

WASHINGTON STATE BOARD OF HEALTH

Date: January 9, 2023

To: Washington State Board of Health Members

From: Keith Grellner, Board Chair

Subject: Petition for Rulemaking – Environmental Health and Safety Standards for Primary and Secondary Schools, chapter 246-366A WAC

Background and Summary:

The Administrative Procedures Act ([RCW 34.05.330](#)) allows any person to petition a state agency to request adoption, amendment, or repeal of any rule. Upon receipt of a petition, the agency has sixty days to either (1) deny the petition in writing stating the reasons and, as appropriate, offer other means for addressing the concerns raised by the petitioner, or (2) accept the petition and initiate rulemaking.

On December 19, 2022 the Board received a petition for rulemaking from Representative Gerry Pollet requesting the Board take action to revise [chapter 246-366A WAC, Environmental Health and Safety Standards for Primary and Secondary Schools](#), to reflect more stringent standards for testing and remediation of lead in school drinking water. The petition states that WAC 246-366A-130, Water quality monitoring – Lead, should reflect requirements of Engrossed Second Substitute House Bill (E2SHB) 1139 (Chapter 154, Laws of 2021) codified in [RCW 28A.210.410](#).

The Board has authority under [RCW 43.20.050](#) to adopt rules related to environmental conditions in schools, including but not limited to heating, lighting, ventilation, sanitary facilities, and cleanliness. In 2009, the Board adopted chapter 246-366A WAC, which establishes a set of minimum environmental health and safety standards for school facilities to promote healthy and safe school environments.¹

WAC 246-366A-130 sets requirements for school officials to sample plumbing fixtures that are regularly used for drinking or cooking for lead contamination. Initial monitoring must be conducted between one and four years after the effective date of the rules, depending on sampling method and school facility type. Ongoing monitoring must be conducted every five to nine years depending on the school facility type. Samples resulting in lead levels above 20.0 parts per billion (ppb) must be immediately shut off or made inoperable, and remediate by providing bottled water, manual or automatic flushing, fixture replacement, or treatment. School officials must also notify school facility staff, students, parents, and the local health officer within five business days of

¹ Chapter 246-366A WAC was intended to replace [chapter 246-366 WAC, Primary and Secondary Schools](#), with more modern health and safety standards. Until chapter 246-366A WAC is implemented, chapter 246-366 WAC remains in effect. Chapter 246-366 does not contain specific requirements for lead in drinking water, but requires compliance with public water system regulations.

(continued on the next page)

receiving sampling results over 20.0 ppb. These results must also be made available upon request.

RCW 28A.210.410 requires schools to coordinate with the Department of Health (Department) or contract for sampling and testing for lead contamination in drinking water outlets. Schools must shut off water to outlets that have lead concentrations that exceed 15 ppb and develop an action plan for test results exceeding five ppb. Action plans must:

- Be developed in consultation with the Department or their local health jurisdiction and the Office of the Superintendent of Public Instruction
- Describe mitigation measures implemented since the test result was received
- Include a schedule of remediation activities and post-remediation retesting to confirm lead concentrations have been reduced

Schools must also provide the public with notice and opportunity to comment on action plans, and post action plans on their websites.

Chapter 246-366A has not been implemented due to restrictions enacted by the Legislature related to concerns with the financial impact of the new rules. The 2009-2011 Washington state operating budget bill included a proviso prohibiting the Department and the Board from implementing new or amended school rules until the legislature takes action to fund implementation:

The department of health and the state board of health shall not implement any new or amended rules pertaining to primary and secondary school facilities until the rules and a final cost estimate have been presented to the legislature, and the legislature has formally funded implementation of the rules through the omnibus appropriations act or by statute.

Based on the proviso, the Board filed a Rule-Making Order (CR-103) on December 22, 2009, specifying a July 1, 2010 effective date for these rules. The Board agreed to review the actions of the legislature at the end of each session to determine whether any portions of the rules could be implemented and to amend the CR-103 accordingly. The effective date has been delayed eight times, most recently on June 24, 2022 ([WSR 22-14-021](#)), as each operating budget bill since the 2009-2011 biennium has included the proviso.

The petition asserts that the legislature has fully funded implementation of the new standards for lead testing, remediation, and notification; therefore, the Board is no longer restricted from adopting and implementing rules that reflect these more protective standards.

Per the fiscal note, E2SHB 1139 had the following estimated operating and capital budget expenditures:

	Fiscal Biennium		
	2021-23	2023-25	2025-27

Total Estimated Operating Expenditures	\$2,826,714	\$2,810,000	\$3,688,000
Total Estimated Capital Budget Expenditures	\$2,776,017	\$2,760,642	\$2,760,642

The 2021-23 biennium operating budget² appropriated \$2,809,000 to the Department to implement E2SHB 1139. Additionally, \$500,000 for both fiscal year 2020 and 2021 was appropriated to the Department to conduct testing for lead in public schools. The 2021-23 biennium capital budget³ appropriated \$3,598,000 to the Office of the Superintendent of Public Instruction (OSPI) to provide grants to school districts, charter schools, and state-tribal education compact schools for lead remediation. Grants for lead remediation costs may not exceed \$100,000. Additionally, \$128,000 of appropriated funds were provided solely for OSPI to study lead-contaminated drinking water remediation and mitigation costs associated with complying with statutory lead remediation standards for schools. Further appropriations to implement E2SHB 1139 were not included in 2022 supplemental operating and capital budgets.

It is unclear at this time whether funding provided in the 2021-23 biennium to implement E2SHB 1139 was sufficient to fulfill statutory requirements for lead remediation and whether future funding is available for required ongoing testing and remediation. It does not appear that the legislature has formally funded implementation of relevant sections the rules through the omnibus appropriations act or by statute, in accordance with the budget proviso restricting implementation of chapter 246-366A WAC which was included in the 2021-23 supplemental operating budget⁴.

However, because Chapter 246-366A is not currently in effect, there is no conflict between the rules and the requirements of RCW 28A.210.410 requiring an immediate revision to the rules.

I have invited Kaitlyn Campbell, Board Staff, to provide additional information from the petitioner and outline the Board’s options for responding to the petition.

Recommended Board Actions:

The Board may wish to consider and amend, if necessary, one of the following motions:

The Board declines the petition for rulemaking to revise applicable sections of chapter 246-366A WAC to reflect testing, remediation, and notification requirements for lead in school drinking water under RCW 28A.210.410 for the reasons articulated by Board members. The Board directs staff to notify the petitioner of the Board’s decision.

² [Engrossed Substitute Senate Bill 5092, Chapter 334, Laws of 2021](#)

³ [Substitute House Bill 1080, Chapter 332, Laws of 2021](#)

⁴ [Engrossed Substitute Senate Bill 5693, Chapter 297, Laws of 2022](#)

OR

The Board accepts the petition for rulemaking to revise applicable sections of chapter 246-366A WAC to reflect testing, remediation, and notification requirements for lead in school drinking water under RCW 28A.210.410 for the reasons articulated by Board members. The Board directs staff to notify the petitioner of its decision and to file a CR-101, Proposal of Inquiry, under its authority in RCW 43.20.050.

Staff

Kaitlyn Campbell

To request this document in an alternate format or a different language, please contact Kelie Kahler, Washington State Board of Health Communication Manager, at 360-236-4102 or by email at kelie.kahler@sboh.wa.gov. TTY users can dial 711.