

# COMMENT

## A PROPOSED RULE THAT NSPIRES FEW TENANTS: THE SHORTCOMINGS OF HUD’S PUBLIC HOUSING INSPECTION STANDARDS IN ADDRESSING ENVIRONMENTAL HAZARDS

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INTRODUCTION .....	136
I. THE RISKS TO TENANTS OF NSPIRE’S SILENCE ON ENVIRONMENTAL SITE CONTAMINATION HAZARDS .....	141
A. <i>Amending NSPIRE to Require Environmental Site Testing Where         Appropriate</i> .....	145
II. THE EFFECTS OF NSPIRE’S LEAD PAINT ASSESSMENT STANDARD ON TENANTS .....	147
A. <i>Congressional Clarification and Raising NSPIRE’s Lead Paint Assessment         Standard</i> .....	149
III. THE RISK OF NSPIRE’S UNDEFINED SAFE WATER STANDARD IN FAILING TO PROTECT TENANTS FROM WATER CONTAMINATION .....	151
A. <i>Defining Safe Water and Monitoring Local Government Compliance with         EPA Regulations</i> .....	155
CONCLUSION .....	157

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## INTRODUCTION

The COVID-19 pandemic, perhaps more than ever, has demonstrated the importance of housing to the public health and welfare of Americans.<sup>1</sup> Currently, more than ten million people in the United States live in households that receive federal rental assistance.<sup>2</sup> The U.S. Department of Housing and Urban Development (HUD) implements and oversees the nation's federal housing programs, which provide financial assistance to the most vulnerable groups of Americans.<sup>3</sup> Millions of low-income workers, children, elderly people, and individuals with disabilities rely on HUD's rental assistance to maintain a place to live.<sup>4</sup>

HUD has three predominant rental assistance programs, each of which operates differently than the others.<sup>5</sup> The public housing program currently provides 1.8 million Americans housing in government-owned units.<sup>6</sup> Public housing is administered by local public housing agencies (PHAs) that receive funding from agency appropriations and typically manage the developments themselves.<sup>7</sup> HUD also maintains various project-based rental assistance

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1. During the first three months of the COVID-19 pandemic, county officials across the country mandated that residents remain at home to prevent spread of the disease. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *Timing of State and Territorial Covid-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1 – May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1198–1200 (Sept. 4, 2020) (identifying the forty-two states and territories that issued such orders to limit person-to-person interaction and prevent population migration). The outbreak caused an estimated fifteen percent of American adults to lose their jobs. Kim Parker, Rachel Minkin, & Jesse Bennett, PEW RSCH. CTR., *ECONOMIC FALLOUT FROM COVID-19 CONTINUES TO HIT LOWER-INCOME AMERICANS THE HARDEST* 4–5 (2020) (noting that four months later, half of these Americans remained unemployed). Consequently, many individuals could not make rent payments, and landlords evicted a large, unknown number of families from their homes. *See, e.g., Eviction Tracking System*, EVICTION LAB, <https://evictionlab.org/eviction-tracking/> (last visited May 10, 2022) (stating that while the federal government does not track the data, over 759,304 evictions have occurred since March 2020).

2. CTR. ON BUDGET & POL'Y PRIORITIES, U.S. FEDERAL RENTAL ASSISTANCE FACT SHEET (2022), <https://www.cbpp.org/research/housing/federal-rental-assistance-fact-sheets#US>.

3. *See id.* (identifying the majority of federally assisted housing recipients as elderly people, individuals with disabilities, and families experiencing poverty).

4. *Id.*

5. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-277T, RENTAL HOUSING ASSISTANCE: HUD SHOULD STRENGTHEN PHYSICAL INSPECTION OF PROPERTIES AND OVERSIGHT OF LEAD PAINT HAZARDS 1 (2019) [hereinafter 2019 GAO REPORT].

6. CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: PUBLIC HOUSING 1 (2021), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-housing.pdf>.

7. *Id.* at 3–4.

programs.<sup>8</sup> Under these programs, housing owners, both nonprofit and private, contract with the federal government to offer low-income individuals affordable homes.<sup>9</sup> Lastly, HUD's Housing Choice Voucher (HCV) program offers eligible individuals subsidies to secure housing in either subsidized units or the private market.<sup>10</sup> The Department funds local PHAs that administer the vouchers and tenants then pay landlords the difference.<sup>11</sup>

HUD, by law, holds the responsibility of providing "decent and safe" housing.<sup>12</sup> Under its rulemaking authority, it promulgates regulations interpreting the "decent and safe" statutory mandate to mean housing that is "decent, safe, sanitary[,] and in good repair."<sup>13</sup> This mission consistently proves to be no small feat. Today, almost half of the nation's public housing stock is more than fifty years old and twenty percent is over sixty years old.<sup>14</sup> As such, a substantial portion of these buildings are in disrepair with deteriorating infrastructure, aged electrical and temperature control systems, outdated appliances, inaccessible premises, and environmental hazards.<sup>15</sup>

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8. *Project-Based Rental Assistance*, NAT'L HOUS. L. PROJECT, <https://www.nhlp.org/resource-center/project-based-rental-assistance/> (last visited May 10, 2022).

9. *Id.*

10. U.S. DEP'T OF HOUS. & URB. DEV., HOUSING CHOICE VOUCHERS FACT SHEET, [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited May 10, 2022). The Housing Choice Voucher (HCV) program puts the onus on tenants to find a unit that meets the Department of Housing and Urban Development's (HUD's) criteria with a landlord willing to accept the voucher. *See* U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF POL'Y DEV. & RSCH., LANDLORDS: CRITICAL PARTICIPANTS IN THE HOUSING CHOICE VOUCHER PROGRAM (2019), <https://www.huduser.gov/portal/periodicals/em/winter19/highlight1.html#title> (explaining that many landlords decline to accept vouchers for a variety of reasons, including financial concerns, bureaucratic implications, and discrimination).

11. *Impact of Federal Funding*, NAT'L HOUS. L. PROJECT (Nov. 17, 2017), <https://www.nhlp.org/resources/impact-of-federal-funding-2/>.

12. Housing Act of 1937, 42 U.S.C. § 1437(a)(1)(A).

13. 24 C.F.R. § 5.703 (2021).

14. *See Building Back a Better, More Equitable Housing Infrastructure for America: Oversight of the Department of Housing and Urban Development: Hybrid Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong., 5–6 (2021) (testimony of Marcia L. Fudge, Sec'y, U.S. Dep't of Hous. & Urb. Dev.) (urging Congress to invest in public housing to address unmet capital needs); *see also* Alex F. Schwartz, HOUSING POLICY IN THE UNITED STATES 145–46 (Routledge ed., 4th ed. 2021) (detailing the emergence of public housing developments in cities across the United States beginning in the 1960s).

15. *See* Margery Austin Turner, Susan J. Popkin, G. Thomas Kingsley, & Deborah Kaye, *Distressed Public Housing—What it Costs to Do Nothing*, URB. INST. 2, 2–3 (2005); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-163, PUBLIC HOUSING: DISTRESSED CONDITIONS

Studies have linked these substandard conditions to increased probabilities of resident health issues.<sup>16</sup> While some have attributed the substandard living conditions to corrupt PHAs or inadequate maintenance by owners, others blame historical underinvestment in public housing.<sup>17</sup>

At its foundation, PHAs built subsidized housing using cheap materials and substandard construction.<sup>18</sup> Inferior infrastructure further increased maintenance costs.<sup>19</sup> Many owners and PHAs in HUD's public housing program rely on the Public Housing Capital Fund (PHCF) for the money needed to address their backlogs of repairs.<sup>20</sup> Despite the urgent need, the federal government's investment in PHCF fell thirty-five percent over the past twenty years.<sup>21</sup> In its 2017 request for additional PHCF funding, HUD estimated a need in excess of \$26 billion to address unmet capital needs in public housing.<sup>22</sup> The New York City Housing Authority, the PHA that accounts for more than seventeen percent of all federal housing, stated in 2017 that it needed \$31.8 billion over the next five years to cover the cost of necessary repairs and replacements.<sup>23</sup>

As part of his agenda, President Biden announced the framework for the Build Back Better Act, which lawmakers first introduced in the House of Representatives in September 2021.<sup>24</sup> The bill provides HUD with \$80 billion for public housing funding, which, if enacted, would represent

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IN DEVELOPMENTS FOR THE ELDERLY AND PERSONS WITH DISABILITIES AND STRATEGIES USED FOR IMPROVEMENT 13–16 (2005) (describing the cumulative effects of underinvestment in aging infrastructure).

16. See INST. FOR PUB. POL'Y & ECON. DEV., IMPLICATIONS OF THE REGION'S AGING HOUSING STOCK 9 (2019) (illustrating the correlation between poor housing conditions and heart disease, asthma, and other illnesses).

17. See Schwartz, *supra* note 14, at 151–53.

18. *Id.* at 151.

19. *Id.* at 151–52.

20. *Policy Basics: Public Housing*, CTR. ON BUDGET AND POL'Y PRIORITIES 3 (2021), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-housing.pdf>.

21. Schwartz, *supra* note 14, at 155.

22. U.S. DEP'T OF HOUS. & URB. DEV., PUBLIC HOUSING CAPITAL FUND: 2017 SUMMARY STATEMENT & INITIATIVES 10-2 (2017).

23. See N.Y.C. HOUS. AUTH., PHYSICAL NEEDS ASSESSMENT 2017 5 (2018); Schwartz, *supra* note 14, at 144.

24. Build Back Better Act, H.R. 5376, 117th Cong. (2021); *President Biden Announces the Build Back Better Framework*, WHITE HOUSE (Oct. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/> (discussing the Build Back Better Act).

the largest investment in the program to date.<sup>25</sup> Currently, it awaits passage in the Senate.<sup>26</sup>

In spite of funding challenges, HUD remains responsible for providing safe federal housing programs.<sup>27</sup> Though the laws creating HUD's subsidized housing programs do not define "safe," HUD's subsequent regulations have clarified that in the context of public housing, "safe" means "free of health and safety hazards[.]" such as poor air quality and lead-based paint.<sup>28</sup>

To understand HUD's approach to tenant safety, we must look to its housing inspection processes. Housing inspections serve as an essential tool that the Department uses to monitor the conditions of tenants' homes.<sup>29</sup> Currently, HUD has two housing inspection models with differing standards: the Uniform Physical Condition Standards (UPCS) and the Housing Quality Standards (HQS).<sup>30</sup> While the public housing and project-based rental assistance programs use the UPCS standards, the HCV program operates on the HQS model.<sup>31</sup>

Recognizing that neither of these standards directly supports modern needs, HUD is in the process of overhauling and streamlining its housing inspection processes for the first time in twenty years.<sup>32</sup> In January 2021, HUD proposed the National Standards for the Physical Inspection of Real

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25. See H.R. 5376, at 751–753; *NLIHC Statement on Historic Housing Investments in "Build Back Better Act,"* NAT'L LOW INCOME HOUS. COAL. (Oct. 28, 2021), <https://nlihc.org/news/nlihc-statement-historic-housing-investments-build-back-better-act>.

26. In November 2021, the bill passed the House of Representatives. See 167 CONG. REC. H6666-67 (daily ed. Nov. 19, 2021) (detailing the bill's passage by a vote of 220 to 213).

27. 42 U.S.C. § 1437(a)(1)(A).

28. See *id.* (declaring the nation's policy of promoting general welfare by "remedy[ing] the unsafe housing conditions and the acute shortage of . . . safe dwellings"); 24 C.F.R. § 5.703.

29. See Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD to Resume Public Multifamily Housing Inspections in June (Apr. 23, 2021) (on file with HUD Public Affairs); see also Letter from Marcia L. Fudge, Sec'y, U.S. Dep't of Hous. & Urb. Dev. 1 (Apr. 23, 2021) (informing public housing agency (PHA) directors, multifamily housing owners, and property managers of the resumption of housing inspections to "ensure the whole health and well-being of the households [the agency] serve[s]").

30. U.S. DEP'T OF HOUS. & URB. DEV., REGULATORY IMPACT ANALYSIS: ECONOMIC GROWTH REGULATORY RELIEF AND CONSUMER PROTECTION ACT: IMPLEMENTATION OF NATIONAL STANDARDS FOR THE PHYSICAL INSPECTION OF REAL ESTATE (NSPIRE) 1–2 (2021) [hereinafter NSPIRE IMPACT ANALYSIS].

31. *Id.*

32. See *id.* at 1; Suzy Khimm, *Biden Administration Weakens Some Proposed Safety Rules for Public Housing, Alarming Advocates*, NBC NEWS (July 14, 2021, 4:37 AM), <https://www.nbcnews.com/politics/politics-news/biden-administration-weakens-some-proposed-safety-rules-public-housing-alarming-n1273860>.

Estate (NSPIRE).<sup>33</sup> Aimed at reducing the regulatory burden, NSPIRE consolidates HUD's two housing inspection protocols into a uniform process.<sup>34</sup> In advance of NSPIRE, HUD also announced its associated housing demonstration program, which invited 4,500 volunteer properties to adopt the NSPIRE framework early, collaborate with agency executives, and gain the benefit of technical assistance training on the new standards.<sup>35</sup> After the public comment phase for NSPIRE ended, HUD extended the ongoing demonstration to further evaluate various standards.<sup>36</sup>

Although NSPIRE makes various improvements that will likely promote coordination across programs, NSPIRE currently neglects a variety of environmental hazards that may threaten tenants' health.<sup>37</sup> To carry out its mission and statutory obligation of providing safe housing, HUD should make significant changes to NSPIRE before promulgating the rule. Specifically, it should amend the NSPIRE standards to address three environmental hazards: site contamination, lead-based paint, and water contamination.

This Comment discusses three housing safety risks created by environmental hazards that pose a danger to federally assisted renters today. Part I examines site contamination at subsidized housing locations and HUD's limited efforts to address the issue. Part II discusses the hazards of lead-based paint to tenant safety and the shortcomings of HUD's existing approach to mitigating this threat. Part III focuses on water contamination and problems HUD currently faces in monitoring federally assisted housing residents' tap water safety. Part IV explores recommendations HUD could implement to better protect tenant safety.

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33. Economic Growth Regulatory Relief & Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE), 86 Fed. Reg. 2582 (Jan. 13, 2021) (to be codified at 24 C.F.R. pts. 5, 92, 93, 200, 574, 576, 578, 880, 882, 884, 886, 902, 982, 983, and 985) [hereinafter NSPIRE].

34. *Id.* at 2582.

35. Notice of Demonstration to Address the National Standards for the Physical Inspection of Real Estate and Associated Protocols, 84 Fed. Reg. 43,536 (Aug. 21, 2019) (codified at C.F.R. pts. 5 and 200).

36. NSPIRE, *supra* note 33; Notice of Continuation of Demonstration to Test Proposed New Method of Assessing the Physical Conditions of Voucher-Assisted Housing, 86 Fed. Reg. 30,468 (June 8, 2021).

37. See NSPIRE IMPACT ANALYSIS, *supra* note 30.

## I. THE RISKS TO TENANTS OF NSPIRE'S SILENCE ON ENVIRONMENTAL SITE CONTAMINATION HAZARDS

Krystle Jackson, a recipient of HUD's federal rental assistance, resided at the West Calumet Housing Complex (WCHC) in East Chicago, Indiana.<sup>38</sup> WCHC represented the first steady housing that Jackson, a low-income worker and single mother of four young children, had experienced in years.<sup>39</sup> After living at WCHC with her children for a few years, a pediatrician diagnosed her three-year-old son with lead poisoning,<sup>40</sup> a serious illness that can result in permanent neurological and behavioral problems.<sup>41</sup>

Upon learning that her son had elevated blood lead levels (EBLLs), Jackson reported the diagnosis to the East Chicago Housing Authority (ECHA), the local PHA in charge of administering the federal public housing program.<sup>42</sup> In response to Jackson's report, ECHA employees denied the presence of lead in her home and declined to take action to address the situation further.<sup>43</sup> About a year later, Jackson took her youngest child to the doctor for a lead screening.<sup>44</sup> During the appointment, Jackson learned that the place she and her children called home was built atop an area known for its lead contamination.<sup>45</sup>

Unsurprisingly, Jackson's youngest child's tests revealed that he too was suffering from lead poisoning.<sup>46</sup> Jackson and her children fled WCHC, first moving in with family and eventually living in Jackson's car.<sup>47</sup> Two weeks after their departure, ECHA first notified Jackson and the other WCHC residents—over three hundred families—that the complex would close permanently due to lead and arsenic contamination.<sup>48</sup> The city's mayor later ordered WCHC's more than one thousand residents

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38. Emily Coffey, Kate Walz, Debbie Chizewer, Emily A. Benfer, Mark N. Templeton, & Robert Weinstock, *Poisonous Homes: The Fight for Environmental Justice in Federally Assisted Housing*, SHRIVER CTR. ON POVERTY L. 10 (June 2020).

39. *Id.*

40. *Id.*

41. *Health Effects of Lead Exposure*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nceh/lead/prevention/health-effects.htm> (last visited May 10, 2022); Emily A. Benfer & Allyson E. Gold, *There's No Place Like Home: Reshaping Community Interventions and Policies to Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities*, 11 HARV. L. & POL'Y REV. ONLINE S1, S3 (2017).

42. Coffey et al., *supra* note 38, at 10.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 11.

48. *Id.*

to leave immediately.<sup>49</sup> Investigations in the months following these events revealed that ECHA knowingly constructed the WCHC at the site of a former lead smelting plant.<sup>50</sup> The plant's operation inadvertently produced lead dust and runoff that contaminated the area.<sup>51</sup> Consequently, children who spent years playing in their yards and on WCHC's playground experienced lead and arsenic contamination from the polluted soil.<sup>52</sup> Despite the ECHA's denial of awareness of these hazards, the HUD Office of Inspector General (OIG) recently reported that other agencies documented possible lead contamination at the housing complex some thirty years earlier.<sup>53</sup>

Tragically, Jackson and the other WCHC residents are not alone in their experiences. The Environmental Protection Agency (EPA) estimates that some nine thousand federally subsidized housing properties sit within a mile of the country's most contaminated locations.<sup>54</sup> Approximately seventy-seven thousand of America's most vulnerable families currently receive federal rental assistance to occupy homes that HUD knows pose a serious risk of health problems due to environmental site contamination.<sup>55</sup> This frightening reality is neither the product of coincidence nor an accidental oversight. Rather, the susceptibility of federally assisted renters to environmental contaminants is the result of PHA officials' deliberate decisions to construct public housing on the "least desirable" land, or the land that has endured the most industrial pollution.<sup>56</sup>

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49. Meredith Colias-Pete, *Federal Housing Agency Failed West Calumet Families, Leaving Kids Exposed for Decades to Lead*, Report Says, CHI. TRIB. (Feb. 23, 2021, 2:50 PM), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-ec-west-calumet-housing-report-st-0224-20210223-rtinmf364vdd7buk37zmidbwm-story.html>.

50. Enrique Saenz, *Decades of Missed Opportunities Exposed Multiple Generations of East Chicago Residents to Lead Contamination*, Federal Report Finds, IND. ENV'T REP. (Mar. 31, 2021), <https://www.indianaenvironmentalreporter.org/posts/decades-of-missed-opportunities-exposed-multiple-generations-of-east-chicago-residents-to-lead-contamination-federal-report-finds>.

51. *Id.*

52. Coffey et al., *supra* note 38, at 11.

53. See OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URB. DEV., 2019-OE-0003, CONTAMINATED SITES POSE POTENTIAL HEALTH RISKS TO RESIDENTS AT HUD-FUNDED PROPERTIES 10 (2021) (describing separate findings by the Indiana State Department of Health and the Environmental Protection Agency (EPA) in 1985 of lead contamination in the area surrounding the West Calumet Housing Complex (WCHC)) [hereinafter 2021 OIG REPORT].

54. Angela Caputo & Sharon Lerner, *House Rich Pollution Poor*, AM. PUB. MEDIA REPS. (Jan. 13, 2021), <https://www.apmreports.org/story/2021/01/13/public-housing-near-polluted-superfund-sites>.

55. Coffey et al., *supra* note 38, at 11.

56. See 2021 OIG REPORT, *supra* note 53, at 13–14; Caputo & Lerner, *supra* note 54 (explaining that vacant areas near industry provided cheap land).



The health hazards posed by such severe contamination have not gone unnoticed by the federal government.<sup>57</sup> More than four decades ago, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly referred to as the “Superfund” program.<sup>58</sup> This legislation authorized the EPA to identify the top most polluted sites in the country and hold the responsible parties liable for remedying the damage.<sup>59</sup> For the Superfund sites where the EPA could not hold the responsible party liable, Congress provided a federal fund to finance the cleanup.<sup>60</sup> Of the more than thirteen hundred areas that the EPA has since classified as Superfund sites, approximately seventy percent are located within one mile of federally subsidized housing.<sup>61</sup> The public outcry from tenants and advocacy groups in response to the WCHC tragedy forced the EPA to examine the realities of environmental contamination that threaten the safety of residents in its housing programs.<sup>62</sup> A year after the story broke, HUD and the EPA published a joint memorandum detailing their commitment to work together to reduce the risk that environmental contaminants pose to American families.<sup>63</sup>

Congress specifically authorized HUD to create safe housing for the country’s low-income families, elderly, and individuals with disabilities.<sup>64</sup> Decades later, Congress passed the National Environmental Protection Act

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57. See, e.g., Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601–75.

58. See Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601–75).

59. 42 U.S.C. § 9607(a)–(c) (liability); *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> (last visited May 10, 2022).

60. *Id.*

61. Coffey et al., *supra* note 38, at 11.

62. *West Calumet Housing Complex – East Chicago, Ind.*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/uss-lead-superfund-site/west-calumet-housing-complex-east-chicago-ind> (last visited May 10, 2022).

63. Letter from Emily Coffey, Eric Sirota, Debbie Chizewer, Kate Walz, Emily Benfer, Mark Templeton, & Robert Weinstock to Secretary Marcia L. Fudge (Apr. 9, 2021) [hereinafter Coffey Letter] (citing U.S. DEP’T OF HOUS. & URB. DEV. & U.S. ENV’T PROT. AGENCY, MEMORANDUM OF UNDERSTANDING IMPROVING COMMUNICATION ABOUT CERTAIN PUBLIC AND HUD-ASSISTED MULTIFAMILY HOUSING NEAR SUPERFUND SITES (Jan. 2017)) (responding to the HUD Office of Inspector General’s (OIG’s) February 2021 report).

64. Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965).

(NEPA),<sup>65</sup> which specifically requires HUD's programs to be safe from environmental contamination.<sup>66</sup> Pursuant to this authority, HUD created an environmental review process that gives state and local offices the power to conduct evaluations of site contamination at federally subsidized housing.<sup>67</sup> This process is a tiered review system designed to ensure that a project complies with all environmental laws prior to receiving federal funding.<sup>68</sup>

The current scheme strictly limits the scope of review to sites seeking reinvestment of government funds.<sup>69</sup> Thus, the local office must only conduct an environmental review when significant development or remodeling will take place at the site.<sup>70</sup> The regulations exempt housing inspections, including inspections that score poorly, from initiating an environmental review.<sup>71</sup> Without any retroactive application to housing developments not currently seeking project development, the environmental review process leaves many subsidized housing units at risk of environmental hazards.<sup>72</sup>

Moreover, even when a site's activity reaches the level that requires the appropriate office to conduct an environmental review, the process can be flawed.<sup>73</sup> The HUD OIG published a report in January 2021 detailing its oversight of the environmental review process at WCHC as inadequate and a contributing factor to residents' lead poisoning.<sup>74</sup> The subsequent investigation into the site contamination at WCHC revealed that the Indianapolis field office for HUD's public housing program had completed four environmental reviews of WCHC between 2003 and 2014.<sup>75</sup> However, the reviewers failed to obtain government records regarding prior uses of the land, and the official who signed off on one of the reviews later admitted he had no knowledge of an environmental review ever having taken place.<sup>76</sup> A year after the final environmental review allegedly took place, Krystle Jackson learned that her children had lead poisoning.<sup>77</sup>

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65. 42 U.S.C. §§ 4331–35.

66. *Id.* § 4331.

67. 24 C.F.R. §§ 58.4(a)–(b)(2), 58.18(a)–(b) (2021); *Environmental Review*, HUD EXCH., <https://www.hudexchange.info/programs/environmental-review/> (last visited May 10, 2022).

68. 24 C.F.R. pts. 50, 58 (2021).

69. *See id.*

70. *Environmental Review*, *supra* note 67.

71. 24 C.F.R. § 58.34 (2021).

72. *See* 2021 OIG REPORT, *supra* note 53, at 16.

73. *See id.* at 11–13.

74. *Id.*

75. *Id.* at 11; *see* Saenz, *supra* note 50.

76. *See* Saenz, *supra* note 50.

77. *Compare* 2021 OIG REPORT, *supra* note 53, at 11 (dating the last environmental review

A. *Amending NSPIRE to Require Environmental Site Testing Where Appropriate*

The current version of NSPIRE makes no mention of environmental site contamination.<sup>78</sup> None of the enumerated standards relate to the safety of the air or soil surrounding federally subsidized properties.<sup>79</sup> NSPIRE's silence on such hazards appears at odds with HUD's obligations under various statutes and Executive Order 13,990, which requires all executive agencies to review their rulemaking and other activity throughout the past four years to ensure that agency action promotes public health and a clean environment.<sup>80</sup>

Nonetheless, NSPIRE's new scoring methodology actually shifts the focus of a housing inspection away from the surrounding area and toward the individual units.<sup>81</sup> While HUD justifies the shift as prioritizing tenant safety over building appearance, in light of the industrial contamination statistics and the problems with its existing environmental review process detailed above, one must question whether the elimination of site inspections actually stands to benefit tenant safety.<sup>82</sup>

HUD plans to implement NSPIRE's changes to the housing inspection criteria at the sub-regulatory level rather than by including the standards in the official rule.<sup>83</sup> This policymaking tactic, in which an agency issues guidance documents advising the public on the interpretation and applicability of regulations, is widely used by executive agencies; rather than proposing or amending a codified rule, HUD publishes a guidance document in the *Federal Register*.<sup>84</sup> This strategy allows an agency to forego the usual rulemaking process and thus avoid having to submit the proposed changes for public comment.<sup>85</sup> Regulating via guidance documents has some benefits: it is more efficient than rulemaking because it omits delays caused by the public notice-and-comment period and the

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conducted at WCHC to 2014), *with Coffey et al.*, *supra* note 38, at 10 (citing Jackson's 2015 physician visit in which she learned her older son's diagnosis).

78. See NSPIRE, *supra* note 33.

79. See *NSPIRE Standards*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/reac/nspire/standards](https://www.hud.gov/program_offices/public_indian_housing/reac/nspire/standards) (last updated Apr. 2, 2021).

80. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (declaring the Biden Administration's policy of protecting public health and fostering environmental justice).

81. *HUD Publishes National Physical Inspection Standards*, NAT'L LOW INCOME HOUS. COAL. (Jan. 19, 2021), <https://nlihc.org/resource/hud-publishes-national-physical-inspection-standards>.

82. See NSPIRE IMPACT ANALYSIS, *supra* note 30, at 5–6, 11–12; see *supra*, Part I.

83. See NSPIRE IMPACT ANALYSIS, *supra* note 30, 3–4.

84. See CONG. RSCH. SERV., AGENCY USE OF GUIDANCE DOCUMENTS, LSB10591, 1–2 (Apr. 19, 2021).

85. See *id.*

thirty-day delayed-effectiveness requirement.<sup>86</sup> Moreover, guidance documents are not subject to judicial review.<sup>87</sup> These same benefits exist when a new administration, perhaps with drastically different regulatory and political goals, takes over, and agency officials can quickly rescind guidance documents from prior administrations.<sup>88</sup> However, an amendment to or rescission of an enacted regulation requires the more rigorous process of notice-and-comment rulemaking.<sup>89</sup> For these reasons, HUD should carefully consider the importance of codifying the housing inspection standards into the legally binding rule.

At the very least, HUD should define “safe” in the rule, in line with federal laws, to mean free from environmental contamination.<sup>90</sup> To fulfill its legal duty to provide safe housing and avoid public health crises like the lead poisoning of residents at the WCHC in East Chicago, Indiana, HUD should amend NSPIRE’s housing inspection criteria to address site contamination.<sup>91</sup> Requiring housing inspectors to test the air and soil quality at at-risk properties, especially those located near Superfund sites, could prove to be an effective approach to begin to tackle this problem.<sup>92</sup> Even if HUD abides by its plan to implement NSPIRE’s standards at the sub-regulatory level, criteria that require testing of the surrounding area for industrial pollutants is needed to protect tenants from environmental site contamination.<sup>93</sup>

Since HUD’s internal reports suggest that it may lack the scientific proficiency needed to accurately assess air and soil safety, it may need to rely on the EPA’s expertise.<sup>94</sup> Although coordination between agencies can sometimes be time-consuming and undesirable, resources exist to

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86. See *id.* (citing Administrative Procedure Act, 5 U.S.C. § 553(A), which exempts guidance documents from these rulemaking requirements).

87. See *id.* at 2.

88. MICHAEL ASIMOW & RONALD LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 378–89 (5th ed. 2020); see, e.g., Moriah Balingit, *DeVos Rescinds 72 Guidance Documents Outlining Rights for Disabled Students*, WASH. POST (Oct. 21, 2017), <https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students/>.

89. 5 U.S.C. § 553.

90. 42 U.S.C. § 4321–45.

91. See Coffey Letter, *supra* note 63, at 5.

92. See *Contamination Detection and Sampling Analysis*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/emergency-response-research/contaminant-detection-and-sampling-and-analysis> (last visited May 10, 2022) (recommending analysis of collected samples to determine how to proceed in cleaning up contaminated areas).

93. See NSPIRE IMPACT ANALYSIS, *supra* note 30, at 3–4.

94. 2021 OIG REPORT, *supra* note 53, at 14.

foster effective collaboration toward shared goals.<sup>95</sup> Also, the existence of such cooperation between the two agencies is not entirely unprecedented; the interagency memorandum published by HUD and the EPA in recent years signals their willingness to work together on this issue.<sup>96</sup> The joint memorandum, along with the current Administration's emphasis on public health and the environment, serves as a foundation for a successful partnership between HUD and the EPA to address environmental site contamination.<sup>97</sup>

## II. THE EFFECTS OF NSPIRE'S LEAD PAINT ASSESSMENT STANDARD ON TENANTS

Nearly half of the country's federal public housing stock is over fifty years old,<sup>98</sup> meaning that a significant portion of HUD-assisted housing was built prior to 1978—the year that the federal government banned the use of lead-based paint in homes.<sup>99</sup> Consequently, many subsidized housing units contain lead-based paint, which puts tenants at risk of lead poisoning.<sup>100</sup> In response to a growing awareness of the prevalence of lead poisoning in American children, Congress passed a law in 1992 that sought to reduce the risk of lead poisoning among families, especially those with children, receiving federal rental assistance.<sup>101</sup>

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95. *Leading Practices in Collaboration Across Governments, Nonprofits, and the Private Sector*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/leading-practices-collaboration-across-governments%2C-nonprofits%2C-and-private-sector> (last visited May 10, 2022). These practices include defining shared outcomes, developing joint strategies, leveraging agency resources, and reinforcing agency accountability, among others. *See id.*

96. Memorandum of Understanding from Danielle Schopp, the U.S. Dep't of Hous. & Urb. Dev., and Dana Stalcup, the U.S. Env't Prot. Agency, *Improving Communication About Certain Public and HUD-Assisted Multifamily Housing Near Superfund Sites* (Jan. 11, 2017) (on file with author).

97. *See id.* (detailing the agencies' mutual interests in protecting HUD program participants from environmental dangers at Superfund sites).

98. *See* Schwartz, *supra* note 14, at 145 (noting that forty-two percent of all public housing units were built before 1970); *Building Back A Better, More Equitable Housing Infrastructure for America: Oversight of the Department of Housing and Urban Development Before the H. Comm. on Fin. Servs.*, *supra* note 14.

99. *Lead in Paint*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nceh/lead/prevention/sources/paint.htm> (last visited May 10, 2021).

100. Teresa Wiltz, *HUD Spends Millions on Lead Abatement. Why Are Public Housing Authorities Still Struggling?*, PEW CHARITABLE TRUSTS (Dec. 17, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/12/17/hud-spends-millions-on-lead-abatement-why-are-public-housing-authorities-still-struggling?>.

101. Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended at 42 U.S.C. § 63A) (commonly referred to as "Title X").

Pursuant to the authority granted to it by Congress under the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X), HUD has issued two regulations regarding lead-based paint.<sup>102</sup> These rules govern the procedures that HUD, PHAs, and property owners must follow regarding lead-based paint in federally assisted housing.<sup>103</sup> Although the Lead Safe Housing Rule and its subsequent amendments have established useful processes for reducing incidents of lead poisoning, such as requiring PHAs to track incidents of EBLLs, many problems exist with the current approach.<sup>104</sup> First, in regards to EBLL tracking, public health departments' failures to report instances of EBLLs means that many PHAs and owners go unnotified.<sup>105</sup> Second, HUD's monitoring of PHA compliance with the rules has proven to be insufficient; in some cases, HUD allows PHAs to self-certify compliance with its lead regulations.<sup>106</sup> While, in theory, self-certification fosters an efficient regulatory process because it shifts the burden from agency officials to local PHAs, it is insufficient in practice.<sup>107</sup> Some PHAs are historically inadequate and, in extreme cases, outright corrupt.<sup>108</sup> There is a reported problem of PHAs falsely certifying compliance with HUD's lead regulations.<sup>109</sup> Third, HUD's other lead-based paint regulation allows PHAs and owners to simply disclose the presence of lead-based paint, rather than requiring them to mitigate the hazard.<sup>110</sup> By notifying tenants that the property may contain lead-based paint and the associated risks of lead poisoning, PHAs and owners can use a loophole in the rule to avoid actually dealing with the problem.<sup>111</sup>

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102. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-394, LEAD PAINT IN HOUSING: HUD SHOULD STRENGTHEN GRANT PROCESSES, COMPLIANCE MONITORING, AND PERFORMANCE ASSESSMENT 6-7 (2018) [hereinafter 2018 GAO REPORT].

103. *Id.*

104. *See id.* at 29-30 (describing the ineffectiveness of the current lead-based paint mitigation strategies).

105. *Id.* (providing many reasons that PHAs do not receive such notice: physicians do not always screen children for elevated blood lead levels (EBLLs); when physicians discover and report a child's EBLLs, public health officials often do not know that the child lives in HUD assisted housing; and federal medical privacy laws often prevent public health departments from disclosing the reports to the appropriate PHA).

106. *Id.* at 24.

107. 2018 GAO REPORT, *supra* note 102, at 24.

108. Schwartz, *supra* note 14, at 152-53 (describing problems of nepotism and failures to respond to tenant safety complaints).

109. 2019 GAO REPORT, *supra* note 5, at 2-3, 11.

110. 24 C.F.R. § 35.

111. *See generally id.* (highlighting that the disclosure requirement alone does not include a

HUD's two existing housing inspection protocols differ in their approaches to lead-based paint hazards.<sup>112</sup> UPCS, the standards for public housing and Section 8 project-based housing, requires risk assessments based on building age and, when appropriate, testing of the paint to determine its potential toxicity to tenants.<sup>113</sup> By contrast, HQS, the standard applicable to the HCV program, requires only a visual inspection for lead-based paint.<sup>114</sup> Accordingly, inspectors of HCV properties need only conduct a visual search for signs of deteriorating or chipping paint which may cause lead dust.<sup>115</sup> Under this model, inspectors need not consider whether a building's construction pre-dated the federal ban on lead-based paint nor conduct tests to determine whether the paint is lead-based.<sup>116</sup> Unfortunately, a visual inspection alone is insufficient because lead dust is undetectable with the naked eye.<sup>117</sup> Although lead-based paint presents a danger only when chipped, the absence of signs of physical deterioration does not guarantee that the paint is lead-free.<sup>118</sup> Therefore, risk assessments and testing of paint, where appropriate, are needed to ensure tenant safety.

#### A. Congressional Clarification and Raising NSPIRE's Lead Paint Assessment Standard

Uniformity in lead inspection has been a HUD goal for years, but the differing housing inspection standards prevented it until now.<sup>119</sup> The

requirement to bring units containing lead into compliance with HUD standards for lead-based paint hazards).

112. 2019 GAO REPORT, *supra* note 5, at 12.

113. *Safe at Home: Preserving and Improving Federally Assisted Housing: Subcomm. on Hous., Transp., & Cmty. Dev. of the S. Comm. on Banking, Hous., and Urb. Affs.*, 117th Cong. 5 (2021) (statement of David Jacobs, Chief Scientist, National Center for Healthy Housing) [hereinafter *David Jacobs' testimony*].

114. *Id.*

115. *Inspection Checklist, Housing Choice Voucher Program*, U.S. DEP'T OF HOUS. & URB. DEV., <https://www.hud.gov/sites/dfiles/OCHCO/documents/52580.PDF>.

116. *Id.*

117. *Sources of Lead*, N.Y. STATE DEP'T OF HEALTH, <https://www.health.ny.gov/environmental/lead/sources.htm> (last visited May 10, 2022).

118. *See Lead in Paint*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nceh/lead/prevention/sources/paint.htm> (last visited May 10, 2022). The CDC estimates that some twenty-four million homes contain lead-based paint hazards. *See id.* Once the paint begins to deteriorate, lead dust puts residents at risk of serious illness. *Protect Your Family from Lead in Your Home*, U.S. ENV'T PROT. AGENCY AND U.S. DEP'T OF HOUS. & URB. DEV. (Mar. 2021), <https://www.epa.gov/sites/default/files/2020-04/documents/lead-in-your-home-portrait-color-2020-508.pdf>.

119. U.S. DEP'T OF HOUS. & URB. DEV., STRATEGIC PLAN 2018–2022 19 (May 2019).

NSPIRE framework meets this goal by establishing one inspection standard for detecting lead-based paint across all of its housing programs.<sup>120</sup> Unfortunately, NSPIRE’s proposed lead-based paint standard reflects that of the HCV program: the lower standard requiring only a visual assessment.<sup>121</sup> Thus, if HUD promulgates the final rule as is, it would subsequently issue a guidance document enumerating the inferior lead inspection standard; accordingly, housing inspectors would no longer be required to conduct risk assessments or test paint for lead toxicity, even in homes built prior to 1978 that are likely to contain lead-based paint.<sup>122</sup> Adopting the lower of the two standards increases the risk that lead-based paint will go undetected and that families receiving federal rental assistance may experience lead poisoning.

There is likely a reason for the framework’s proposed lower lead-based paint standard.<sup>123</sup> The Government Accountability Office (GAO), tenant advocacy groups, and a former executive in HUD’s lead hazard office have stated that HUD officials do not believe that HUD has the statutory authority to impose the stricter lead inspection standard in its HCV program, which relies, in part, on housing in the private housing market.<sup>124</sup> This belief largely stems from Title X, which lacked “specific risk assessment requirements for voucher units” but required risk assessments for public housing and project-based rental assistance programs.<sup>125</sup> Congress’s statutory silence on the HCV program in Title X could explain HUD’s reasoning for choosing the lower of the two standards since NSPIRE will apply to all of HUD’s subsidized housing programs including the HCV program.<sup>126</sup>

To fulfill its obligation to protect recipients of federal rental assistance from lead poisoning, HUD should amend the current version of NSPIRE’s

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120. NSPIRE IMPACT ANALYSIS, *supra* note 30, at 1–2.

121. *Potential Lead-Based Paint Hazards – Visual Assessment, NSPIRE*, U.S. DEP’T OF HOUS. & URB. DEV. (Apr. 2021), <https://www.hud.gov/sites/dfiles/PIH/documents/NSPIRE-Standards-v2.1-Potential-Lead-based-Paint-Hazards-Visual-Assessment.pdf>.

122. *See id.*

123. *See* 2018 GAO REPORT, *supra* note 102, at 35–36 (highlighting agency officials’ lack of a clear legal authority to compel private owners to engage in lead-based paint mitigation).

124. *Id.*; *David Jacobs’ testimony, supra* note 113; *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited May 10, 2022).

125. *See* 2018 GAO REPORT, *supra* note 102, at 36 (referencing 42 U.S.C. § 63A). HUD’s regulations under Title X apply to all “federally owned residential property and housing receiving [f]ederal assistance.” Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 45, 9064, 9065 (codified at 24 C.F.R. § 35).

126. *See generally* NSPIRE, *supra* note 33.



lead-based paint standard.<sup>127</sup> Rather than using the lower, visual inspection standard, the Department should require that all housing inspectors conduct a risk assessment and, if appropriate, test the paint to determine its potential for harm.<sup>128</sup> To resolve the statutory ambiguity and ensure HCV recipients' protection from lead-based paint, Congress should amend Title X to explicitly grant HUD the authority to impose the stricter lead-based paint standard in its inspection of homes in the HCV program.<sup>129</sup> This change would clarify HUD's authority to regulate the physical conditions of housing in the private market when owners receive federal funding.<sup>130</sup> Accordingly, the NSPIRE lead-based paint standard could be heightened to better protect families.

Beyond HUD's statutory obligation to reduce the risk of lead-based paint hazards, policy arguments support requiring the higher standard as well. First, the history of congressional action in requiring HUD to regulate lead-based paint evidences the Legislature's priority to eliminate public health hazards from lead-based paint.<sup>131</sup> Second, lead poisoning is an environmental hazard that can be entirely eliminated through effective lead abatement techniques.<sup>132</sup> Finally, obvious moral considerations exist to motivate Congress and HUD to tackle this problem; as one former Department executive bluntly stated, "taxpayer dollars should not be used to subsidize housing units that poison children."<sup>133</sup>

### III. THE RISK OF NSPIRE'S UNDEFINED SAFE WATER STANDARD IN FAILING TO PROTECT TENANTS FROM WATER CONTAMINATION

As the federally assisted housing supply ages, so does the plumbing within the homes. Moreover, many localities across the country have significantly outdated water systems.<sup>134</sup> Pipes used beyond their capacity can break down or corrode, which can contaminate the water flowing through them with heavy metals, chemicals, pesticides, and other toxins.<sup>135</sup> Eight years after its

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127. See 42 U.S.C. § 63A (outlining HUD's federal housing responsibilities).

128. *Potential Lead-Based Paint Standard – Visual Assessment*, *supra* note 121.

129. See 2019 GAO REPORT, *supra* note 5, at 12.

130. *Id.*

131. See, e.g., 42 U.S.C. § 63A.

132. *Protect Your Family from Lead in Your Home*, *supra* note 118, at 10–11.

133. *David Jacobs' testimony*, *supra* note 113, at 6. Jacobs served as the former Director of HUD's Office of Healthy Homes and Lead Hazard Control (OHHLHC), which oversees the agency's lead abatement programs. *Id.* at 4.

134. *Water, Health, and Equity, The Infrastructure Crisis Facing Low-Income Communities & Communities of Color – and How to Solve It*, CLEAN WATER FOR ALL 6 (2018) [hereinafter *Water, Health, and Equity*].

135. *Id.* at 5.

ban on lead-based paint in the residential context, Congress similarly banned the use of lead pipes in public water systems and plumbing.<sup>136</sup> Despite the Legislature's intent, the ban did not apply retroactively, and replacing pipes is very expensive.<sup>137</sup> As a result, lead pipes are still in use in many water systems across the country.<sup>138</sup> The ongoing water crisis in Flint, Michigan demonstrates the profound harm that tap water contamination resulting from corroded pipes can have on public health.<sup>139</sup> Since outdated water systems serve many communities today, Americans across the country may be drinking and bathing in contaminated water.<sup>140</sup>

Sadly, issues with water safety, and environmental hazards in general, have disproportionately impacted low-income communities and communities of color.<sup>141</sup> Low-income communities and communities of

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136. *Use of Lead-Free Pipes, Fittings, Fixtures, Solder, and Flux for Drinking Water*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/sdwa/use-lead-free-pipes-fittings-fixtures-solder-and-flux-drinking-water> (last visited May 10, 2022).

137. See Andrew Restuccia, *Biden Push to Replace America's Lead Pipes Faces Challenges*, WALL ST. J., (Sept. 17, 2021, 8:00 AM), <https://www.wsj.com/articles/biden-push-to-replace-americas-lead-pipes-faces-challenges-11631880001> (estimating that the replacement of a single lead service line can cost a city between \$15,000 and \$26,000).

138. See *Lead Pipes: A Threat to Kids Across America*, ENV'T DEF. FUND, <https://www.edf.org/health/lead-pipes-threat-kids-across-america> (last visited May 10, 2022) (estimating that 9.2 million families throughout the United States receive water service from systems containing lead pipes).

139. Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NAT. RES. DEF. COUNCIL (Nov. 8, 2018), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know>; see, e.g., Perri Zeltz Ruckart, Adrienne S. Ettinger, Mona Hanna-Attisha, Nicole Jones, Stephanie I. Davis & Patrick N. Breyse, *The Flint Water Crisis: A Coordinated Public Health Emergency Response and Recovery Initiative*, 25 J. PUB. HEALTH MGMT. & PRAC. 1 (2019) (showing that contaminated water exposed approximately 140,000 Flint residents to lead and other environmental contaminants); see also *Water, Health, and Equity*, *supra* note 134, at 9–10 (stating that the contaminated water may have hindered “fertility, fetal development, and infant health”); see Terry Gross, *Pediatrician Who Exposed Flint Water Crisis Shares Her ‘Story of Resistance’*, NAT'L PUB. RADIO (June 25, 2018, 2:10 PM), <https://www.npr.org/sections/health-shots/2018/06/25/623126968/pediatrician-who-exposed-flint-water-crisis-shares-her-story-of-resistance> (interviewing Dr. Mona Hanna-Attisha, who describes lead poisoning's potential for detrimental impacts on cognition and behavior and explaining that the long-term health effects of Flint's water crisis remain unknown).

140. See Madison Condon, *Rural America's Drinking Water Crisis*, A.B.A., [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/vol-44--no-2--housing/rural-america-s-drinking-water-crisis/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol-44--no-2--housing/rural-america-s-drinking-water-crisis/) (last visited May 10, 2022) (noting that water systems in rural areas are particularly susceptible to health hazards as a result of America's outdated water systems).

141. See Juliana Maantay, *Mapping Environmental Injustices: Pitfalls and Potential of Geographic*

color bearing the brunt of the adverse effects of environmental issues has come to be known as “environmental injustice.”<sup>142</sup> Environmental injustice in the country’s federal housing programs does not come as a surprise; local government officials chose to construct public housing complexes in poor, industrial areas predominately occupied by minority populations.<sup>143</sup> In the private market context, some city governments and local utility companies require residents who want their lead pipes replaced to finance the replacement of their portion of the pipes.<sup>144</sup> The reality is that the lowest-income families cannot afford to pay the replacement costs.<sup>145</sup> Flint, Michigan, which is “one of the poorest cities in the United States[.]” serves as a poignant example of the disproportionate harm of environmental hazards on the nation’s most vulnerable communities.<sup>146</sup>

The laws passed by Congress creating HUD and its subsidized housing programs consistently require that the housing be decent and safe.<sup>147</sup> But by law, the EPA regulates the safety of drinking water.<sup>148</sup> The EPA, in conjunction with guidance from the Centers for Disease Control and Prevention (CDC), sets the standards for water safety, including maximum

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*Information Systems in Assessing Environmental Health and Equity*, 110 ENV’T HEALTH PERSPECTIVES 161, 161, 163 (2002).

142. *Id.* at 161 (defining environmental injustice as “the disproportionate exposure of communities of color and the poor to pollution, and its concomitant effects on health and environment, as well as the unequal environmental protection and environmental quality provided through laws, regulations, governmental programs, enforcement, and policies”).

143. See Schwartz, *supra* note 14, at 145–46, 149–50 (describing that the law’s design “virtually guarantee[d] that public housing would be concentrated in central cities and working-class suburbs and absent from most affluent suburbs[.]” The author also highlights the roles of racial discrimination and prioritization of political interests in furthering the outcome). See *id.*

144. See *Lead Pipes and Environmental Injustice: A Study of Pipe Replacement in Washington, DC*, ENV’T DEF. FUND, 4–5 (Mar. 2020), [https://www.edf.org/sites/default/files/u4296/LeadPipe\\_EnvironJustice\\_AU%20and%20EDF%20Report.pdf](https://www.edf.org/sites/default/files/u4296/LeadPipe_EnvironJustice_AU%20and%20EDF%20Report.pdf) (describing a ten-year study of lead-based pipe replacement demonstrating the correlation between requirements that owners’ pay for replacements with lower rates of replacement in areas with lower median household incomes).

145. *Id.* at 8, 11.

146. See Barry E. Hill, *Human Rights, Environmental Justice, and Climate Change: Flint, Michigan*, A.B.A. (June 14, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-truth-about-science/human-rights-environmental-justice-and-climate-change/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-truth-about-science/human-rights-environmental-justice-and-climate-change/) (explaining that half of the city’s households earn less than \$26,330 annually with 41.2% of individuals living below the federal poverty line).

147. 42 U.S.C. § 1437(a)(1)(A).

148. OFF. OF WATER, U.S. ENV’T PROT. AGENCY, EPA 816-F-04-030, UNDERSTANDING THE SAFE WATER DRINKING ACT (2004) (explaining the EPA’s authority to set national water standards pursuant to the *Safe Drinking Water Act*, 42 U.S.C. § 300 et. seq.).

allowable levels of contamination, and oversees state and local government adherence to those standards in their public water systems.<sup>149</sup>

While HUD is not directly tasked with monitoring water safety, it is responsible for providing safe public housing, and the safety of residents depends on the purity of their tap water.<sup>150</sup> Moreover, NEPA requires that HUD's housing programs be safe from environmental contamination.<sup>151</sup> Also, Executive Order 13,990 mandates that all federal agencies—HUD included—ensure their actions promote access to clean water.<sup>152</sup> In spite of its legal obligation and promulgated regulations, HUD has not taken any clear actions toward ensuring the safety of tap water in subsidized housing.<sup>153</sup> HUD has no mechanism in place to monitor city water systems' compliance with EPA standards.<sup>154</sup> HUD has not required PHAs to implement any system of testing when officials learn of incidents of EBLs.<sup>155</sup> Furthermore, HUD's existing housing inspection standards, UPCS and HQS, do not address potential water contaminants; the standards require only that inspectors check each unit for an operable water supply.<sup>156</sup>

As is, NSPIRE will require that housing units have “an adequate source of safe and potable water[.]” but the proposed rule does not explain what “safe” water means.<sup>157</sup> HUD requested public comment on how it should define water safety and whether it should rely on a city water system's

149. *Safe Drinking Water Act (SDWA) Compliance Monitoring*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/compliance/safe-drinking-water-act-sdwa-compliance-monitoring> (last visited May 10, 2022); see also *National Primary Drinking Water Regulations*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations> (last visited May 10, 2022) (showing examples of maximum allowable levels of contamination such as Chlorite, which has an allowable containment level of 1.0(Mg/L)<sup>2</sup>).

150. See OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URB. DEV., HUD'S OVERSIGHT OF LEAD IN THE WATER OF HOUSING CHOICE VOUCHER AND PUBLIC HOUSING PROGRAM UNITS 10 (2020) [hereinafter 2020 OIG REPORT] (reporting that HUD currently relies on local water systems' compliance with EPA regulations).

151. 42 U.S.C. §§ 4321–45.

152. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (detailing the Administration's policy of “ensur[ing] access to clean air and water”).

153. See 2020 OIG REPORT, *supra* note 150, at 5.

154. *Id.*

155. *Id.*

156. See *Uniform Physical Condition Standards*, U.S. DEP'T OF HOUS. & URB. DEV., [https://www.hud.gov/sites/documents/DOC\\_26481.PDF](https://www.hud.gov/sites/documents/DOC_26481.PDF) (last visited May 10, 2022); *Inspection Checklist: Housing Choice Voucher Program*, U.S. DEP'T OF HOUS. & URB. DEV., <https://www.hud.gov/sites/dfiles/OCHCO/documents/52580.PDF> (last visited May 10, 2022).

157. NSPIRE, *supra* note 33, at 2,595.

compliance with EPA regulations.<sup>158</sup> The latter question is disheartening, given a report by HUD itself that its own reliance on the EPA resulted in an inability to ensure that assisted units had safe water.<sup>159</sup>

*A. Defining Safe Water and Monitoring Local Government Compliance with EPA Regulations*

NSPIRE is entirely ambiguous on HUD's future approach to water safety in its housing inspection process.<sup>160</sup> That the safety of a public water system as a whole does not establish the safety of the tap water that residents ultimately bathe in and drink in their homes serves as a particularly convincing argument against relying solely on a PHA's account of its city's compliance with EPA regulations.<sup>161</sup> Tap water safety depends not only on the underlying source of the water but also the adequacy of a building's plumbing system, which may itself contain lead pipes.<sup>162</sup> Furthermore, even if the building's plumbing is adequate, a PHA's attestation that its local water system complies with EPA regulations may be inaccurate.<sup>163</sup> When interviewed, numerous PHA employees shared that they knew of incidents of local water contamination but had taken no action to address the problem or protect local tenants from potential health risks.<sup>164</sup>

To best protect public housing residents from the hazards associated with water contamination, HUD should amend NSPIRE to define "safe" water in alignment with EPA standards.<sup>165</sup> Currently, HUD proposes implementing any future standard for water safety at the sub-regulatory

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158. *Id.* at 2585.

159. *See* 2020 OIG REPORT, *supra* note 150, at 10 (depicting the vulnerability of thirty-seven thousand households, including more than eight thousand children under the age of six, in the HCV program).

160. *See supra* Part III.

161. Uruj Sheikh, Comment Letter in Response to HUD's Water Safety Standards Under the Economic Growth and Regulatory Relief and Consumer Protection Act: Implementation Of National Standards For The Physical Inspection Of Real Estate (NSPIRE) 2 (Mar. 3, 2021) (published at Regulations.gov) (indicating that the EPA does not require testing *inside* HUD facilities, which may contain corrosive plumbing fixtures). The author submitted this response to HUD during NSPIRE's notice-and-comment period. *Id.*

162. *Id.*

163. *See* 2020 OIG REPORT, *supra* note 150, at 9–10 (reporting that some staff members in PHAs conducted only limited tests of water sources in their communities).

164. *See id.*

165. *Drinking Water Regulations*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/dwreginfo/drinking-water-regulations> (last visited May 10, 2022) (regulating the acceptable levels of chemical and microbial contaminants).

level.<sup>166</sup> However, the prominence of lead pipes in water systems throughout the country and the known health risks of lead poisoning from corroded pipes demonstrate the need for a codified water safety standard that cannot be amended or withdrawn at a later date without the notice-and-comment rulemaking process.<sup>167</sup>

Additionally, HUD should implement a standard requiring housing inspectors to verify that city and local governments are following federal drinking water safety regulations. It currently uses a similar compliance process in its HCV program to ensure compliance with its lead-based paint regulations.<sup>168</sup> It supplies landlords with a packet explaining their legal obligations as recipients of HUD funding and containing the various documents that landlords must fill out and maintain in their records.<sup>169</sup> During housing inspections, inspectors review these forms for completion to ensure that landlords affirm they have taken the necessary actions to comply with federal regulations and protect tenants from lead-based paint hazards.<sup>170</sup> Though HUD's existing lead-based paint compliance processes require improvements, it could use similar procedures to monitor compliance with federal water safety regulations.<sup>171</sup>

Finally, for those buildings where tenants are most at-risk for water contamination, HUD should work with the EPA to incorporate water safety testing into NSPIRE's housing inspection criteria. Similar to the risk assessments that housing inspectors conduct for lead hazards, inspectors could analyze the risk of water contamination based on the ages of the building's plumbing system and the city's water system.<sup>172</sup> When pipes are determined to be outdated, or when an owner or PHA fails to provide the required documentation evidencing compliance with federal water safety regulations, inspectors could test the tap water in the units to determine whether contaminants exist that pose health risks to tenants. Using these strategies, HUD could strengthen NSPIRE's goal of protecting tenant safety by addressing the risks of water contamination.

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166. See NSPIRE IMPACT ANALYSIS, *supra* note 30, at 3–4 (explaining that all criteria will be implemented via guidance documents in the *Federal Register*).

167. See *Lead Pipes: A Threat to Kids Across America*, ENV'T DEF. FUND, <https://www.edf.org/health/lead-pipes-threat-kids-across-america> (last visited May 10, 2022).

168. See *generally Compliance Toolkit: Housing Choice Voucher Program*, U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF HEALTHY HOMES & LEAD HAZARD CONTROL (OHHLHC) (Aug. 20, 2007), [https://portalapps.hud.gov/CORVID/HUDBLPAdvisor/info/documents/hcvpleadtoolkit\\_20aug07.pdf](https://portalapps.hud.gov/CORVID/HUDBLPAdvisor/info/documents/hcvpleadtoolkit_20aug07.pdf) (packet provided to HUD program participants).

169. See *id.*

170. See 2018 GAO REPORT, *supra* note 102, at 24.

171. See *supra* Part II.

172. See *supra* Part II (describing the assessments conducted to evaluate potential risks of lead-based paint hazards).

## CONCLUSION

As the most senior body overseeing the country's housing programs, HUD has the primary responsibility of promoting and protecting the safety of Americans residing in federally assisted housing.<sup>173</sup> Housing inspections serve as an essential safeguard of tenant safety and a vital source of information needed to carry out this mission.<sup>174</sup> For the first time in over twenty years, HUD is overhauling its existing housing inspection standards and has introduced the NSPIRE framework.<sup>175</sup>

Environmental hazards, including site contamination, lead-based paint, and chemical contamination from pipe corrosion, threaten the safety of many American families living in federally assisted housing.<sup>176</sup> Despite HUD's statutory obligation to provide decent and safe housing and its own regulations governing lead-based paint and water safety, thousands of subsidized housing residents face risks of lead poisoning as a result of the aging public housing stock, outdated water systems, and failure of PHAs to comply with federal regulations, among other hazards discussed above.<sup>177</sup> The promulgation of NSPIRE, a uniform housing standard applicable to all rental assistance programs, presents an opportunity for HUD to address its weaknesses in protecting tenants from environmental hazards to date;<sup>178</sup> however, as is, NSPIRE falls short of the regulation necessary to do so.<sup>179</sup> Prior to promulgating the official rule, HUD should amend NSPIRE to account for these environmental hazards to better fulfill its statutory obligations.

In light of the history of subsidized housing construction on land contaminated by industry and the associated health hazards to humans living amidst polluted air and soil, HUD should amend NSPIRE's standards to account for site contamination.<sup>180</sup> The safety of one's home depends on the safety of the surrounding air and soil.<sup>181</sup> As thousands of HUD-assisted homes are built atop the country's most contaminated sites,

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173. See Housing Act of 1937, 42 U.S.C. § 1437.

174. See Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD to Resume Public Multifamily Housing Inspections in June (Apr. 23, 2021).

175. See Khimm, *supra* note 32.

176. See *supra* Parts I, II, and III.

177. See *id.*

178. See NSPIRE, *supra* note 33.

179. See *supra* Parts I.A, II.A, and III.A.

180. See Angela Caputo & Sharon Lerner, *Thousands of Public Housing Residents Live Near the Most Polluted Places in the Nation – and the Government Has Done Little to Protect Them*, AM. PUB. MEDIA REPS. (Jan. 13, 2021), <https://www.apmreports.org/story/2021/01/13/public-housing-near-polluted-superfund-sites>.

181. See *supra* Part I.

HUD should work closely with the EPA to improve its ability to test for environmental site contamination.<sup>182</sup> By building off of the momentum resulting from the WCHC crisis and the joint memorandum published by the two agencies tasked with handling the Superfund mess, HUD is poised to make a substantial difference by reducing the threats that environmental contaminants pose to tenants.<sup>183</sup> Incorporating site contamination into the NSPIRE standards would reaffirm HUD's prior commitment and legal obligation to protect public housing tenants from environmental pollutants and toxins.

Additionally, HUD should raise the proposed lead-based paint standard from the lower visual inspection standard to the stricter standard requiring risk assessment based on building age and physical testing of paint toxicity.<sup>184</sup> This change would significantly improve its ability to combat the primary source of EBLs in American children, lead-based paint.<sup>185</sup> Since agency officials remain under the impression that HUD currently lacks the statutory authority to enforce the higher standard in the HCV program, Congress should clarify the existing statutory ambiguity.<sup>186</sup> Given the clear legislative intent to mitigate the public health risks of lead-based paint and the substantial portion of federally assisted housing construction that predated the federal ban of lead-based paint in homes, lawmakers should explicitly grant HUD the authority to hold all of its subsidized housing programs, HCV included, to the stricter standard.<sup>187</sup>

NSPIRE should also be amended so that it lays out a clear standard for safe water reflecting the levels established by the EPA and CDC.<sup>188</sup> This definition should be included in the official rule, rather than implemented later at the sub-regulatory level, to ensure that the public has the opportunity to read and comment on any future modifications to the water safety standard.<sup>189</sup> HUD's current method of relying on city and state compliance with federal water regulations has proven to be

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182. See Coffey et al., *supra* note 38, at 11.

183. See U.S. DEPT OF HOUS. & URB. DEV. & U.S. ENV'T PROT. AGENCY, MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGARDING IMPROVING COMMUNICATION ABOUT CERTAIN PUBLIC AND HUD-ASSISTED MULTIFAMILY HOUSING NEAR SUPERFUND SITES (Jan. 2017).

184. See *supra* Part II.A.

185. *Id.*

186. 2018 GAO REPORT, *supra* note 102, at 36.

187. See *supra* note 131 and accompanying text; see *supra* Part II.A.

188. See *supra* Part III.A.

189. *Id.*



insufficient,<sup>190</sup> and even if the public water system satisfies all federal requirements, the safety of the tap water that tenants ultimately receive relies on the sufficiency of their building's plumbing system.<sup>191</sup> For these reasons, HUD should implement a system of compliance monitoring based on documentation provided by owners and PHAs certifying the drinking water's compliance with federal regulations; and in areas most at risk for water contamination, HUD should require housing inspectors to test the water for contaminants.<sup>192</sup> By adopting these recommendations, HUD could improve NSPIRE and its efforts to promote tenant safety by addressing existing health risks from environmental hazards.

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190. *Id.*

191. *See* Sheikh, *supra* note 161, at 2.

192. *See supra* Part III.