable for gross and flagrant violations of housing condition standards, it is critical that residents retain these rights of enforcement.¹²¹ To the extent HUD is concerned about it getting sued for failure to act, that is already happening, in large part due to HUD’s failure to protect residents from harm.¹²²

¹¹⁸ COMMUNITY CHANGE, NEW DEAL FOR HOUSING JUSTICE, A HOUSING PLAYBOOK FOR THE NEW ADMINISTRATION 120 (2021).

¹¹⁹ 86 Fed. Reg. at 2591.

¹²⁰ 12 U.S.C. § 1715z-1b(a); 24 C.F.R. §§ 964.11, 245.5.

¹²¹ Molly Parker, *HUD’s House of Cards*, PROPUBLICA, <https://www.propublica.org/series/hud-house-of-cards> (a series of stories in conjunction with the Southern Illinoisan about substandard conditions in HUD-assisted housing); Molly Parker, *How HUD’s Inspection System Fails Low-Income Tenants Nationwide*, PROPUBLICA (Nov. 16, 2018, 10:58 AM EST), <https://www.propublica.org/article/hud-inspection-system-fails-low-income-tenants>; Suzy Khimm et al., *Under Ben Carson, more families live in HUD housing that fails health and safety inspections*, NBC NEWS, <https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421> (updated Nov. 14, 2018, 5:22 PM PST); Molly Minta, *Cordoba Courts in Opa-locka Criticized as a Slum*, MIAMI NEW TIMES (September 5, 2018, 8:00 AM), <https://www.miaminewtimes.com/news/slum-conditions-at-cordoba-courts-in-opa-locka-10698557>; Sarah Smith, *Living In Hell: As HUD pays Private Company Millions, Tenants say Complaints of Mold, Pest go Ignored*, HOUSTON CHRONICAL (March 11, 2021), <https://www.houstonchronicle.com/news/investigations/article/Living-Hell-housing-tenants-hud-properties-problem-16000650.php>.

¹²² Center for Leadership and Justice et al. v. HUD, No. 3:30-cv-01728 (Nov. 11, 2020); Sandpiper Residents Assoc. et al. v. HUD, No. 1:20-cv-01783 (Jun. 30, 2020).

PART C: NSPIRE DEMONSTRATION

On August 21, 2019, the Department of Housing and Urban Development (HUD) published its Notice of Demonstration to Assess NSPIRE and Associated Protocols in the Federal Register.¹²³ The demonstration will test the NSPIRE model, with the intention of the model replacing the current physical inspection processes. NHLP submitted comments in response to the notice. NHLP's comments remain relevant for HUD's consideration regarding the current structure of the NSPIRE demonstration. Additionally, HUD's website provides little information about the Demonstration to Test Proposed New Method of Assessing the Physical Conditions of Voucher-Assisted Housing.¹²⁴ HUD must provide the public more information about the demonstration and an opportunity to engage on the findings of the demonstration.

We applaud HUD for engage residents and other stakeholders throughout last year on the NSPIRE condition standards. HUD should expand its "infrastructure of partnerships" to include residents at the participating properties, state and local code enforcement agencies, legal service attorneys, housing advocates, public health advocates, and environmental justice advocates. Additionally, HUD should engage its partners on the enforcement of the physical condition standards. While it is important that the physical inspection process consistently capture an accurate picture of the conditions of assisted properties, it is also vital that the enforcement of the physical condition standards be effective and efficient. HUD's partners have a wealth of knowledge and insight for how to achieve the two.

Thank you for your consideration of our comments and recommendations. We look forward to working with HUD and are happy to further discuss our suggestions. Please contact Kate Walz (kwalz@nhlp), Bridgett Simmons (BSimmons@nhlp.org), or Debbie Chizewer (dchizewer@earthjustice.org) should you wish to clarify our position on these important issues.

Sincerely,
/s/Kate Walz & /s/Bridgett Simmons
Kate Walz & Bridgett Simmons
National Housing Law Project

/s/Debbie Chiwezer
Debbie Chizewer
Earthjustice

¹²³ Notice of Demonstration to Assess the National Standards for the Physical Inspection of Real Estate and Associated Protocols, 84 Fed. Reg. 43536 (Aug. 21, 2019).

¹²⁴ 81 Fed. Reg. at 26759 (May 4, 2016).