

A R T I C L E

WHO PAYS FOR THE LEAD SERVICE LINE?

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SUMMARY

The U.S. Environmental Protection Agency’s (EPA’s) Lead and Copper Rule Improvements (LCRI) ambitiously required every public water system in the country to replace all lead service lines within 10 years. The LCRI’s preamble “strongly encourages” water systems to absorb the cost of replacing privately owned lines into general water rates; that is likely to generate ratepayer opposition, litigation, and political pressure for roll-back. A better answer is the surcharge-lien system, a financing structure in which the water system advances the replacement cost, attaches an enforceable lien to the property whose line was replaced, and recovers the expenditure through property tax enforcement laws. This system applies tools that are universal in American municipal finance, and is available under the laws of every state with a meaningful lead service line inventory. For every water system in every state, it is what equity demands. This Article uses New York as the most fully developed example to demonstrate that the surcharge-lien system is available for virtually every governmental structure in the state, and provides an analytical template for practitioners in every state.

Nine million lead water service lines are still delivering water to American children. Where they all are, nobody knows. The federal government has finally ordered them out. The question every water system in the country must now answer is who pays to remove them.¹ Both law and equity say the property owner does.

Author’s Note: The author previously served as Chief Legal Officer and General Counsel to the Suffolk County Water Authority, whose operational implementation of a parcel-specific surcharge-and-lien system is discussed in this Article as a proof of concept. The author currently advises a New York municipality on Lead and Copper Rule Improvements compliance matters.

The author used an AI assistant (Anthropic’s Claude) throughout development of this Article. This included conceptualization of the analytical framework, initial outlining and structural drafting, comparative state legal research, doctrinal analysis, editorial review, and substantive revision suggestions across multiple drafts. All legal analysis, doctrinal conclusions, citation verification, and final wording decisions are the author’s own, and the author independently verified every legal authority cited against its primary source.

1. The preamble to the final Lead and Copper Rule Improvements (LCRI) provides in relevant part: “The EPA strongly encourages water system to offer full service line replacement at no direct cost to the customer wherever

The insidious thing about lead service line exposure is that it is invisible, odorless, and ubiquitous in the built environment of older communities. While some parents can fix their tap water at home, they cannot control the water fountain at the soccer complex, the church hall, the dance studio, the grandparents’ house, or the friend’s apartment. The exposure pathway is everywhere a child goes, and most of those places have no idea whether they have a lead service line.

The maximum contaminant level goal (MCLG) for lead is zero,² which means the safest level is zero. The only answer is elimination, not management, not filtration, not bottled water. Every pipe has to come out. And the financing structure that can make that happen at national scale, equitably, without generating the political opposition that kills the mandate, is a surcharge-lien system.

possible, but this is not a requirement of the LCRI. The final LCRI remains neutral on how water systems provide and charge for services to their customers.” National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI), 89 Fed. Reg. 86418, 86454 (Oct. 30, 2024).

The juxtaposition is self-defeating. The U.S. Environmental Protection Agency (EPA) “strongly encourages” a financing approach in one clause and immediately disclaims it as “not a requirement” in the next. That self-negating construction, however well-intentioned, reflects an Agency that understood its preferred financing approach lacked both federal legal compulsion and, as this Article demonstrates, legal soundness under the applicable state statutory frameworks.

2. 40 C.F.R. §141.51(b) (MCLG for lead = zero); 89 Fed. Reg. at 86418-19.

But the U.S. Environmental Protection Agency (EPA) is killing its own rule. The Lead and Copper Rule Improvements' (LCRI's) preamble "strongly encourages" water systems to offer full replacement at no direct cost to the customer, absorbing the cost of replacing privately owned lead service lines into general water rates and spreading it across the entire ratepayer base. That guidance is a disaster. It puts every water board in an impossible position: follow EPA's "strong encouragement" and absorb costs that state law requires the property owner to bear, or follow state law and appear indifferent to lower-income property owners who cannot afford to pay.

And it generates opposition from every ratepayer without a lead pipe who sees a higher water bill and asks why. That opposition fuels litigation and political pressure for rollback. No amount of social engineering protects children if the rule collapses under the weight of the opposition that its own financing guidance creates. The lead pipes should come out. There is a legal and equitable way to make that happen without raising anyone's rates or taxes, and New York law has required it for decades.

The LCRI requires every public water system in the country to replace all lead service lines, not only the ones they own and operate, but also privately owned portions on customer property. Replacement must be accomplished at a mandatory minimum rate of 10% of inventory annually, with full replacement required within 10 years.³ The aggregate national cost runs to billions of dollars, and the compliance clock is running⁴: each water system must submit a replacement plan to its primacy agency by November 1, 2027.⁵ Thus, there is an immediate planning imperative for every covered system in the country, regardless of size, governmental structure, or the outcome of pending federal litigation over the rule's validity.⁶

The financing question the LCRI forces every water system to answer is deceptively simple to state and important to answer correctly⁷: When a water system advances public funds to replace a privately owned lead service line, how should the cost of that replacement be allocated? The answer water systems may default to—absorb the cost into general water rates, spread it across the entire ratepayer base, and move on—is administratively easy but fundamentally inequitable. For most New York water systems, it is also contrary to law.

The answer this Article proposes is the surcharge-lien system: a financing structure in which the water system

advances the cost of each individual replacement, attaches an enforceable lien to the specific property whose service line was replaced, and recovers the expenditure from that property's owner over a defined repayment period through property tax enforcement laws. The cost follows the benefit, property by property, parcel by parcel.

The architecture of the surcharge-lien system is universal in American municipal finance. Every state with a meaningful lead service line inventory has, in its own statutory and constitutional framework, the materials necessary to construct it. Massachusetts has codified essentially the same structure for over a century under the name of the "betterment."⁸ Virginia's Constitution explicitly authorizes special assessments on abutting property owners for local public improvements, with the same beneficiary-pays limit that animates the surcharge-lien system.⁹

Pennsylvania's Municipal Claim and Tax Lien Law and Municipality Authorities Act provide the same lien-conversion architecture for the state's approximately 2,082 publicly owned community water systems.¹⁰ Illinois' Municipal Code authorizes a special-assessment lien framework that maps directly onto the statutory utility lien described here, even as Illinois communities currently confront the financing question under the most aggressive state-level replacement mandate in the nation.¹¹ New York has been chosen for the bulk of this Article because its enabling legislation has spoken to the question with unusual specificity for unusually long, but the analytical framework that makes the surcharge-lien system available in New York operates, with appropriate adaptation to local statutory and constitutional architecture, in every state.

In New York, both law and equity compel the answer that the property owner pays. The legal pathway, however, is not the same for every water system. New York's water service landscape encompasses at least four distinct governmental structures, each with its own enabling legislation, its own constitutional and statutory framework, and its own existing authority to implement the surcharge-lien system.

For villages and water districts, the most important finding is that the surcharge-lien system is not a novel constitutional workaround or an innovation that requires new legislation. It is the statutory requirement that the legislature built into the enabling legislation decades ago. New York Village Law §11-1112 already provides villages with a complete surcharge-lien framework, including the authority to assess the cost of a defaulted service line

3. 40 C.F.R. §§141.80(b), 141.84(f).

4. 89 Fed. Reg. at 86420.

5. 40 C.F.R. §141.80(b). The replacement plan submission deadline is November 1, 2027, applicable to all systems subject to the LCRI. New York systems submit to the New York State Department of Health as the state primacy agency; systems in other states submit to their respective primacy agencies.

6. *American Water Works Ass'n v. U.S. Env't Prot. Agency*, No. 24-1376 (D.C. Cir. filed Dec. 13, 2024).

7. This Article addresses the financing obligations of publicly owned water systems of villages, water districts, municipalities, and public water authorities. Investor-owned utilities subject to public utility commission rate regulation face a distinct set of regulatory, constitutional, and ratemaking questions that are beyond the scope of this analysis.

8. MASS. GEN. LAWS ch. 80 (statewide betterment framework); MASS. GEN. LAWS ch. 40, §§42A-42K (water utility lien authority).

9. VA. CONST. art. X, §§3 and 10; VA. CODE ANN. §§15.2-2118 to 15.2-2120 (water and sewer liens); VA. CODE ANN. §15.2-5139 (water authority lien authority).

10. Municipal Claim and Tax Lien Law, Act of May 16, 1923, Pub. L. No. 207, No. 153 (codified at 53 P.S. §§7101 et seq.); Municipality Authorities Act, 53 PA. CONS. STAT. ch. 56. The 2,082 figure is drawn from National Association of Water Companies (Pennsylvania Chapter) legislative testimony before the Pennsylvania General Assembly.

11. 65 ILL. COMP. STAT. 5/9-2-1 et seq. (Local Improvements special-assessment framework); 415 ILL. COMP. STAT. 5/17.12 (Lead Service Line Replacement and Notification Act).

replacement as a lien against the property and collect it as other local assessments.¹² New York Town Law §198(3) (a) already provides water districts with mandatory cost allocation language, a uniform service charge mechanism, and assessment-against-real-property enforcement.¹³ For all municipalities, New York's Gift and Loan Clause and the New York State Comptroller's Troy Opinion (Opinion 2024-1) supply the constitutional framework within which the surcharge-lien system is a sound financing path in the absence of a fully funded grant.¹⁴

For public water authorities, no direct constitutional prohibition applies. The Gift and Loan Clause expressly governs counties, cities, towns, and villages, not authorities, but enabling legislation limits, bond covenant constraints, and sound public finance principles point in the same direction, with a legislative gap for most water authorities that demands prompt attention.

The equity argument for the surcharge-lien system is the universal principle that transcends all four legal pathways in New York and operates universally. It applies regardless of state, regardless of governmental structure, regardless of the availability of federal grant funding, and regardless of which version of the federal rule ultimately governs. It rests on three foundations.

First, the private service line is private property. Its owner has used it, benefited from it, and will benefit from its replacement through improved water quality and enhanced property value. The cost of improving private property is properly borne by the property owner, not spread across a ratepayer base that shares neither the ownership nor the benefit.

Second, the cross-subsidization that general rate financing produces is neither random nor neutral in its distributional effects. Lead service lines are a function of community age, not community wealth. Virtually every established municipality in the Northeast and Midwest has them, in wealthy suburbs and lower-income neighborhoods alike. A general ratepayer financing approach may require newer, lower-income communities without lead pipes to subsidize replacement programs in older communities with more lead infrastructure. That distributional outcome is the opposite of the environmental justice rationale that often motivates general revenue financing proposals.

Third, the surcharge-lien system preserves the integrity of the rate structure by ensuring that private infrastructure improvement costs are borne by the properties that benefit from them, maintaining the cost-of-service principles that underlie sound utility regulation in every state.

The surcharge-lien system is not theoretical. The Suffolk County Water Authority (SCWA) in New York implemented a parcel-by-parcel surcharge and lien structure at large scale for water main extension costs, demonstrating that water charge liens can be attached to individual prop-

erties, integrated with county property tax enforcement laws, and made self-executing through the real estate transaction process that title companies incorporated into standard closing practice.¹⁵ That proof of concept, developed in the water main extension context, provides the operational and legal foundation for the lead service line replacement financing structure proposed here.

What does all of this mean for a water board member or village trustee? If your water system uses the surcharge-lien system, your water rates will not increase, your taxes will not increase, and you will have fulfilled your obligations under the LCRI. The cost of replacing privately owned lead service lines will be borne by the owners of those properties, recovered over time through a parcel-specific surcharge, secured by an enforceable lien, and collected through the property tax enforcement mechanism that is already the most powerful debt collection tool in American municipal law.

The financing structure is the difference between a rule that gets implemented and one that does not. A regulation that strongly encourages water systems to absorb the cost of private-side lead service line replacement into general rates, making that cost visible to tens of millions of ratepayers who have no lead service lines, generates political opposition that fuels both litigation and pressure for rollback. A rule that water systems can implement without raising rates and without raising taxes has no ratepayer opposition to sustain. The surcharge-lien system is therefore simultaneously the equitable answer, the legally required answer for most New York water systems, and the answer that gives the LCRI its best chance of long-term political and legal survival.

The Article proceeds as follows. Part I describes the LCRI's core requirements, the federal funding landscape, and the regulatory context, including the American Water Works Association (AWWA) litigation and current federal implementation posture. Part II develops the equity imperative as a stand-alone universal principle, both the classical equitable argument that the beneficiary of an improvement pays for it and the modern distributive equity argument that general rate financing is regressive, not progressive, and the case that the surcharge-lien system is the financing structure that gives the LCRI its best chance of political and legal survival.

Part III provides the legal analysis by governmental structure, village, water district, municipality, and public water authority, with the statutory text of New York Village Law §11-1112 and New York Town Law §198(3)(a) as the load-bearing foundation for the first two. Part IV spells out structural requirements that make the surcharge-lien system work: the seven requirements for a legally sound program and the proof of concept of real-life implementation. Part V addresses the disclosure layer, New York Real Property Law §§242 and 462, that completes the frame-

12. N.Y. VILLAGE LAW §11-1112.

13. N.Y. TOWN LAW §198(3)(a).

14. N.Y. CONST. art. VIII, §1; Opinion of the N.Y. State Comptroller, Op. 2024-1 (City of Troy) (Dec. 5, 2024), <https://www.osc.ny.gov/legal-opinions/opinion-2024-1> [hereinafter N.Y. State Comptroller Opinion].

15. N.Y. PUB. AUTH. LAW §1078-f (SCWA surcharge and lien authority); N.Y. REAL PROP. LAW §242(2)(a), as amended by Act of May 4, 2004, ch. 61, §1, 2004 N.Y. Laws 131 (S. 3756).

work at the point of sale. Part VI concludes with a call to action for water system counsel, governing boards, and policymakers in every state.

I. The Federal Mandate— What the LCRI Requires

A. Background and Regulatory History

Lead is a potent neurotoxin, for which the safest level of exposure is zero. EPA has established a MCLG of zero for lead in drinking water, meaning that any detectable lead represents an unacceptable health risk, particularly for infants and children whose neurological development is irreversibly damaged by even low-level exposure.¹⁶ The legal and public health significance of the zero MCLG is addressed in the first two Articles of this series.¹⁷

What distinguishes lead in drinking water from other exposure pathways is that it is entirely and immediately preventable through the replacement of lead service lines. Unlike lead paint or contaminated soil, a lead service line can be removed, eliminating that exposure pathway completely and permanently for every household it serves. That is what makes lead service line replacement a genuine and achievable public health imperative, and makes the equity of its financing more than an abstract legal question.

The age-of-infrastructure reality at the heart of that financing question is frequently misunderstood. Lead service lines are a function of community age, not community wealth. The federal ban on lead in new water service line installations, effective in 1986, means that communities developed largely after that date have few or no lead service lines regardless of income level.¹⁸

Communities developed before 1986, which include virtually every established municipality of meaningful size across the Northeast and Midwest, have lead service lines in the ground in wealthy suburbs and lower-income urban neighborhoods alike. What has differed is not whether the lead pipes have been removed. Decades of corrosion-control treatment suppressed lead leaching without eliminating the source,¹⁹ obscuring the problem. The LCRI's mandate to remove the pipes entirely is long overdue, and its financing should be structured to reflect where the benefit actually lands, not where the administrative convenience of general rate financing points.

The significance of that mandate is best understood against the alternatives. Corrosion-control treatment—

adding phosphates or adjusting hydrogen ion concentration to reduce lead leaching from pipe walls—does not achieve the zero MCLG. It reduces exposure under controlled conditions, but does not eliminate it, and three decades of corrosion-control programs have demonstrated its fundamental inadequacy as a permanent solution.²⁰ Point-of-use filters reduce exposure at specific taps, but cannot guarantee protection at every point of use and depend on consistent maintenance that cannot be enforced across an entire service population. Bottled water substitutes a different source at the point of consumption, but does not address exposure through cooking or bathing and imposes an ongoing cost that falls disproportionately on lower-income households.

None of these measures achieve the zero MCLG; only pipe removal does. That is a scientific observation as well as a legal and financing conclusion. It is also what makes the financing structure the correct answer rather than a mere compliance choice: lead is categorically different from other regulated contaminants because its source of exposure is private infrastructure on private property, serving only the household it connects. For most contaminants, shared cost financing is correct because the treatment benefit is shared across the system. For lead service line replacement, the benefit is entirely private, and the cost must follow that pathway.

B. The LCRI's Core Requirements

The LCRI's mandatory replacement obligation is straightforward in its basic structure and demanding in its practical implications. Every public water system with lead service lines or galvanized-requiring-replacement (GRR) service lines in its inventory must replace those lines at a minimum rate of 10% of its initial inventory annually, achieving full replacement within 10 years.²¹ The 10% annual replacement rate is calculated against a baseline inventory established as of November 1, 2027.²²

The replacement obligation applies to service lines “under control” of the water system, a concept central to the LCRI's structure.²³ EPA's definition of control is functional rather than ownership-based. A system exercises control over a service line if it has the legal authority and practical ability to replace it, regardless of whether the line is located on public or private property.²⁴ For example, the portion of a privately owned service line located in the public road

16. 40 C.F.R. §141.51(b) (MCLG for lead = zero); 89 Fed. Reg. at 86418-19.

17. Timothy J. Hopkins, *MCLGs in Water Contamination Litigation: Why Health-Based Standards Matter*, 56 ELR 10037 (Jan./Feb. 2026), <https://www.elr.info/articles/elr-articles/mclgs-water-contamination-litigation-why-health-based-standards-matter>; Timothy J. Hopkins, *A New Path to Achieving Health-Based Drinking Water Standards*, 56 ELR 10105 (Mar./Apr. 2026), <https://www.elr.info/articles/elr-articles/new-path-achieving-health-based-drinking-water-standards>.

18. Safe Drinking Water Act (SDWA) Amendments of 1986, Pub. L. No. 99-339, §109, 100 Stat. 642, 650 (1986) (prohibiting use of pipes, solder, or flux containing more than 8% lead in public water systems or in plumbing providing water for human consumption, effective June 19, 1986).

19. See 89 Fed. Reg. at 86430-32.

20. Lead crises in Washington, D.C., and Flint, Michigan, highlighted the shortcomings of relying on corrosion control as the primary means of addressing lead-containing water service lines. See *id.* at 86431.

21. 40 C.F.R. §141.84(f). GRR service lines are galvanized steel service lines that are or were downstream of a lead service line, or whose upstream material is unknown; they are included in the mandatory replacement obligation because they may retain lead particles from prior contact with lead pipe. See *id.* §§141.2, 141.84.

22. *Id.* §141.80(a)(3) (specifies lock-in date for most community and non-transient non-community water systems).

23. 89 Fed. Reg. at 86419.

24. U.S. EPA, Office of Water, EPA's Final Lead and Copper Rule Improvements Technical Fact Sheet: Calculating Service Line Replacements (2024), https://www.epa.gov/system/files/documents/2024-10/final_lcric_fact-sheet_calculating-service-line.pdf.

right-of-way is likely “under [the] control” of a municipal water system. Asserting lack of control over privately owned service lines is not a viable long-term compliance strategy. The strategic question is therefore not whether to replace private-side service lines, but how to finance those replacements in a manner that is legally sound, operationally feasible, and fair to ratepayers.

The LCRI also establishes a partial replacement prohibition with direct implications for financing.²⁵ A system that replaces the portion of a service line “under its control” must also replace the private portion located on private property if the property owner consents to access. Partial replacement can temporarily increase lead levels at the tap by disturbing corrosion scales on the remaining pipe.²⁶ Systems cannot discharge their replacement obligations by replacing only the portion they own or control. The private side must come out, and the financing mechanism should be in place before replacement begins.

Each water system must submit a lead service line replacement plan to its primacy agency by November 1, 2027.²⁷ That plan must address the system’s strategy for financing private-side replacements, including identification of all state and local laws, rate provisions, and agreements that affect the system’s ability to access privately owned service lines.²⁸ A system that submits a replacement plan without a credible, legally sound private-side financing mechanism is submitting an incomplete plan. The surcharge-lien system described here is that mechanism.

The November 2027 deadline lands hardest in states where state-level mandates compound the federal one, and Illinois is currently the clearest example. Under Illinois Public Act 102-0613,²⁹ every Illinois community water supply must replace every lead service line in its system, including the privately owned portion, on tiered statutory timelines varying by system size and inventory. Chicago alone has more than 400,000 lead service lines, more than twice the count of any other American city.³⁰

What the Illinois statute commands, however, it does not finance. The Lead Service Line Replacement and Notification Act prohibits partial replacement and imposes the substantive obligation, but it is silent on cost allocation as between the water system and the property owner.³¹ Illinois communities are accordingly being forced into precisely

the choice addressed here, with no statutory direction. The financing question is being answered, parcel-by-parcel, in Cook County right now.

C. Federal Funding and the Importance of Cost Recovery

The Bipartisan Infrastructure Law (BIL), enacted in 2021, appropriated \$15 billion for lead service line replacement nationally, distributed through EPA’s Drinking Water State Revolving Fund.³² BIL funding was available to water systems through state environmental and drinking water infrastructure programs in the form of both low-interest loans and grants, including principal forgiveness provisions for qualifying disadvantaged community water systems.³³ As of this writing, BIL funding has effectively closed.³⁴ Systems that did not secure BIL funding commitments face the prospect of financing their replacement programs entirely from state and local sources, a significantly more challenging fiscal environment that makes the surcharge-lien system both legally preferable and financially essential.

For New York systems specifically, the form of funding matters constitutionally as well as fiscally. In *Kradjian v. City of Binghamton*,³⁵ the Appellate Division held that a municipality’s participation in a federal program did not implicate New York’s Gift and Loan Clause where the municipality was not required to guarantee a loan from its own resources and any effect on the public fisc was speculative.³⁶ The New York State Comptroller applied this reasoning in the Troy Opinion, concluding that where state grant funds fully offset Troy’s debt obligation, it was “at least arguable” that the gift and loan prohibition was not implicated at all.³⁷

The *Kradjian* argument has important limits, however. It applies only where federal or state grant funds precisely

25. 40 C.F.R. §141.84(d).

26. 89 Fed. Reg. at 86454.

27. 40 C.F.R. §141.84(b).

28. *Id.* at §141.84(c). The replacement plan must include, among other elements, a description of the system’s financing strategy for private-side replacements and identification of all legal constraints on the system’s ability to access customer-owned service lines. A system that cannot demonstrate a credible private-side financing mechanism will face New York State Department of Health (NYSDOH) scrutiny during plan review.

29. Public Act 102-0613, codified at 415 ILL. COMP. STAT. 5/17.12 (effective Jan. 1, 2022).

30. Chicago Department of Water Management Service Line Inventory, submitted to the Illinois Environmental Protection Agency, April 14, 2025 (reporting approximately 412,000 of 491,000 service lines as known or suspected lead).

31. 415 ILL. COMP. STAT. 5/17.12. The statute imposes the substantive replacement obligation and prohibits partial replacement, but does not specify cost allocation between the community water supply and the property owner.

32. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, §50105, 135 Stat. 429 (2021).

33. For New York systems, BIL lead service line replacement funds are distributed through the Drinking Water State Revolving Fund (DWSRF), administered jointly by the New York State Environmental Facilities Corporation (EFC) and NYSDOH. See EFC, *Drinking Water State Revolving Fund*, <https://efc.ny.gov/dwsrf> (last visited May 7, 2026); NYSDOH, *Drinking Water State Revolving Fund (DWSRF)*, <https://health.ny.gov/environmental/water/drinking/water> (last revised Mar. 2026). As a condition of receiving BIL funds, projects must replace the entire service line, including the privately owned portion. See N.Y. State Comptroller Opinion, *supra* note 14; Syracuse University Environmental Finance Center & New York State Water Resources Institute, *Lead Service Line Removal Funding in New York State (2025)*, https://efc.syr.edu/wp-content/uploads/2025/03/LSLR-Fact-Sheet-Final-Version_March-2025.pdf. Practitioners in other states should consult their state primacy agency and state revolving fund (SRF) program administrator for current availability and program requirements.

34. The \$15 billion BIL appropriation for lead service line replacement is distributed through the DWSRF over five federal fiscal years (FFYs), FFY 2022 through FFY 2026, with FFY 2026 representing the final year of new capitalization grants. Reallocated funds from underutilizing states may remain available for a limited period thereafter. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, §50105, 135 Stat. 429, 1159 (2021).

35. 482 N.Y.S.2d 89, 104 A.D.2d 16 (3d Dept. 1984).

36. *Id.* at 18, *discussed in* N.Y. State Comptroller Opinion, *supra* note 14, at §III.A.

37. N.Y. State Comptroller Opinion, *supra* note 14, at §III.A.

offset the municipal pledge of credit. For the much larger universe of systems financing private-side lead service line replacement from a combination of federal funds, state revolving fund (SRF) loans, and local revenues without fully offsetting grants, the constitutional question remains open, and the surcharge-lien system is the mechanism by which the applicable constitutional standard is met.

Federal funding also does not eliminate the need for a cost recovery mechanism. A water system that borrows SRF funds to finance private-side replacements without a legally sound recovery mechanism is left holding a debt service obligation with no corresponding revenue stream.³⁸ A water system that accepts federal funds with a commitment to full replacement but lacks a constitutionally sound mechanism to finance the private side has made a commitment it cannot legally keep.³⁹

D. Regulatory Uncertainty—The AWWA Litigation and Federal Implementation Posture

The LCRI faces legal challenge in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit from the AWWA and other water-sector organizations, which contend that EPA exceeded its statutory authority in imposing a universal replacement mandate untethered to action-level exceedances.⁴⁰

These developments do not alter the fundamental analysis. The LCRI is current federal law. New York State has its own statutory requirements independent of the federal rule, and those obligations operate regardless of what happens in federal court. The constitutional and equity framework this Article addresses is a creature of state law, unaffected by whatever EPA does or does not do. A water system that defers planning pending resolution of federal regulatory uncertainty is not managing risk, it is creating it.

More fundamentally, the surcharge-lien system is a tool for making the LCRI politically and fiscally sustainable. A rule that water systems can implement without raising rates and without raising taxes is a rule that can withstand litigation, political opposition, and changes in federal enforcement posture. General rate financing, by contrast, makes

the LCRI a visible cost imposed on every ratepayer in the system, including ratepayers with no lead service lines, who will object.

The surcharge-lien system removes that pressure point entirely. The cost falls on the properties that benefit from replacement, collected through the same mechanism that collects property taxes, invisible to the general ratepayer base. That structure both satisfies the equity imperative and makes the long-term political sustainability of universal lead service line replacement achievable.

The equity case for the surcharge-lien system therefore does not depend on the LCRI's survival in its current form. Water systems across the country will face the challenge of private-side lead service line replacement under some regulatory framework. The question of who should pay demands a legally sound and equitable answer regardless of which version of the federal rule ultimately governs.

II. The Equity Imperative—The Universal Answer

The surcharge-lien system is the legally required answer for most New York water systems, and the equitable answer for every water system in every state. The statutory, constitutional, and financial legal requirements vary by governmental structure and by jurisdiction, but the equity imperative does not. It applies regardless of governmental structure, regardless of the availability of federal grant funding, and regardless of which version of the federal rule ultimately governs. A water board member who understands the equity argument does not need to fully master the legal analysis. The equity argument is sufficient to justify the surcharge-lien system on its own, and it rests on foundations that are as durable as the problem they address.

A. The Classical Equity Argument—The Beneficiary Pays

The equitable principle that the beneficiary of an improvement bears its cost is among the oldest and most fundamental principles in Anglo-American law. Law and equity have operated for centuries as twin pillars of that legal tradition—law supplying the rule, equity providing the corrective principle when the rule would otherwise produce an unjust result. The answer to this Article's question of who pays for the lead pipe is the answer that legal rules and equitable principles have always given when public funds improve private property: the owner of that property pays.⁴¹

The special assessment is the clearest institutional expression of that principle in American municipal law.

38. *Id.* §III.C; see also *Murphy v. Erie Cnty.*, 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771 (1971); *Bordeleau v. State*, 18 N.Y.3d 305, 937 N.Y.S.2d 126, 960 N.E.2d 917 (2011). A water system that finances private-side replacements through SRF borrowing without a cost recovery mechanism has pledged public credit to improve private property and made no provision to be made whole. That is precisely the structure the Gift and Loan Clause prohibits.

39. SDWA §1459B, 42 U.S.C. §300j-19b; Memorandum from Jennifer L. McLain, Director, Office of Ground Water and Drinking Water, U.S. EPA, to Water Division Directors, Regions I-X, re: Implementing Lead Service Line Replacement Projects Funded by the Drinking Water State Revolving Fund (May 1, 2024), <https://www.epa.gov/dwstrf/implementing-lead-service-line-replacement-projects-funded-dwsrf>. Federal SRF loan conditions may themselves require a credible cost recovery mechanism as a condition of funding, independently of state constitutional requirements.

40. *American Water Works Ass'n v. U.S. Env't Prot. Agency*, No. 24-1376 (D.C. Cir. filed Dec. 13, 2024) (petition for review filed by AWWA and the Water Research Foundation challenging the universal lead service line replacement mandate as exceeding EPA's authority under SDWA §1412(b)(4), 42 U.S.C. §300f(b)(4)).

41. The equitable principle that the beneficiary of an improvement should bear its cost finds its deepest roots in the law of restitution and unjust enrichment. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §1 (Am. L. Inst. 2011) ("A person who is unjustly enriched at the expense of another is subject to liability in restitution."). The pairing of law and equity as complementary pillars of the Anglo-American legal tradition is addressed in standard treatments of equity jurisprudence. See generally JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (5th ed. 1941).

For generations, municipalities have financed street paving, sidewalk construction, sewer installation, and water main extensions by levying the cost of each improvement against the specific parcels that received a direct and particularized benefit.⁴² The constitutional rationale is straightforward: when a public expenditure confers a specific, identifiable benefit on a specific parcel, it is both equitable and constitutionally sound to recover that cost from the owner of the benefited parcel rather than from the general public.⁴³ The benefit principle is not a novel theory. It is a load-bearing element of American municipal finance, tested in courts across the country for more than a century.

The lead service line replacement surcharge fits comfortably within this analogy, and in one critical respect makes the case for parcel-specific cost recovery more compelling than the classic special assessment. In the traditional special assessment, public funds finance a public improvement that happens to confer a particularized benefit on adjacent private property. The improvement belongs to the public.

Here, the improvement is the private service line itself. Public funds are advanced to improve infrastructure that is privately owned, will remain privately owned after replacement, and will directly enhance the value of the specific private parcel it serves. The public treasury is advancing funds to improve something it will never own. If parcel-specific cost recovery is the right answer when public funds improve public infrastructure that incidentally benefits private property, it is even more compelling when public funds are used to improve the private property directly.

B. *The Financing Intermediary Model—Lender, Not Grantor*

The equity argument is given operational form through the financing intermediary model. The distinction between a grantor and a financing intermediary is the conceptual heart of the surcharge-lien system, and it separates an equitable financing structure from an inequitable one regardless of what state law requires.

When a water system replaces a privately owned lead service line and absorbs the cost into its general rate base, it is functioning as a grantor. Public funds flow out, a permanent capital improvement lands on private property, and the system recovers nothing from the specific prop-

erty that benefited. The ratepayer base bears the cost; the property owner captures the benefit. In states with gift and loan-type constitutional constraints, that structure is an impermissible gift of public funds. In every state, it is an inequitable allocation of costs that no sound public finance principle supports.

The surcharge-lien system reframes the transaction entirely. Under a properly structured program, the water system functions as a financing intermediary. It advances the cost of replacement, attaches a lien to the benefited property in the amount of that cost plus market-rate interest, and recovers the expenditure over a defined repayment period through property tax enforcement laws. The property owner receives the capital improvement and pays for it over time through a legally enforceable obligation. When the water system is structured as a lender rather than a grantor, the equitable principle that the beneficiary pays is not merely an aspiration, it is an enforceable obligation running with the land. The public treasury is made whole.

C. *The Modern Equity Argument—Turning the Conventional Wisdom on Its Head*

The conventional wisdom about equity in lead service line replacement financing runs in the opposite direction from the argument made here. The conventional view holds that equity requires the water system to absorb the cost of private-side replacement, that requiring individual property owners to bear the cost is a hardship that falls disproportionately on lower-income households, and that socialized financing through general rates is the progressive answer. That view is understandable; it is also wrong, and the distributional arithmetic demonstrates why.

What follows from that distributional reality is the opposite of the conventional wisdom. A general ratepayer financing approach that spreads lead service line replacement costs across the entire customer base requires ratepayers in newer, often lower-income communities without lead service lines to subsidize replacement programs in older communities with more lead infrastructure. The cross-subsidy flows from the ratepayer without a lead pipe to the property owner with one, from the community that never had the problem to the one that did. That is a regressive distributional outcome, and it is the predictable result of socializing a parcel-specific cost across a general rate base without regard for who bears the burden of the problem being solved.

The conventional equity argument fails on its own terms for a second, independent reason. In the lower-income communities where that argument is most forcefully advanced, most residents are tenants, not property owners. The direct benefit of private-side lead service line replacement, the elimination of a lead hazard from the service line supplying the structure, runs to the property itself and is captured by its owner. The tenant receives the health benefit of lead-free water, but the owner receives the asset improvement. Under a general rate financing model, all ratepayers, including tenants in lead-free communities,

42. Special assessments represent the historical application of the beneficiary-pays principle in American municipal law, allocating the cost of public improvements to the properties that receive a special benefit thereby. See 15 EUGENE McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §44.01 (3d ed. rev. 2024). The constitutional validity of special assessments has been long established. See *Norwood v. Baker*, 172 U.S. 269, 279 (1898) (special assessment must bear a reasonable relationship to the benefit conferred on the assessed property); see also *Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Vill. of Roslyn Harbor*, 40 N.Y.2d 158, 386 N.Y.S.2d 198, 352 N.E.2d 115 (1976).

43. *Norwood*, 172 U.S. at 279 (holding that a special assessment levied without reasonable relationship to the benefit conferred on the assessed property violates the Fourteenth Amendment); see also *Embree v. Kansas City & Liberty Boulevard Rd. Dist.*, 240 U.S. 242, 250 (1916) (reaffirming that the constitutional validity of a special assessment depends on whether the charge bears a fair approximation to the benefit received).

subsidize an infrastructure improvement whose economic benefit is captured by the landlord. The surcharge-lien system corrects this misallocation: it charges the improvement to the property that receives it, recoverable upon sale or refinancing, ensuring that the party who captures the asset benefit ultimately bears the cost.

The surcharge-lien system produces the genuinely equitable distributional outcome. The cost of replacing a privately owned lead service line is borne by the owner of the property whose lead pipe was replaced. That owner captures the health benefit, the regulatory benefit, elimination of lead pipe liability exposure, and the long-term property value enhancement that replacement produces.⁴⁴ The cost follows the benefit, parcel-by-parcel. Ratepayers without lead service lines pay nothing for replacements they did not need and did not receive. The distributional outcome reflects the actual distribution of the problem.

D. Financial Accessibility—The Surcharge as a Manageable Obligation

A recurring objection to the surcharge-lien system is that it imposes a financial hardship on lower-income property owners who cannot afford to pay for their service line replacement. The objection deserves a serious answer, because the equity case for the surcharge-lien system depends in part on the system being financially accessible as well as fairly allocated.

Consider a typical residential lead service line replacement with an estimated cost of \$10,000.⁴⁵ Under the

surcharge-lien system, the water system advances the replacement cost, attaches a lien to the property, and establishes a repayment schedule at a market interest rate of 4.5% annually over 10 years. New York Local Finance Law §11.00(a)(109) would permit a repayment period of up to 30 years for municipalities, and comparable flexibility is available through other enabling legislation for other governmental structures. The amortization profile at a 10-year term is set out in Table 1 below.

Table 1: Lead Service Line Replacement Surcharge—Amortization Summary

\$10,000 Principal at 4.5% Annual Interest Over 10 Years

	Amount	Payment period	Amount
Principal	\$10,000.00	Monthly payment	\$103.64
Annual interest rate	4.5%	Quarterly payment	\$310.92
Term	10 years/120 months	Total amount paid	\$12,436.80
		Total interest paid	\$2,436.80

Source: Standard mortgage-style amortization. Monthly payment: $P \times [r(1+r)^n] / [(1+r)^n - 1]$, where $P = \$10,000$, $r = 0.375\%$ (monthly), $n = 120$.

A monthly obligation of \$103.64, comparable to a modest utility bill, is a manageable financing arrangement for a capital improvement that permanently eliminates a health hazard and enhances the value of the property.⁴⁶ It is categorically different from a demand for \$10,000 in immediate out-of-pocket payment, which would impose a hardship that many property owners could not readily absorb. A water system that advances the replacement cost and recovers it over time through the surcharge mechanism is providing the property owner with exactly the kind of financing that makes a significant infrastructure improvement accessible. The system is not punishing the property owner, it is financing an improvement the property owner is legally obligated to pay for, on terms that make that obligation manageable.

The structural answer for the property owner for whom even a \$103.64 monthly surcharge is unaffordable is not novel. Massachusetts has codified that answer for over a century in the “betterment” statute identified above as the

44. Replacement of a lead service line directly benefits the served property by eliminating its primary source of lead contamination and enhancing its market value. Empirical studies confirm that lead service line replacement produces measurable property value appreciation. See Adam Theising, *Lead Pipes, Prescriptive Policy and Property Values*, 74 ENV'T & RES. ECON. 1355, 1355-56 (2019) (finding average post-replacement price appreciation of 3%-4% of property value in Madison, Wisconsin, implying a more than 75% average return on public and private remediation costs); Michelle M. Marcus, *Burying the Lead: Effects of Public Lead Service Line Replacements on Child Blood Lead Levels and Property Values* (Working Paper, Vanderbilt Univ. Dep't of Econ., July 2023) (finding 7%-8% property value increase following public-side lead service line replacement in Providence, Rhode Island); see also MIKE BLACKHURST, *DO LEAD WATER LATERALS AFFECT PROPERTY VALUES: A CASE STUDY OF PITTSBURGH, PA* (2018) (finding lead laterals reduce property sales values by approximately 5%, implying corresponding appreciation upon removal). See generally 89 Fed. Reg. at 86454 (discussing health and economic co-benefits of LCRI replacement mandate).

45. Replacement costs for private-side lead service lines vary significantly by location, pipe length, soil conditions, depth, and local contractor markets. EPA's regulatory impact analysis for the LCRI used an average replacement cost of approximately \$4,700 per line as a national baseline estimate. See 89 Fed. Reg. at 86508. The \$10,000 figure used throughout this Article reflects a mid-range estimate more consistent with actual field costs in the Northeast, which include restoration, traffic control, and program administration costs not captured in EPA's construction-cost baseline. See ELIN W. BE-

TANZO & VANESSA SPEIGHT, *LEAD SERVICE LINE REPLACEMENT COSTS AND STRATEGIES FOR REDUCING THEM* 41-44 (2024), <https://www.nrdc.org/sites/default/files/2024-08/lsr-costs-strategies-reducing-them.pdf> (finding that non-construction costs, local policy-driven costs, and site-specific conditions substantially increase per-line costs above EPA's baseline estimate); see also AMERICAN WATER WORKS ASSOCIATION, *CONSIDERATIONS WHEN COSTING LEAD SERVICE LINE IDENTIFICATION AND REPLACEMENT* (2022).

46. Monthly payment calculation: \$10,000 principal at 4.5% annual interest (0.375% monthly rate) over 10 years (120 payments) = \$103.64/month. Total payments: $120 \times \$103.64 = \$12,436.80$. Total interest paid: \$2,436.80. Computed using standard mortgage-style amortization formula: $M = P[r(1+r)^n] / [(1+r)^n - 1]$, where M = monthly payment, P = principal, r = monthly interest rate, and n = number of payments. At a 30-year term authorized under N.Y. Local Finance Law §11.00(a)(109), the monthly payment on the same principal at the same rate would be \$50.67, with total interest of \$8,241.20—a lower monthly burden at significantly higher total cost to the property owner.

surcharge-lien system's closest doctrinal relative.⁴⁷ When a Massachusetts municipality assesses a betterment against a parcel whose owner qualifies as elderly or as financially constrained under defined statutory criteria, that owner may enter into a deferral and recovery agreement that postpones payment until the property is transferred. The lien remains attached and the obligation is not forgiven, only deferred. The municipality recovers the betterment at the closing of a future sale or transfer of the property, with interest accrued at a statutory rate.

That is, in essence, a contingent payment arrangement that converts an immediate financial obligation into a deferred recovery against the property's eventual change of hands. Any state pursuing the surcharge-lien system can build a deferral framework into its program design from the outset rather than as an exception. The financial-accessibility objection to the surcharge-lien system is the easiest of the equity objections to answer in operation, because deferral mechanisms are an existing, long-tested feature of the same body of law from which the surcharge-lien system itself emerges.

That context is further illuminated by a reality many households with lead service lines already face. Many such households spend \$200 to \$500 or more annually on bottled water or home filtration systems because they do not trust the water delivered through their lead pipes, expenditures that lead service line replacement would eliminate. A family purchasing two cases of bottled water weekly at \$6 per case spends more than \$600 annually; home filtration systems add \$200 to \$600 in annual filter replacement costs.⁴⁸ For many of those households, the \$103.64 monthly surcharge would be offset, in whole or in part, by the elimination of bottled water and filtration expenditures that lead service line replacement makes unnecessary. The net financial impact of replacement is therefore considerably smaller than the surcharge figure alone suggests, and the net environmental outcome is substantially better.

E. *The Equity Argument as the Universal Principle*

The equity argument developed here stands on its own regardless of what any statute, constitution, or federal regulation requires. It is the universal principle that transcends all four legal pathways this Article identifies for New York water systems. It applies with equal force in every state, whether or not a gift and loan clause or analogous con-

stitutional provision independently compels parcel-specific cost recovery.

The board member who understands the equity argument—that the cost of replacing privately owned infrastructure should be borne by the owner of that infrastructure, recovered on terms that make the obligation financially accessible, and not socialized across a ratepayer base that shares neither the ownership nor the benefit—has the answer to the financing question that the LCRI demands. The legal analysis in Part III confirms and reinforces that answer, but the equity argument is sufficient to reach it on its own.

III. **The Legal Framework— By Governmental Structure**

The equity imperative established in Part II applies universally. The legal pathway to implementing it does not. It depends on governmental structure, and in New York that means villages, water districts, municipalities, and public water authorities each operate under a distinct enabling framework with its own statutory authority, its own constitutional or fiscal constraints, and its own existing capacity to implement the surcharge-lien system.

This part analyzes each structure in turn. The most important conclusion of this analysis is that for villages and water districts, which together constitute the majority of public water systems in New York, the surcharge-lien system is not a novel constitutional workaround or a financing innovation that requires new legislation, but the statutory default that the legislature built into the enabling legislation decades ago. The water system need only use the tool the legislature provided.

A. *Villages—The Statutory Obligation*

For villages operating water systems under the New York Village Law, the question of who pays for lead service line replacement was answered by the legislature long before the LCRI existed. New York Village Law §11-1112, titled “Connections with mains,” provides a complete surcharge-lien framework in three subdivisions. It is the most direct and powerful statutory answer in New York law to the LCRI's financing question.⁴⁹

Subdivision 1 states the baseline rule without qualification: “Supply pipes, connecting with mains and used by private owners or occupants, shall be laid and kept in repair at their expense, as in this section or in other sections of this act provided.”⁵⁰ The legislature's instruction is unambiguous: supply pipes are the property owner's responsibility. The cost of laying them and keeping them in repair falls on the owner or occupant, not on the village water system. A lead service line is a supply pipe, and its replacement is a repair. The statutory command applies

47. MASS. GEN. LAWS ch. 80, §13B (deferral and recovery agreements for elderly betterment-payers, with eligibility cross-reference to MASS. GEN. LAWS ch. 59, §5, cl. 41A).

48. See Daniel Jaffee, *Unequal Trust: Bottled Water Consumption, Distrust in Tap Water, and Economic and Racial Inequality in the United States*, 11 WIREs WATER e1700 (2024), <https://wires.onlinelibrary.wiley.com/doi/10.1002/wat2.1700> (finding that purchasing the average per-capita volume of bottled water represents an expenditure of hundreds of dollars or more per household per year, driven in significant part by distrust in tap water quality); see also *The Costs of Lead in Our Drinking Water*, METRO. PLAN. COUNCIL (Apr. 16, 2020), <https://metroplanning.org/the-costs-of-lead-in-our-drinking-water/> (estimating household bottled water costs of \$150-\$200 per month in Flint, Michigan, during the lead crisis, and noting that households with children bear disproportionately higher costs).

49. N.Y. VILLAGE LAW §11-1112(1) (McKinney).

50. *Id.*

directly to lead service line replacement under the LCRI, and has applied since long before the federal rule existed.

Subdivision 2 provides the complete enforcement and cost recovery machinery, everything a village needs to implement the surcharge-lien system in a single provision:

The board of water commissioners may cause a notice to be published in the official newspaper of the village, requiring the owners or occupants of any and all property fronting or abutting on any street or portion thereof . . . to repair such connection pipes to and from the water mains or distributing pipes in said street or any portion thereof in front of or upon each separate piece of property . . . and whenever any such owner or occupant shall have made default in making such connections . . . or . . . in repairing supply pipes . . . the said board shall have power and authority to so make, extend and complete the same and the actual expense thereof, including all labor done and materials used in doing and completing the same, shall be assessed by the trustees of the village upon each separate piece of property opposite or upon which the same shall be done and completed and shall be a lien and liens on said premises and lots of land respectively, and the same shall be collected in the same manner as other local assessments or assessments for local improvements . . . and when so collected the amount thereof shall be paid into the water fund of the village. Nothing herein contained shall be construed to prevent the financing, in whole or in part, pursuant to the local finance law, of any expense incurred by the village pursuant to this section.⁵¹

The surcharge-lien machinery is entirely present in this provision. The board publishes notice requiring the owner to act. If the owner defaults, the board does the work. The actual expense is assessed against the specific property. The assessment is a lien on the premises, collected as other local assessments. The proceeds go to the water fund. And the final sentence provides explicit New York Local Finance Law authorization for bond financing of the upfront costs giving the village the capital it needs to advance replacement costs before collecting them through the lien mechanism.

Subdivision 3 provides the ultimate enforcement tool: discontinuation of water service. Where the published notice states that failure to comply will result in discontinuation of water supply, the board of water commissioners may, after mailing a copy of the notice to the property owner, discontinue water service within 30 days after the compliance period expires.⁵² The practical significance of this provision should not be understated. A village operating under New York Village Law §11-1112 could in theory order the property owner to replace the lead service line

directly, under threat of service discontinuation. The property owner's obligation is not contingent on the village's decision to advance the cost. The village has discretion to invoke the advance-and-assess mechanism in Subdivision 2, but that mechanism exists because the owner defaulted on an obligation that was already the owner's to begin with.

The implications for this analysis are significant. For villages, general ad valorem financing of private-side lead service line replacement costs is both inequitable and contrary to the express command of the enabling legislation. A village board that votes to spread private-side replacement costs across the general ratepayer base is acting contrary to what the statute requires. The surcharge-lien system is not novel for villages, it is the statutory obligation.

In plain terms, the village advances the replacement cost, assesses it against the specific property, attaches a lien, and collects through the local assessment mechanism. Rates and taxes do not increase. Implementation under New York Village Law §11-1112 satisfies the federal LCRI mandate, New York Public Health Law §1114-b,⁵³ and the enabling legislation's cost-allocation command simultaneously.

B. Water Districts—The Statutory Obligation With a Roadway Exception

New York Town Law §198(3)(a) governs water districts established under town authority and delivers the same answer as New York Village Law §11-1112, in terms that are equally direct.⁵⁴ The key provision on supply pipe cost allocation reads:

Supply pipes connecting with district mains shall be installed and repaired at the property owner's expense under the direction of an employee of the town or the district after a permit therefor has been granted, except that the town board may, by resolution, provide that that portion of a supply pipe within the bounds of a public highway shall be installed, maintained and repaired by the water district.⁵⁵

The cost allocation rule is mandatory, not discretionary. "Shall be installed and repaired at the property owner's expense" is not an obligation that the town board may override by resolution, it is the statutory command. The only exception, a narrow one, is for the highway-side portion of the supply pipe, the segment within the bounds of a public highway, which the town board may by resolution elect to have installed and maintained by the water district.

51. *Id.* §11-1112(2).

52. *Id.* §11-1112(3). The discontinuation of service power operates as the ultimate enforcement backstop. A village that has exhausted the advance-and-assess mechanism of subdivision 2 may proceed to discontinue service, subject to the notice and mailing requirements of subdivision 3. The existence of this power reinforces the statutory conclusion that the obligation to maintain and repair supply pipes rests on the property owner, not the village.

53. N.Y. PUB. HEALTH LAW §1114-b; *see supra* note 13 and accompanying text. Public Health Law §1114-b applies to all public water systems in New York regardless of governmental structure.

54. N.Y. TOWN LAW §198(3)(a) (McKinney). The full text of this provision is set out in the block quotation above. Its cost-allocation command predates the federal lead service line replacement mandate by decades, having been present in the Town Law long before the LCRI was promulgated.

55. *Id.*

Even that limited exception does not create a ratepayer subsidy. New York Town Law §198(3)(a) continues:

The costs of installation, maintenance and repair shall be district charges to be assessed, levied and collected as provided in sections two hundred two and two hundred two-a of this chapter. The town board may also fix a uniform service charge for the installation of such portion of a supply pipe, regardless of the location of the water main and regardless of the soil, rock or other physical conditions within the highway, and provide for the time and manner of payment of such charge by the property owner served by the supply pipe. If a property owner shall fail to pay the uniform service charge, a statement showing the name of the property owner and the amount unpaid and containing a brief description of the real property shall be transmitted to the board of supervisors of the county and such amount shall be levied and collected as an assessment against the real property, all in the manner provided in paragraph (d) of this subdivision in the case of unpaid water rents.⁵⁶

The highway-side exception does not absorb the cost into general district revenues. It shifts the initial installation to the district while still requiring recovery from the property owner through assessment. The statute already provides the uniform service charge mechanism, a flat charge to the property owner for the highway-side installation regardless of conditions, and specifies the enforcement pathway: unpaid charges are transmitted to the county board of supervisors and levied as an assessment against the real property. That is the surcharge-lien system as a matter of existing statutory design, not as a new program to be implemented.

The critical cost allocation distinction for water districts follows directly from the statute. District-side costs, the portion of the service line within the highway right-of-way that the district owns and maintains, are legitimate shared infrastructure expenses that *may* properly be financed as district charges and levied ad valorem across all properties in the district. Private-side costs, the portion of the service line beyond the curb stop on private property, *must* be charged parcel-by-parcel to the specific properties whose private infrastructure was replaced. The statute does not authorize the district to spread private-side costs across the general district ratepayer base. It requires that those costs follow the property whose pipe was replaced.

In plain terms, the district advances the private-side replacement cost, establishes a uniform service charge, attaches it to the specific property, and collects through the county assessment mechanism. Rates and taxes do not increase. Again, the statute already says this is how it works.

56. *Id.*

C. Municipalities—The Constitutional Framework

Municipalities, counties, cities, and towns operating water systems outside of the water district structure face a more complex legal framework than villages and water districts, because the Gift and Loan Clause of the New York Constitution applies directly to them. Article VIII, §1 of the New York Constitution provides that “no county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association.”⁵⁷ When a municipality advances public funds to replace privately owned infrastructure on private property without a genuine cost recovery mechanism, that transaction is constitutionally exposed under the Gift and Loan Clause and must be justified by a predominant public purpose under the *Murphy/Bordeleau* standard. The surcharge-lien system removes that exposure entirely by ensuring the public treasury is made whole.

The constitutional standard governing this analysis is the *Murphy/Bordeleau* incidental private benefit test, established by the New York Court of Appeals in *Murphy v. Erie County*⁵⁸ and reaffirmed in *Bordeleau v. State of New York*.⁵⁹ Under that standard, an expenditure does not violate the Gift and Loan Clause if it primarily serves a public purpose and any private benefit conferred is merely incidental to that public purpose. The challenger’s burden is heavy, unconstitutionality must be demonstrated beyond a reasonable doubt, and courts will sustain a legislative determination of public purpose if any reasonable basis for it exists.

The New York State Comptroller’s Opinion 2024-1, issued December 5, 2024, in response to the city of Troy’s request for an advisory opinion on its lead service line replacement bond financing, is the most significant New York constitutional authority on this question.⁶⁰ Applying the *Murphy/Bordeleau* standard to Troy’s proposed financing, the Comptroller concluded that a program with a genuine and predominant public health purpose can satisfy the constitutional test, pointing to the robust scientific evidence of the dangers of lead exposure, the LCRI’s federal mandate, the independent state mandate under New York Public Health Law §1114-b, and the explicit authorization provided by New York Local Finance Law §11.00(a)(109).

57. N.Y. CONST. art. VIII, §1. The enumerated entities subject to the Gift and Loan Clause are counties, cities, towns, villages, and school districts. Public water authorities are not among them. This is not a gap or ambiguity in the constitutional text; it reflects the legislature’s decision to subject traditional municipal entities to the clause while leaving public authorities to be governed by their enabling legislation and the judicially developed public authority doctrine.

58. 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771 (1971).

59. 18 N.Y.3d 305, 937 N.Y.S.2d 126, 960 N.E.2d 917 (2011).

60. N.Y. State Comptroller Opinion, *supra* note 14. The Comptroller explicitly noted that the opinion “solely pertains to the use of the proposed funding mechanism by the City and does not necessarily apply to other municipalities and alternate funding sources.” *Id.* §IV (Conclusion). Practitioners advising municipalities other than Troy should not rely on the Troy Opinion as a blanket approval for general rate financing of private-side lead service line replacement; the constitutional analysis must be applied to each municipality’s specific funding structure.

Any constitutional challenger, the Comptroller concluded, would face “a daunting, if not insurmountable task.”⁶¹

Before examining the Troy Opinion’s critical footnote, a separate piece of statutory authority warrants attention. In 2023, the state legislature amended New York Local Finance Law §11.00 to add subsection (a)(109), establishing a 30-year period of probable usefulness for “lead service line replacement programs established by a municipality, school district or district corporation, including, but not limited to programs that inventory, design and replace publicly and privately owned lead service lines within an established water system.”⁶² This amendment, enacted independently of the LCRI, confirms that the expenditure of municipal funds for private-side lead service line replacement is a recognized municipal purpose under state law and provides an independent statutory basis for bond financing of replacement costs. It also means that a municipality may offer property owners a repayment period of up to 30 years, extending the amortization illustrated in Table 1 and further reducing the monthly payment burden.

The most analytically important passage in the Troy Opinion for present purposes is not the constitutional blessing it extended to Troy’s specific financing structure, but what the Comptroller said in footnote 47. There, having noted that fully federally funded programs may not even implicate the Gift and Loan Clause, the Comptroller observed: “the provisions of Town Law §198(3)(a) and Village Law §11-1112(1) could be read as requiring each individual property owner to pay for the expense of their individual lead service line repair.”⁶³

The Comptroller did not develop this observation further, but its implications are far-reaching. Read in context, footnote 47 signals two things. First, for the large majority of New York water systems, those organized as villages

or water districts, the statutory framework may already resolve the constitutional question by requiring property owners to bear the cost in the first place. There is no Gift and Loan Clause problem when the statute says the money is owed by the property owner. Second, the Troy Opinion’s constitutional blessing was explicitly limited to Troy’s specific federal funding scenario. For the much larger universe of municipalities financing private-side lead service line replacement without fully offsetting federal or state grants, the analytical logic of footnote 47—that the property owner bears the cost in the first instance—supports the surcharge-lien system as the constitutionally safest path.

A municipality implementing the surcharge-lien system must have rate-setting authority for the surcharge, adopt a governing board resolution reciting the public health mandate and predominant public purpose, and ensure the cost recovery lien is genuine, attaching at time of replacement and collectible through property tax enforcement. Those three elements together satisfy the constitutional standard regardless of the availability of offsetting grants.

The proposed Lead Pipe Replacement Act would, if enacted, provide explicit statutory authority for municipal no-cost replacement of private-side lead service lines.⁶⁴ This Article takes no position on the merits of that bill, only observes that the bill’s general rate financing approach—requiring water systems to absorb private-side replacement costs without parcel-specific cost recovery—is both inequitable for the reasons developed in Part II and constitutionally exposed for municipalities without fully offsetting grant funding. The existing statutory and constitutional framework already provides the answer the bill is trying to mandate through a less equitable mechanism.

In plain terms, the municipality advances the replacement cost, adopts a public health program resolution, attaches a lien, and recovers through property tax enforcement. The surcharge-lien system is the constitutionally safest path because it satisfies the *Murphy/Bordeleau* public purpose standard while ensuring the public treasury is made whole, eliminating Gift and Loan Clause exposure regardless of whether offsetting grant funds are available.

D. Public Water Authorities—Enabling Legislation and Sound Public Finance

Public water authorities in New York occupy a distinct position in this analysis. The Gift and Loan Clause of the New York Constitution, which drives the constitutional analysis for municipalities, does not apply directly to public water authorities. Article VIII, §1 enumerates “any county, city,

61. *Id.* §III.C. The “daunting, if not insurmountable task” language paraphrases the Comptroller’s conclusion that the combination of public health necessity, dual regulatory mandate, and explicit Local Finance Law authorization makes a successful constitutional challenge highly unlikely. See also *Bordeleau*, 18 N.Y.3d at 313; *Murphy*, 28 N.Y.2d 80; *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 11-12 (1976).

62. N.Y. LOCAL FIN. LAW §11.00(a)(109), added by ch. 58 of the Laws of 2023. The 30-year period of probable usefulness applies to “lead service line replacement programs established by a municipality, school district or district corporation.” Public water authorities are not municipalities, school districts, or district corporations; their financing authority derives from their enabling legislation. The Local Finance Law amendment therefore does not directly extend to public water authorities, which must rely on their enabling legislation for capital financing authority.

63. N.Y. State Comptroller Opinion, *supra* note 14 n.47 (emphasis added). The full text of footnote 47 reads:

For example, on their face, the provisions of Town Law §198(3)(a) and Village Law §11-1112(1) could be read as requiring each individual property owner to pay for the expense of their individual lead service line repair. We note, however, that as discussed above, programs fully federally funded where the municipality serves merely as a pass through, or in which the municipality does not lend its full faith and credit, likely would not be subject to a gift and loan analysis in the first instance.

This Article argues that the Comptroller’s observation in footnote 47 is the analytically correct starting point for most New York water systems: the statute already requires the property owner to pay, making the Gift and Loan Clause analysis secondary for villages and water districts, and pointing toward the surcharge-lien system as the constitutionally safest path for municipalities.

64. A. 7878, 2025-2026 Reg. Sess. (N.Y. 2025) (introduced Apr. 11, 2025, by Assemb. Paulin, referred to Comm. on Health); S. 6892, 2025-2026 Reg. Sess. (N.Y. 2025) (companion Senate bill). As of the date of this Article, both bills remain in committee. If enacted as introduced, these bills would require water utilities to replace all lead service lines regardless of ownership at no cost to customers—the financing approach this Article argues is inequitable and, for many New York governmental structures, legally impermissible.

town, village or school district” as the entities subject to the clause.⁶⁵ Public water authorities are none of those things.

The constraints applicable to public water authorities are real and binding, but they derive from three distinct and different sources. The first is the ultra vires doctrine: a public authority can only do what its enabling legislation authorizes. An authority that advances public funds to replace privately owned infrastructure without statutory authority for the expenditure and without a cost recovery mechanism acts outside its enabling statute.

The second is bond covenant constraints: most public water authorities finance capital programs through revenue bonds whose covenants require that revenues be sufficient to cover debt service. In general, they either directly prohibit gifting or strongly frown upon it. Unreimbursed private-side replacement costs absorbed into the rate base affect revenue calculations, may impair coverage ratios, and could trigger covenant compliance concerns.

The third is sound public finance principles: ratepayer funds collected for water service are trust funds held for the benefit of ratepayers. Using those funds to make permanent capital improvements on private property without recovery is a breach of that trust, fiscally unsound regardless of constitutional permissibility.

Two New York public water authorities currently have full statutory lien and tax collection authority for water charges, giving them a complete surcharge-lien framework under existing law. The SCWA operates under Public Authorities Law §1078-f, which makes SCWA water charges a lien on the real property served and provides for unpaid charges to be levied on the county property tax bill and collected through the county’s existing tax enforcement machinery. The Livingston County Water and Sewer Authority (LCWSA) operates under the equivalent provision in its enabling legislation, New York Public Authorities Law §1199-yyy*2, which served as the direct statutory model for the SCWA provision.

Every other public water authority in New York that wishes to access the property tax enforcement collection mechanism must seek an amendment to its own enabling legislation.⁶⁶ That is a real legislative gap, the most urgent remaining action item for policymakers in this space. The more efficient solution, the one this Article commends, is a single statewide amendment to the Public Authorities Law extending equivalent lien and tax collection authority to all New York public water authorities. The legislature has demonstrated its willingness to enact such provisions when presented with a clear public health rationale and an existing statutory precedent. Both are firmly in place. The SCWA proof of concept is developed fully in Part IV.

In plain terms, for the SCWA and the LCWSA, the surcharge-lien system is available now under existing law. For every other authority, the enabling legislation amendment is the threshold requirement. Sound public finance principles require it, and the ratepayer trust demands it. This legislative gap should be closed.

E. *The Universal Conclusion—All Roads Lead to the Surcharge-Lien System*

The legal analysis differs by governmental structure, but the destination does not. For villages, the statute commands it. For water districts, the statute commands it for the privately owned portion and authorizes it for the publicly owned portion. For municipalities, the constitution points toward it and sound program design requires it. For public water authorities, enabling legislation and sound public finance compel it. In every case, the equity argument developed in Part II independently reaches the same conclusion.

This convergence holds across state lines. Pennsylvania’s water service landscape is the closest state-level parallel to New York’s: multiple distinct governmental structures (boroughs, townships, third-class cities, and municipal authorities) operating under enabling legislation, with intermediate authority forms created by statutory delegation under the Municipality Authorities Act,⁶⁷ and a constitutional framework that constrains the lending of public credit. Pennsylvania’s Municipal Claim and Tax Lien Law of 1923 provides the lien-conversion architecture that gives effect to municipal claims as enforceable property liens, the structural counterpart to New York’s integration of water charge liens with property tax enforcement.

Approximately 2,082 of Pennsylvania’s roughly 2,173 community water systems—about 96%—are publicly owned by municipalities or municipal authorities,⁶⁸ systems for which the analytical framework developed here is directly applicable. The Pennsylvania Legislature has, for investor-owned utilities, authorized rate-based recovery of customer-side lead service line replacement costs through Public Utility Commission supervision under Act 120 of 2018,⁶⁹ and has authorized municipalities to use public funds for private lateral replacement under Act 44 of 2017,⁷⁰ but has left the financing question for publicly owned community water systems to local governing-body discretion within constitutional limits. The same convergence New York’s four pathways produce is available to those Penn-

65. N.Y. CONST. art. VIII, §1 (“no county, city, town, village or school district”—public water authorities not enumerated); *see supra* note 48 and accompanying text.

66. N.Y. PUB. AUTH. LAW §1078-f (SCWA surcharge and lien authority); N.Y. PUB. AUTH. LAW §1199-yyy*2 (LCWSA surcharge and lien authority). Every other New York public water authority must seek an amendment to its own enabling legislation before it can access the county property tax enforcement collection mechanism for unpaid water charges.

67. Pennsylvania Municipality Authorities Act, 53 PA. CONS. STAT. ch. 56.

68. National Association of Water Companies (Pennsylvania Chapter) legislative testimony before the Pennsylvania General Assembly. The Pennsylvania Department of Environmental Protection regulates approximately 8,400 public water systems statewide; of approximately 2,173 community water systems, approximately 2,082 are municipal or authority-owned.

69. Act 120 of 2018, codified at 66 PA. CONS. STAT. §1311(b) (signed Oct. 24, 2018).

70. Act 44 of 2017, PA FISCAL CODE §1719-E (enacted via House Bill 674 incorporating Senate Bill 656; signed Oct. 2017).

sylvania systems through the statutory and constitutional architecture they already have.

Other state legal frameworks reach the same destination through their own constitutional and statutory architecture, and Virginia provides perhaps the clearest example. Virginia's Constitution does not only permit parcel-specific assessment as one available financing tool, it identifies parcel-specific assessment as the constitutional pathway when public funds are deployed to improve specific private parcels. Article X, §3 expressly authorizes the General Assembly to permit local governments "to impose taxes or assessments upon abutting property owners for such local public improvements as may be designated by the General Assembly," subject to the constitutional ceiling that "such taxes or assessments shall not be in excess of the peculiar benefits resulting from the improvements to such abutting property owners."⁷¹ That language, drafted long before the federal lead and copper rule existed, is a near-perfect description of the surcharge-lien system: parcel-specific cost recovery, capped by the benefit conferred.

Article X, §10 of the same constitution, which prohibits the lending of state or local credit "directly or indirectly, under any device or pretense whatsoever,"⁷² poses with arguably greater force than New York's Gift and Loan Clause the constitutional question that animates the analysis for New York municipalities. The implementing statutes, Virginia Code §15.2-2118 through §15.2-2120 and §15.2-5139, supply the lien framework that gives effect to the constitutional architecture, including for Virginia's public water authorities.⁷³ Virginia has, in other words, already done at the constitutional level what New York's footnote 47 in the Comptroller's Troy Opinion suggests for villages and water districts: identified parcel-specific assessment as the proper pathway when public funds improve private property.

This comparative analysis supports what the New York Legislature already knew: that the surcharge-lien system is the legally sound answer. New York Village Law §11-1112 and New York Town Law §198(3)(a) built the cost-allocation command into the enabling legislation decades before the LCRI existed, decades before EPA "strongly encouraged" water systems to do the opposite, and decades before any water board was forced to choose between federal guidance and state law.

IV. The Surcharge-Lien System—Structural Requirements and Proof of Concept

There are seven structural requirements that make the surcharge-lien system legally defensible and operationally sound. The requirements apply regardless of whether the

water system is a village, a water district, a municipality, or a public water authority. The SCWA provided the proof of concept that demonstrates it works at large scale in the real world.

A. The Seven Structural Requirements

A surcharge-lien program should incorporate the following structural elements. These requirements apply in any state implementing the surcharge-lien system, though the specific statutory authority for each varies by state and governmental structure.

1. **Dedicated accounting allocation.** Surcharge receipts must be separately accounted for as cost recovery instruments, allocated exclusively to the lead service line replacement program. They are repayments of capital advances, not general revenues, and must be treated as such in the water system's books. Commingling surcharge receipts with operating revenues compromises the program's legal integrity.
2. **Market-rate interest.** The repayment schedule must include interest at a market rate sufficient to make the water system whole in present value terms. A program that advances funds at zero interest or at a rate materially below the cost of capital provides a below-market subsidy to the property owner—a partial gift that, in gift-clause states, reintroduces the very constitutional exposure the surcharge-lien system is designed to eliminate. The interest rate should reflect the water system's actual borrowing cost or an established market benchmark, set at the time of replacement and documented in the surcharge agreement.
3. **Lien attachment at time of replacement, not at default.** The real property lien must attach to the benefited parcel at the time the replacement is completed and the surcharge obligation is established, not at the point of default. A lien that attaches only upon default provides no protection against transfers that occur before the owner misses a payment. The lien must run with the land from the moment the obligation arises.
4. **Formal surcharge agreement.** A written surcharge agreement, executed by the property owner at the time of replacement, documents the terms of the obligation, the interest rate, the repayment schedule, and the lien. The agreement creates the contractual foundation for the legal enforcement structure and provides clear evidence of the property owner's acknowledgment of the obligation in any subsequent dispute.
5. **Governing board authorization by formal resolution.** The surcharge-lien program must be authorized by formal resolution of the governing board, reciting the constitutional and statutory basis for the

71. VA. CONST. art. X, §3.

72. *Id.* §10.

73. VA. CODE ANN. §§15.2-2118, 15.2-2119, 15.2-2120 (water and sewer charge liens; §15.2-2120 provides that such liens, when properly docketed, "may be enforced in the same manner as taxes due a locality"); *id.* §15.2-5139 (extending lien authority to public water authorities through cross-reference).

program, the applicable legal framework under the relevant enabling legislation, and the public health purpose the program serves. For New York municipalities, the resolution should specifically recite the *Murphy/Bordeleau* public purpose framework and the LCRI and Public Health Law mandates. The resolution is the legal foundation of the program and the governing board's evidence of the deliberate, informed decision required by law.

6. Proactive county treasurer coordination. For systems relying on property tax enforcement collection mechanisms, the county treasurer or equivalent collection authority must be engaged proactively before the program is activated, not after the first default. The SCWA experience revealed that routing authority charges through the county tax collection system created an initially unexpected operational challenge for the county treasurer.⁷⁴ County treasurer coordination is a program prerequisite. Water systems that defer this engagement until a collection issue arises may find that the enforcement pathway is slower and less reliable than its design promises.

7. The timing imperative. The surcharge-lien system should be authorized and fully operational before the first publicly financed replacement goes in the ground. This timing requirement reflects the logic of the Gift and Loan Clause as applied to lead service line replacement financing. An expenditure of public funds to improve private property is either supported by a genuine cost recovery obligation or isn't.

A cost recovery structure adopted after the fact does not change the character of expenditures already made. The sounder and safer practice is to ensure the surcharge agreement, lien attachment, and collection mechanism are in place before the first replacement is completed. The same principle applies as a matter of sound public finance for all governmental structures regardless of constitutional applicability.⁷⁵

These seven requirements together constitute the legal architecture of a successful program. But they have no protective force if the program begins advancing public funds before they are in place. The order of operations is not a technicality, it is the constitutional and fiscal core of the framework.

74. The county treasurer coordination challenge described in this section is drawn from the author's firsthand experience as General Counsel of the SCWA during implementation of the Authority's surcharge-lien program. The operational integration of water surcharge billing into Suffolk County's established tax collection infrastructure required direct engagement between the SCWA and the Suffolk County Treasurer's office, and was resolved through that collaboration.

75. See *Bordeleau v. State*, 18 N.Y.3d 305, 313 (2011); *Murphy v. Erie Cnty.*, 28 N.Y.2d 80 (1971); N.Y. CONST. art. VIII, §1; N.Y. State Comptroller Opinion, *supra* note 14, at §III.A.

B. The SCWA Proof of Concept

The SCWA implemented the surcharge-lien system at large scale for water main extension costs, demonstrating that water charge liens can be attached to individual properties, integrated with county property tax enforcement laws, and made self-executing through the real estate transaction process. The complete framework—parcel-by-parcel surcharge, pre-offer disclosure under New York Real Property Law §242,⁷⁶ and tax enforcement collection under New York Public Authorities Law §1078-f⁷⁷—operates as a single integrated system. Unpaid SCWA charges are levied on the county property tax bill, whose consequences (tax delinquency, interest, potential tax sale) motivate payment far more effectively than civil litigation. The practical result was a substantial reduction in uncollected water charges and a demonstration that the system operates efficiently at the volume a large authority requires.

The title industry integration is equally significant. Title companies operating in Suffolk County incorporated water surcharge lien searches into standard closing practice, and the SCWA established a searchable lien disclosure system enabling title professionals to identify outstanding obligations as a routine part of the closing process. The result was a self-executing collection mechanism operating entirely through the normal real estate transaction process. Checks in satisfaction of outstanding SCWA surcharge obligations were delivered to the SCWA's Legal Department at or in anticipation of real property closings, without litigation, without demand letters, without the friction of civil enforcement. Water systems implementing the surcharge-lien system should treat title industry outreach and the establishment of a searchable lien disclosure system as program prerequisites, not afterthoughts.

Two implementation issues warrant specific attention. First, county treasurer coordination must be proactive. The county treasurer is a program partner, not merely a collection agent, and must be engaged before the program is activated, not after the first default. Second, title industry engagement varies across New York State.⁷⁸ In areas where

76. N.Y. REAL PROP. LAW §242(2)(a), as amended by Act of May 4, 2004, ch. 61, §1, 2004 N.Y. Laws 131 (S. 3756) (effective Oct. 31, 2004). The 2004 amendment added water utility surcharges to the preexisting disclosure obligation for electric and gas utility surcharges.

77. N.Y. PUB. AUTH. LAW §1078-f. Section 1078-f was modeled on Public Authority Law §1199-yyy2, the enabling legislation for the LCWSA, which had previously adapted the Town Law §198(3) water district model for use by a public water authority. N.Y. PUB. AUTH. LAW §1199-yyy2. The legislative genealogy of these provisions—from the Town Law district model through the LCWSA enabling act to the SCWA enabling act—demonstrates that the surcharge-lien mechanism is not a novel financing construct but a well-established cost recovery tool that the legislature has deliberately extended to public water authorities on an individual basis.

78. In many upstate and rural counties, attorney closings based on abstract of title examination are more common than title insurance closings; in downstate and suburban markets, title insurance is the predominant practice. See New York State Bar Association, *Residential Real Estate Practice Guide*, <https://nysba.org/residential-real-estate-practice-guide> (Aug. 27, 2020) ("closing customs and practices vary widely from one county to the next" upstate, including variations in title search length and deed type); see also New York State Bar Association, *LEGAlease: Buying and Selling Real Estate*, <https://nysba.org/legalease-buying-and-selling-real-estate> (last visited

attorney closings without title insurance are more common, the New York Real Property Law §242 disclosure obligation carries greater weight as the primary conveyance protection, and water systems in those areas should structure their disclosure and notice practices accordingly.

What every water system can learn from the SCWA's experience is captured in a single operational principle: build the complete framework before the first replacement goes in the ground, engage the county treasurer and the title industry before the first lien attaches, and design the program so that the conveyance mechanism is self-executing. A program built on those foundations does not require litigation to enforce. It requires only that the real estate market does what it always does: clear encumbrances at closing.

V. The Disclosure Layer—Completing the Framework at the Point of Sale

A. *The Conveyance Dimension—Why Disclosure Completes the Framework*

The surcharge-lien system solves the financing problem. But it creates a transactional one. What happens when a property encumbered by an outstanding surcharge obligation is sold? A cost recovery structure that breaks down at conveyance through undisclosed obligations, title disputes, or buyers who discover the lien only after closing is not a complete framework. Disclosure is what completes it.

New York has already solved this problem for water utility surcharges generally, and the solution applies directly to lead service line replacement surcharges. It operates on three layers: (1) the real property lien, which runs with the land and is enforceable against any subsequent owner regardless of disclosure; (2) the pre-offer written disclosure obligation under New York Real Property Law §242, which requires sellers to notify prospective purchasers of outstanding surcharge obligations before accepting a purchase offer; and (3) the title industry's lien search practice, which surfaces and resolves outstanding obligations as a routine part of the closing process. Together, these three layers constitute a complete conveyance framework.

B. *New York Real Property Law §242—The Existing Disclosure Framework*

New York Real Property Law §242 requires any person offering to sell real property against which a water utility surcharge is assessed for the purpose of defraying the costs associated with a water line extension or related facilities to

May 8, 2026) (noting that in some upstate areas attorneys issue title certificates or opinions based on abstract review rather than title insurance). In areas where attorney closings without title insurance predominate, the Real Property Law §242(2)(a) pre-offer disclosure obligation is the primary transactional protection against undisclosed surcharge obligations and must be rigorously enforced by the water system.

provide written notice to the prospective purchaser prior to accepting a purchase offer.⁷⁹ The notice must identify the type and purpose of the surcharge, the amount, and the payment schedule.⁸⁰ That language encompasses the lead service line replacement surcharge proposed here.

The §242 framework serves three distinct functions in the surcharge-lien system. First, it protects the water system's lien position. The seller's failure to disclose does not affect the validity or enforceability of the water system's lien. The cause of action for non-disclosure runs against the seller, not the water system. Second, it protects the purchaser by ensuring the surcharge obligation is a known and negotiable feature of the transaction before the offer is accepted. Third, it eliminates the illusory recovery vulnerability at conveyance by ensuring that surcharge obligations are identified, disclosed, and either satisfied or carried forward as a disclosed encumbrance in virtually every real estate transaction.

C. *The Case for Lead Service Line Disclosure at Listing*

The New York Real Property Law §242 framework addresses properties that already carry a completed surcharge obligation. It does not address the prior question—disclosure of the underlying lead service line condition itself—before any surcharge has been assessed and before any replacement has occurred.

New York Real Property Law §462 establishes a standard property condition disclosure statement that sellers of residential real property must complete and provide to prospective buyers.⁸¹ An amendment to that statement to include a specific disclosure item regarding the presence of a lead service line would close the information gap that §242 leaves open. The current New York State Property Condition Disclosure Statement includes a question about whether lead plumbing is present, but it does not specifically address the property's water service or GRR lines.

The proposed amendment to §462 would complement rather than duplicate §242. Section 242 addresses the financial encumbrance associated with a completed replace-

79. N.Y. REAL PROP. LAW §242(2)(a), *as amended by* Act of May 4, 2004, ch. 61, §1, 2004 N.Y. Laws 131 (S. 3756) (effective Oct. 31, 2004).

80. *Id.*

81. N.Y. REAL PROP. LAW §462 (McKinney). The Property Condition Disclosure Statement (PCDS) prescribed by §462(2) was substantially revised effective March 20, 2024, adding seven new flood-related disclosure questions and increasing the total number of required disclosures to 56. *See* N.Y. REAL PROP. LAW §462 (McKinney Supp. 2025). The March 2024 amendment also eliminated the seller's option to provide a \$500 credit to the buyer in lieu of delivering the disclosure statement, leaving actual damages as the operative remedy for non-delivery. *See* N.Y. REAL PROP. LAW §465 (McKinney); Karl Holtzschue, *Property Condition Disclosure Act Amended; New Requirements Go Into Effect in March*, N.Y. STATE BAR ASS'N (Feb. 28, 2024), <https://nysba.org/pcda-amended-500-seller-credit-deleted-and-additional-questions-added-to-pcds/>. Practitioners implementing surcharge-lien programs should confirm that the current PCDS form is used for all transactions occurring on or after March 20, 2024. The current form is available from the New York State Department of State, Division of Licensing Services, at https://dos.ny.gov/system/files/documents/2025/05/dos-1614-f-property-condition-disclosure-statement_04.2025-eff.-07.2025.pdf.

ment and requires disclosure before the offer is accepted. An amended §462 would address the existence of a lead service line that has not been replaced at the listing stage. Together, they create a complete information framework: the physical condition disclosed at listing, the financial obligation disclosed before the offer is accepted, and the title search confirming the lien status before closing.

When lead service line status is a disclosed and quantifiable feature of property transactions, the real estate market begins to price it. Buyers negotiate price reductions or seller-funded replacement arrangements. Sellers have an incentive to arrange replacement before listing to maximize sale price. And the availability of the surcharge-lien system becomes a marketable feature of the transaction rather than an undisclosed liability—a financing mechanism that a buyer can rely on rather than a surprise obligation discovered after closing.⁸²

Similar amendments to standard property condition disclosure forms should be considered in every state implementing the LCRI. The specific statutory vehicle will vary, but the policy objective is universal: prospective purchasers in every state should know whether the property they are buying has a lead service line before they make an offer.

D. *The Disclosure Framework as an Alternative to Local-Law Replacement Mandates*

The disclosure framework this Article proposes also has an important implication for a policy debate already underway in many communities: whether to enact local-law replacement mandates requiring lead service line replacement at the point of sale or upon the issuance of building permits.⁸³ The conceptual appeal of such mandates is their

simplicity. The transaction or permit application becomes the regulatory trigger.

The practical problems are substantial. A point-of-sale mandate imposes a potentially significant and non-negotiable financial burden on property owners at precisely the moment they are already managing the financial complexity of a real estate transaction. It can delay or prevent transactions, discourage property improvements, generate legal challenges, and place the enforcement burden squarely on the municipality.

The disclosure framework achieves the same policy objective through the marketplace. When lead service line status is disclosed at listing, the real estate market prices the condition into the transaction. The municipality is relieved of enforcement. The property owner retains the autonomy to manage replacement on terms that work for their circumstances. And the broader public health goal—replacement of every lead service line as rapidly as possible—is advanced through market pricing of a known condition between informed parties.⁸⁴

E. *The Legislative Path Forward*

The New York Real Property Law §242 framework is current law and requires no additional legislative action to apply to lead service line replacement surcharges.⁸⁵ Water systems in New York implementing the surcharge-lien system can rely on it immediately. The proposed property condition disclosure amendment requires legislative action: an amendment to New York Real Property Law §462 or the regulations governing the standard disclosure form's required contents to specifically identify lead service lines and GRRs and to require disclosure of water service line surcharges. That amendment is not a prerequisite to implementing the surcharge-lien system, but a logical and important complement that water-sector advocates and their counsel should support.

The same legislative path is available and warranted in every state implementing the LCRI. The goal is the same

82. Empirical research confirms that real estate markets price disclosed environmental conditions into transaction values, and that more rigorous disclosure requirements produce more accurate market pricing of environmental risk. See Theising, *supra* note 44, at 1355-56 (finding that post-replacement property value appreciation of 3%-4% implies the market had discounted the pre-replacement value of properties with lead service lines, demonstrating that lead pipe status is a material pricing factor); Miyuki Hino & Marshall Burke, *The Effect of Information About Climate Risk on Property Values*, 118 PROC. NAT'L ACAD. SCI. no. 17, at 3-4 (2021) (finding that stricter real estate disclosure laws produce larger market discounts for disclosed environmental risk, demonstrating that disclosure law stringency directly affects market efficiency); see also ENVIRONMENTAL DEFENSE FUND, GRADING THE NATION: STATE DISCLOSURE POLICIES FOR LEAD PIPES 1-3 (2017), https://www.edf.org/sites/default/files/content/edf_lsl_state_disclosure_report_final-031317.pdf (evaluating state disclosure policies for lead service lines and finding significant gaps in required disclosure across states, with corresponding risk of market mispricing).

83. Point-of-sale lead service line replacement mandates—requirements that lead service lines be replaced as a condition of property transfer—represent an emerging complement to the surcharge-lien framework addressed in this Article. As of the date of publication, no New York municipality has enacted such a mandate, though New York City's Department of Environmental Protection has publicly supported legislation that would require replacement at the time of property sale, during major renovations, or when a no-cost replacement is offered. See NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY LEAD SERVICE LINE REPLACEMENT PLAN 2025, at 3-4 (2025), <https://www.nyc.gov/site/dep/news/25-032/dep-releases-lead-service-line-replacement-plan-two-years-ahead-schedule>. See also A. 7878/S. 6892, 2025-2026 Reg. Sess. (N.Y. 2025) (pending statewide legislation that would require water systems to replace all lead service

lines at no cost to customers, without incorporating a point-of-sale trigger or surcharge-lien mechanism). Practitioners should confirm current legislative status before citing. See generally U.S. EPA, *Identifying Funding Sources for Lead Service Line Replacement*, <https://www.epa.gov/ground-water-and-drinking-water/identifying-funding-sources-lead-service-line-replacement> (last updated Feb. 10, 2026) (discussing range of local implementation strategies available to water systems under the LCRI).

84. See ENVIRONMENTAL DEFENSE FUND, *supra* note 82, at 1-3 (evaluating state disclosure policies and finding that disclosure requirements create market pressure for replacement by making lead pipe status a material pricing factor in residential transactions); Theising, *supra* note 44, at 1355-56 (documenting that lead pipe status is capitalized into property transaction prices, confirming the market mechanism the disclosure framework relies upon); see also Hino & Burke, *supra* note 82, at 3-4 (demonstrating that disclosure law stringency directly affects the degree to which environmental conditions are priced into real estate transactions).

85. N.Y. REAL PROP. LAW §242(2)(a) (McKinney). No legislative amendment is required for the Real Property Law §242 framework to apply to lead service line replacement surcharges assessed under existing authority. The surcharge-lien program, once authorized by governing board resolution and documented through surcharge agreements and lien attachments, creates the "water utility surcharge" that triggers the pre-offer disclosure obligation under Real Property Law §242(2)(a).

everywhere: mandatory listing-stage disclosure of lead service line condition that activates market pricing, reduces the need for municipal enforcement, and ensures that every prospective purchaser enters a real estate transaction with full knowledge of the infrastructure condition of the property they are buying. The surcharge-lien system provides the financing mechanism, and disclosure provides the market incentive. Together, they replace the blunt instrument of mandate with a framework that is more effective, more equitable, and less legally complex.

VI. Conclusion—Law and Equity Say the Property Owner Pays

A. The Universal Equity Imperative and the Case for Preserving the Rule

Lead is a potent neurotoxin for which the safest level of exposure is zero. The zero MCLG that EPA has established for lead in drinking water represents the scientific conclusion that any detectable lead represents an unacceptable health risk, particularly for infants and children whose neurological development is irreversibly affected by even low-level exposure. The lead service line is the primary drinking water source of lead exposure for the households it serves, and it is entirely and immediately preventable through replacement. Every water system in every state with lead service lines in its inventory has both a legal obligation and a moral imperative to replace them as rapidly and equitably as possible.

The financing question every water system faces now has a right answer and a wrong answer. The wrong answer is general rate financing spread across all ratepayers because it is fundamentally inequitable. The cost does not follow the benefit, but is divorced from it entirely.

The right answer is the surcharge-lien system. The water system advances the cost, attaches an enforceable lien to the specific property whose service line was replaced, and recovers the expenditure from that property's owner over a defined repayment period through property tax enforcement laws. The cost follows the benefit. The property owner whose infrastructure is improved pays for that improvement on terms that are financially accessible and administratively manageable. The ratepayer base is not asked to subsidize private property. That is the equitable answer, and for most New York water systems, also what the law requires.

But there is a dimension to this argument that extends beyond equity and legal compliance, and goes to survival of the LCRI itself. The LCRI faces legal challenge in federal court, and political headwinds are real. The rule requires water systems to replace privately owned infrastructure. The rule's preamble strongly encourages absorbing those costs into general rates. General rate financing makes that cost visible to every ratepayer. Most ratepayers have no lead service lines, and see a rate increase driven by replacement of someone else's private property. That legitimate grievance becomes a political and legal argument against the rule itself.

The surcharge-lien system removes this pressure point entirely. The cost of replacing a privately owned lead service line is borne by the owner of that property, and recovered through a parcel-specific surcharge. It is invisible to the general ratepayer base, collected through the same mechanism that collects property taxes. There is no rate increase to oppose, no visible cross-subsidization to challenge, and no political opening for arguments that the rule is an unfunded mandate. A rule that water systems can implement without raising rates or taxes is a rule that can withstand litigation and changes in administration. It can endure the political opposition that attends any significant federal environmental mandate. The surcharge-lien system not only makes the LCRI equitable, it makes the LCRI sustainable.

B. The New York Opportunity and the Universal Template

New York has the most fully developed state-level statutory framework for the surcharge-lien system in the country. New York Village Law §11-1112 and New York Town Law §198(3)(a) are the statutory requirements for the majority of public water systems in the state that the legislature built into the enabling legislation decades ago. New York Public Authorities Law §§1078-f and 1199-yyy*2 provide established lien and tax collection authority for the SCWA and the LCWSA. New York Local Finance Law §11.00(a)(109) provides the financing vehicle for municipalities. New York Real Property Law §242 closes the conveyance gap. The Comptroller's Troy Opinion provides the constitutional roadmap. And the SCWA proof of concept demonstrates that the system works in the real world, not just on paper.

This Article has examined four states with substantial lead service line inventories—Illinois, Massachusetts, Pennsylvania, and Virginia—each of which possesses in its own constitutional and statutory architecture the elements necessary to implement a surcharge-lien system. The work that remains in each is jurisdictional rather than analytical. Local practitioners must confirm how their state's enabling legislation, lien-conversion authority, and constitutional public-purpose constraints fit together in the way New York's framework does. Local legislators must close any gaps the analysis surfaces, as New York must close the public-water-authority gap discussed in Section III.D. The architecture exists in each state. The implementation discipline is what the November 2027 deadline demands.

For practitioners in states whose constitutional frameworks have not yet been tested against the LCRI's private-side replacement mandate, the caution is real and the prudence requirement is immediate. Many state constitutions contain provisions—variously framed as gift clauses, public purpose requirements, debt limitations, or restrictions on the pledge of public credit—that have not been applied to the novel fact pattern the LCRI presents. The consequences of committing to general rate financing without that analysis and discovering mid-program that the structure is constitutionally vulnerable are severe. The surcharge-lien system eliminates that risk. It is the con-

stitutionally sound answer in every state whether or not a specific constitutional provision independently compels it.

C. *A National Call to Action*

The LCRI's lead service line replacement deadline is November 1, 2027. The BIL funding window has effectively closed. The surcharge-lien system must be in place before the first publicly financed replacement goes in the ground. Title industry integration, county treasurer coordination, and governing board authorization all take time. There is no prudent version of waiting.

For water system counsel in every state, examine your state's constitutional and statutory framework before your governing board commits to a financing structure. Identify the analogous public-purpose constraints in your own constitution. Confirm your enabling authority, your lien mechanism, and your tax enforcement collection pathway. If your state's framework supports it, consider recommending the surcharge-lien system, which is the equitable answer, the legally sound answer, and the answer that gives the LCRI its best chance of political and legal survival.

For New York water systems, the tools are in your hands. The statutory authority exists and the constitutional analysis has been done. The proof of concept has been demonstrated at scale. Engage counsel with specific experience in New York municipal water law, and initiate county treasurer and title industry outreach. Prepare the governing board authorization resolution. If you do, your water rates will not increase, your taxes will not increase, and you will have fulfilled your obligations under the LCRI.

For policymakers in Albany and in every state capital, the legislative pathway is clear. Extend the surcharge-lien system to every publicly owned water system in your state. For New York, that means closing the enabling legislation gap for public water authorities through a statewide New York Public Authorities Law amendment. For other states, it means amending standard property condition disclosure forms to require lead service line disclosure at listing. Give every water system in your state the statutory tools it needs to do the right thing equitably, legally, and without delay.

There is a final point that underlies everything argued here, and it bears repeating: the MCLG for lead in drinking water is zero. That standard reflects the scientific conclusion that any detectable lead in drinking water represents an unacceptable risk to human health, and particularly to the neurological development of children. Corrosion-control treatment does not achieve that standard. Point-of-use filters reduce exposure, but do not eliminate it. Bottled water is a workaround, not a solution. The only way to achieve the zero MCLG for lead in drinking water is to remove the lead service line entirely. That is why the financing question this Article answers—who pays for the pipe and how—is the difference between a rule that gets implemented and one that does not, between children who drink clean water and children who do not.

The lead pipes must come out. The tools to remove them equitably, legally, and at the scale the LCRI demands are available now. Every day they remain in the ground, children are drinking water they should not have to drink. That is the case for action, for accountability, and for urgency.