NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 21-1159

U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

States of Arizona, Louisiana, Ohio, Oklahoma, and Texas,
Petitioners,

v.

U.S. Environmental Protection Agency and Michael S. Regan, Administrator,
Respondents.

Petition for Review of a Final Rule of
the U.S. Environmental Protection Agency

EPA's Combined Opposition to Motion for Stay or Summary Vacatur and Cross-Motion to Dismiss

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by D.C. Circuit Rule 27(a)(4), EPA certifies:

A. Parties and amici

Petitioners are the States of Arizona, Louisiana, Ohio, Oklahoma, and Texas. Respondents are the U.S. Environmental Protection Agency and Michael S. Regan, Administrator.

B. Rulings under review

Under review is the EPA action "National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates," 86 Fed. Reg. 31,939 (June 16, 2021).

C. Related cases

This case was not previously before this or any other court.

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GLOSSARY

Delay Rule	National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates, 86 Fed. Reg. 31,939 (June 16, 2021)
EPA	U.S. Environmental Protection Agency
Mot.	Petitioners' Combined Motion for Stay Pending Review or Summary Disposition and Vacatur (Aug. 24, 2021)
Original Rule	Maximum Contaminant Level Goals and National Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460 (June 7, 1991), as amended in 2000 and 2007
Revision Rule	National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4,198 (Jan. 15, 2021)

INTRODUCTION

This case begins and ends with standing: Petitioners are five states who want this Court to *force* them to do what they can *choose* to do now. The Court has no power to grant their wish.

At dispute is an EPA action under the Safe Drinking Water Act. That action delays an earlier rule, finalized days before the end of the last presidential administration, that revises a drinking-water regulation for lead. Had EPA not acted here, states would have to start adopting the revisions into their own drinking-water programs.

But EPA did act. In its delay action, it gave states the option to wait, and for good reason: EPA, in a separate proceeding not challenged here, is reviewing the revisions to decide whether to withdraw, modify, or keep them. Waiting will give states more clarity about the revisions' fate before changing their own programs. But waiting is not required. States are free to adopt and enforce the revisions now.

Petitioners want the revisions to apply now. Yet rather than adopt the revisions on their own, they seek to undo the delay action. This scheme would have the Court strip Petitioners of the wait-and-see option and force them to adopt the revisions. They lack standing to ask the Court to fix this made-up problem. The Court should dismiss the petition for lack of jurisdiction.

Even setting aside the jurisdictional defect, there is no emergency to justify the extraordinary relief Petitioners seek. EPA delayed—not repealed—the revisions. The delay, which lasts just a few months, is EPA's reasonable response to the competing interests at play. And because Petitioners can adopt the revisions now, they face no irreparable harm, while a stay or vacatur would harm others by taking away their wait-and-see option. The Court should deny Petitioners' motion.

BACKGROUND

I. Sharing regulatory powers under the Safe Drinking Water Act.

The Safe Drinking Water Act, true to its name, aims to protect the nation's drinking water. 42 U.S.C. §§ 300f to 300j-27. To that end, it authorizes EPA to regulate public water systems. *Id.* §§ 300g to 300g-9.

Under that authority, EPA promulgates national regulations for drinking water. *Id.* § 300g-1. These regulations limit contaminants that may harm people's health. *Id.* § 300g-1(b)(1)(A). EPA must "review" the regulations at least once every six years and "revise" them "as appropriate." *Id.* § 300g-1(b)(9). Public water systems generally have three years from promulgation to comply with each regulation. *Id.* §§ 300f(1)(A), 300g, 300g-1(b)(10).

But EPA is not the only regulator under the Act. States may assume primary enforcement responsibility (called primacy) for their public water systems. *Id.* § 300g-2(a). For a state to have primacy, EPA must determine that the state,

among other things, implements and enforces state drinking-water regulations at least as stringent as federal ones. *Id.* EPA's primacy determination does not supplant either federal or state regulations. So public water systems in primacy states must comply with both sets of regulations. *See id.* § 300g-3(e). Today, 49 states—including all Petitioners—have primacy for their public water systems.[1]

To retain primacy, a state must amend its regulations to reflect changes in federal drinking-water regulations. 40 C.F.R. § 142.12(a). Then it must submit a request (known as a primacy application) for EPA to approve those amendments. *Id.* § 142.12(a)(1). States generally have two years, from when EPA promulgates the new or revised regulation, to submit primacy applications. *Id.* § 142.12(b)(1); 42 U.S.C. § 300g-2(a)(1). For states up to date with their primacy obligations, once they submit a completed application, they have interim primary authority to enforce their amended regulations. 40 C.F.R. § 142.12(a), (e).[2]

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[1] *See, e.g.*, 86 Fed. Reg. 14,109 (Mar. 12, 2021) (Arizona); 82 Fed. Reg. 37,212 (Aug. 9, 2017) (Louisiana); 60 Fed. Reg. 15,141 (Mar. 22, 1995) (Ohio); 80 Fed. Reg. 67,399 (Nov. 2, 2015) (Oklahoma); 86 Fed. Reg. 38,713 (July 22, 2021) (Texas); *see also* https://www.epa.gov/dwreginfo/public-water-system-supervision-pwss-grant-program (last visited Sept. 15, 2021).

[2] Interim authority begins the later of (1) when the state submits a complete application, or (2) when the amended state regulation becomes effective, and ends when EPA approves or disapproves the application. 40 C.F.R. § 142.12(e). A state can thus have interim authority right after submitting its application if its amendment is effective before submission.

Even without changes in federal regulations, primacy states can amend their own regulations—so long as the amended regulations remain at least as stringent as existing federal regulations. *Id.* § 142.12(a); 42 U.S.C. §§ 300g-2(a)(1), 300g-3(e). EPA reviews these state-initiated changes at least every year. 40 C.F.R. §§ 142.12(a)(2), 142.17(a)(1).

II. Regulating lead in public water systems.

Lead exposure has long been known to pose a serious public-health risk. Lead can damage many organs, including the brain and the kidney. 86 Fed. Reg. 31,939, 31,941/3-42/1 (June 16, 2021). Children are especially at risk because their growing bodies absorb more lead than adult bodies do. *Id.* And because of disparities in the quality of housing, health care, and other factors, lead exposure disproportionately harms minority and poor children. *Id.* at 31,942/1.

Drinking water is one source of lead exposure. 86 Fed. Reg. 4,198, 4,199/1 (Jan. 15, 2021). Lead enters drinking water mainly from corroding pipes and other plumbing material. *Id.* at 4,199/3. And lead was often used in plumbing until Congress limited the practice starting in 1986. *Id.*; 42 U.S.C. § 300g-6(a)(1).

In 1991 EPA promulgated a drinking-water regulation to reduce lead contamination in tap water. 56 Fed. Reg. 26,460 (June 7, 1991). We will call this rule, as amended in 2000 and 2007, the Original Rule. 65 Fed. Reg. 1,950 (Jan. 12, 2000); 72 Fed. Reg. 57,782 (Oct. 10, 2007). It generally requires public water

systems to monitor tap water and, based on sampling results, to take actions such as corrosion-control treatment and replacement of lead service lines. *See* 86 Fed. Reg. at 4,207/2 (summarizing rule).

In 2007 EPA identified some long-term issues to address in future rule revisions. *Id.* at 4,207/3. The agency then worked steadily on these issues. *See, e.g.*, 82 Fed. Reg. 3,518, 3,521 (Table IV-1), 3,526/3 (Jan. 11, 2017) (including Original Rule in six-year review and noting that EPA is working on revisions).

Those efforts led to a new rule, promulgated on January 15, 2021. 86 Fed. Reg. at 4,198. This rule—the Revision Rule—makes complex changes to the Original Rule. *Id.* at 4,201-05 (comparing the two rules' major differences). These changes focus on areas including corrosion-control treatment, replacement of lead service lines, and tap sampling. *See id.* at 4,200/2-01/2.[3] The Revision Rule set its effective date at March 16, 2021, and its compliance date at January 16, 2024. *Id.* at 4,198/1.[4]

Public-interest groups and states challenged the Revision Rule in this Circuit. They allege, among other things, that the rule is procedurally defective

[3] The Original Rule, formally known as the Lead and Copper Rule, regulates both contaminants. The Revision Rule does not alter the Original Rule's copper provisions. 86 Fed. Reg. at 4,206/1.

[4] The Safe Drinking Water Act uses "effective date" to mean when water systems must achieve compliance. 42 U.S.C. § 300g-1(b)(10). We use "compliance date" to refer to this deadline, and "effective date" to refer to the day a rule is added to the Code of Federal Regulations. 86 Fed. Reg. at 31,941/2 n.1.

because there was no public hearing and that it is less protective than the Original Rule. Non-binding Statements of Issues, *Newburgh Clean Water Proj. v. EPA*, No. 21-1019 (Feb. 24, 2021) (*Newburgh* Statements). That case is in abeyance. *See* Orders (Apr. 9, 2021; July 20, 2021).

III. Delaying the Revision Rule.

A few days after the Revision Rule's promulgation, President Biden was sworn into office and issued an executive order. The order states his administration's commitment to, among other things, protect public health, ensure access to clean water, and prioritize environmental justice. 86 Fed. Reg. 7,037 (Jan. 25, 2021). It also directs executive agencies to review regulations from the last four years to see if they are in keeping with these goals and, if not, to consider suspending, revising, or rescinding them as appropriate. *Id.*; *see* 86 Fed. Reg. at 31,940/2 (noting that the White House identified the Revision Rule as needing review). Next, the White House asked executive agencies to consider postponing effective dates of regulations that, like the Revision Rule, were published in the Federal Register but not yet effective. 86 Fed. Reg. 7,424, 7424/2 (Jan. 28, 2021). This delay would give incoming appointees a chance to review pending rules. *Id.* The White House also asked agencies to consider inviting interested parties to comment on issues raised by those rules. *Id.*

In response, in March EPA did two things with the Revision Rule. First, it finalized a 3-month delay of the rule's effective date, to June 17, 2021. 86 Fed. Reg. 14,003 (Mar. 12, 2021). That action has never been challenged.

Second, EPA invited public comment on a proposed action. The proposal would further delay the Revision Rule's effective date by 6 months, and delay the compliance date by 9 months. 86 Fed. Reg. 14,063 (Mar. 12, 2021). The proposed delay drew support from commenters spanning the waterfront, from public-interest groups, to water systems, to states—including Petitioner Texas. 86 Fed. Reg. at 31,942/2-3; *see* Burneson Decl. Ex. 1 (letter from Texas Comm'n on Envtl. Quality (Apr. 12, 2021)) (Texas Comments) ("TCEQ agrees with the proposed regulatory action…. TCEQ requests that the compliance date extension applies to [the Revision Rule] in its entirety…."); Ex. 2 (letter from public-interest groups (Mar. 4, 2021)) (requesting suspension of effective date to review rule and listing signatories including Earthjustice, NAACP, Natural Resources Defense Council, and Sierra Club). The other Petitioners did not comment on the proposal.

In June, just before the Revision Rule would have gone into effect, EPA finalized the delays as proposed. This final rule—the Delay Rule—is the action under review. *See* 86 Fed. Reg. at 31,946/2-3 (explaining that Delay Rule takes effect immediately).

By pushing back the Revision Rule's effective date, the Delay Rule leaves the Original Rule as the operative federal drinking-water regulation for lead until December 2021. The Delay Rule thus gives EPA a few extra months to finish reviewing the Revision Rule and decide next steps.

The review, in turn, allows EPA to consider concerns voiced by stakeholders ranging from minority and poor communities, states, water systems, environmental groups, and others. *Id.* at 31,940/2-41/1. Given the President's commitments, it is important for EPA to review stakeholder (and litigant) concerns like whether the Revision Rule is less protective than the Original Rule, having a public hearing, and who bears the regulatory burdens. *See id.* at 31,940/3-41/1, 31,942/2, 31,944/2.[5] And EPA needs time to better understand these concerns because it held no public meetings about the Revision Rule between its proposal and promulgation. *Id.* at 31,945/2. Nor did EPA have targeted meetings during this time with communities that are disproportionally harmed by lead exposure. *Id.*[6]

At the same time, EPA saw that its review created uncertainty about the Revision Rule. *Id.* at 31,941/2-3. That uncertainty left regulated entities and

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[5] *See also Newburgh* Statements; 86 Fed. Reg. at 14,065/2 (noting stakeholder questions about "the lead service line replacement requirements and the small system flexibility requirements, including whether they are consistent with the 'anti-backsliding' standard in [42 U.S.C. § 300g-1(b)(9)]").

[6] In the last few months, EPA has been hosting stakeholder roundtables and listening sessions to discuss the Revision Rule. *See* https://www.epa.gov/ground-water-and-drinking-water/lead-and-copper-rule-revisions-virtual-engagements.

primacy states in a tricky spot because the clock had started ticking on the rule's deadlines for compliance and for primacy applications (which entails the time-consuming task of amending state drinking-water regulations). *See* 40 C.F.R. § 142.12(c). These parties, in other words, would have to start incurring costs—costs that may be unnecessary if EPA withdraws or significantly modifies the Revision Rule—without the benefit of knowing the outcome of EPA's review. *See* 86 Fed. Reg. at 31,943/1 (noting first-year costs of $57 to 60 million).

In the Delay Rule, EPA addressed that uncertainty in two ways. First, it gave regulated entities some breathing room by pushing the compliance date back 9 months, to October 2024. *Id.* at 31,941/2. This interval is the same as the total delay of the original effective date (under both the March 2021 final action and the Delay Rule). *Id.*

Second, EPA assured primacy states that they would have enough time to submit primacy applications. As EPA explained, at the end of its review, it could:

- Withdraw the Revision Rule before it takes effect: The Original Rule would remain in effect, so states would not need to submit primacy applications for the Revision Rule.
- Modify the Revision Rule: EPA would set a new primacy-application deadline in its modification action.

- Keep the Revision Rule as is: EPA would use the date on which it announces this decision in the Federal Register as the new promulgation date to set the primacy-application deadline for the Revision Rule.

Id. at 31,941/3. The Delay Rule, in effect, gives primacy states a choice about what to do in the next few months. They can either (1) start preparing primacy applications now; or (2) wait and see until EPA decides what, if anything, to do about the Revision Rule. *Id.* Without the Delay Rule, only option (1) would exist.

To recap, here are the changes to the Revision Rule's key dates:

	Revision Rule	**March 2021 final action**	**Delay Rule**
Effective date (date of C.F.R. codification)	March 16, 2021	June 17, 2021	December 16, 2021
Promulgation date (date of Fed. Reg. publication)	January 15, 2021	No change	No change, but EPA assured states they would have enough time for primacy applications.
Compliance date (date when regulated entities must achieve compliance)	January 16, 2024	No change	October 16, 2024

Petitioners timely petitioned for this Court's review of the Delay Rule. *See* Petition (July 29, 2021); 42 U.S.C. § 300j-7(a)(1). About a month later they moved for a stay pending review or summary vacatur.

STANDARDS OF REVIEW

Article III of the Constitution limits federal-court jurisdiction to cases and controversies. That limit requires Petitioners to show standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). When, as here, Petitioners seek a final judgment on the merits, they must set forth, by affidavit or other evidence, specific facts supporting each element of standing. *Id.* at 561; *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002); *see* Mot. at 5.

"On a motion for stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (per curiam), *abrogated on other grounds by Winter v. NRDC*, 55 U.S. 7 (2008). Petitioners must discuss "with specificity" (1) the likelihood that they will succeed on the merits; (2) the prospect of irreparable injury to them if relief is denied; (3) the possibility of harm to others if relief is granted; and (4) the public interest. D.C. Cir. R. 18(a)(1). The last two factors merge here because the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Finally, summary reversal is "rarely granted." D.C. Cir. Handbook of Practice & Internal Procedures 36. That relief is proper only when the merits are "so clear" that "plenary briefing, oral argument, and the traditional collegiality of

the decisional process would not affect [the Court's] decision." *Id.* (internal quotation marks omitted).

ARGUMENT

I. This Court lacks jurisdiction because Petitioners have no standing.

The three elements of Article III standing are well known. First, Petitioners must suffer an injury in fact. *Lujan*, 504 U.S. at 560. Second, the injury must be fairly traceable to the challenged action of the defendant. *Id.* Third, it must be likely that the injury will be redressed by a favorable decision. *Id.*

Because their standing is not self-evident, Petitioners must make that showing at the earliest opportunity. *See* D.C. Cir. R. 15(c)(2), 28(a)(7); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175, 177 (D.C. Cir. 2012) (noting that standing is not self-evident when challenged rule gives petitioner a choice). Yet in asking this Court for emergency relief, Petitioners say nothing about standing, much less offer the necessary specific facts. *See* Mot. at i-ii; *Sierra Club*, 292 F.3d at 899. The closest they come to the subject is the scant two pages devoted to irreparable harm. Mot. at 26-27. That, at most, speaks to only the first element of standing.

Even if Petitioners had tried to show standing in their motion, they would have failed. *See* Docketing Statement (Sept. 1, 2021). All that the Delay Rule does to them is give them an option: Rather than act now to adopt the Revision Rule, they can act later. That option cannot create Article III standing.

A. The Delay Rule benefits Petitioners by giving them a choice.

As an initial matter, "a State in general lacks *parens patriae* standing to sue the federal government." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 183 (D.C. Cir. 2019); *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). No exception to that bar exists here, so Petitioners cannot claim injury based on harm to their residents. *See* Mot. at 26 ("The States' residents will directly experience negative health consequences").

More to the point, the Delay Rule does not require primacy states like Petitioners to do anything. Nor does it prevent them from doing anything. It simply gives them a choice: Either start adopting the Revision Rule now, or wait and see what, if anything, EPA decides to do about the rule. *See* 86 Fed. Reg. at 31,941/3. Without that choice—without the Delay Rule—primacy states would have to start adopting the Revision Rule now. So the choice is a benefit, not a harm.[7] Petitioner Texas apparently thought so, having submitted comments supporting the delay. *See* Texas Comments.

[7] Petitioners do not allege that other states' actions under the Delay Rule harm them.

B. Any injury Petitioners suffer is not traceable to the Delay Rule.

Petitioners appear to allege two types of pocketbook injuries: (1) higher state spending on lead-related health problems, Mot. at 26, and (2) higher compliance costs. *Id.* at 27. Neither injury is fairly traceable to the Delay Rule.

Start with health-related spending. Petitioners' theory is that the Revision Rule better protects the public from lead exposure and thus reduces state spending on lead-related health problems.[8] And so, Petitioners say, delaying the Revision Rule would delay those reductions and cost them money. *See id.* at 26.

That theory assumes that the Delay Rule bars Petitioners from adopting the Revision Rule (or stricter requirements) now. It does no such thing. For primacy states like Petitioners, the Delay Rule's "only real effect" is to give them the wait-and-see option. *Grocery Mfrs.*, 693 F.3d at 177; *see* 86 Fed. Reg. at 31,941/3. But states are free to reject that option and instead adopt the Revision Rule now. *See* 40 C.F.R. § 142.12(a), (e). Petitioners, it seems, chose to wait. So "any injury they incur as a result is a 'self-inflicted harm' not fairly traceable to the challenged government conduct." *Grocery Mfrs.*, 693 F.3d at 177 (finding no causation when

[8] Groups challenging the Revision Rule say that it is less protective than the Original Rule. *See Newburgh* Statements. EPA is evaluating this issue in its review. 86 Fed. Reg. at 31,942/2. For standing purposes, we assume, as Petitioners contend, that the Revision Rule is more protective. *See, e.g.*, *Louie v. Dickson*, 964 F.3d 50, 55 (D.C. Cir. 2020). If it is not, Petitioners, who want to protect their residents from lead exposure, would presumably not want the Revision Rule to apply.

petitioners voluntarily chose option under challenged rule); *see Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (rejecting state standing because "[n]o State can be heard to complain about damage inflicted by its own hand"); *Brotherhood of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006) (citing *Pennsylvania* on this point and collecting cases); *cf. California v. Texas*, 141 S. Ct. 2104, 2114, 2117 (2021) (holding that state plaintiffs fail to show traceability when federal government cannot enforce disputed statutory provision).

Or, to put the traceability problem another way: Rather than choose to adopt the Revision Rule now, Petitioners want the Court to stay or vacate the Delay Rule (and its wait-and-see option). Stripped of that option, Petitioners would then be forced to adopt the Revision Rule. Petitioners, in effect, are asking the Court to change *their own* conduct. Their alleged injury is thus not traceable to EPA. It is the result of Petitioners' choice to wait. *See, e.g.*, *Grocery Mfrs.*, 693 F.3d at 177.

Nor is their alleged compliance-cost injury traceable to the Delay Rule. Petitioners say that they, as operators of water systems, would face higher compliance costs "as a result of the regulatory uncertainty the Delay Rule would occasion…." Mot. at 27; *see also id.* at 22. That is wrong. The uncertainty comes from EPA's review of the Revision Rule. Until EPA finishes its review, no one knows whether the rule would be "potential[ly] replace[d] (or not)." *Id.* at 22. The Delay Rule, far from causing uncertainty, is a response to it. And Petitioners do

not challenge EPA's review of the Revision Rule. *Cf. Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002) (explaining that agency action under reconsideration is unreviewable). So even if the Court were to stay or vacate the Delay Rule, the uncertainty Petitioners worry about would remain because EPA's review would continue. Their uncertainty theory thus fails the traceability test (and the redressability test). *See Grocery Mfrs.*, 693 F.3d at 177 ("if the injuries of [petitioners] are traceable to anything other than their own choice to incur them, it is to the [Renewable Fuel Standard], not to the partial waivers they challenge here.").

Because Petitioners have no standing to challenge the Delay Rule, this Court should dismiss the petition for lack of jurisdiction.

II. A stay is improper.

Staying an agency action pending judicial review is an "extraordinary" remedy. *Cuomo*, 772 F.2d at 974. Petitioners have not met their heavy burden to win that relief. Not only are they unlikely to succeed on the merits, but their alleged injuries are self-inflicted. So they are perfectly able to cure those injuries on their own. More problematically, staying the Delay Rule would harm other states and water systems (and even Petitioners themselves). The Court should not use its extraordinary powers in this way.

A. Petitioners are unlikely to succeed on the merits because the Delay Rule reasonably balances different interests.

The Delay Rule is EPA's response to the competing interests created by the review of the Revision Rule. Because that response is reasonable, Petitioners are unlikely to succeed on the merits of their challenge.

Under the Administrative Procedure Act, agency actions are unlawful if they are arbitrary or capricious. 5 U.S.C. § 706(2)(A). The review is a "narrow" one and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court should uphold a decision when the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made. *Id.* EPA did exactly that in the Delay Rule.

When the President ordered review of the Revision Rule, EPA found itself juggling different interests. To do a meaningful review EPA needs time to engage with stakeholders, including communities suffering disproportionally from lead exposure. *E.g.*, 86 Fed. Reg. at 31,940/2-41/1, 31,944/2. After all, the President had made clear that EPA should protect these communities and invite public input in its review. 86 Fed. Reg. at 7,037; 86 Fed. Reg. at 7,424/2. Engagement is all the more valuable here because EPA held no public or targeted meetings with stakeholders about the Revision Rule after its proposal. 86 Fed. Reg. at 31,945/2. (Indeed, EPA faces a lawsuit alleging procedural defects in the rule due to lack of a

public hearing. *See Newburgh* Statements.) So as part of its review, EPA developed a public-engagement plan that includes listening sessions and community and tribal roundtables. 86 Fed. Reg. at 31,943/1. The plan would help EPA evaluate important issues such as whether the Revision Rule better protects the public than the Original Rule.

Meanwhile, for regulated entities and primacy states, the Revision Rule had set compliance and primacy-application deadlines. *Id.* at 31,941/2-3. EPA's review, however, created uncertainty about the rule's fate. That uncertainty is all the more acute given the possibility that EPA could withdraw the rule before it takes effect or could substantially rewrite it. *See id.* If regulated entities and states have to start working to meet their deadlines now, they would be spending scarce resources—to the tune of $57 to 60 million in the first year—that may turn out to be unnecessary. *Id.* at 31,943/1-2. These entities, like EPA, would benefit from having more time.

Naturally, there is a downside to more time. Delaying compliance means delaying the Revision Rule's quantified benefits. *Id.* at 31,944/3-45/1. Though these benefits were not going to start accruing until later (or, more precisely, until January 16, 2024, the original compliance deadline), any delay would still reduce quantified benefits expected under the Revision Rule. *Id.* (EPA did note that

public engagement would improve awareness about lead exposure from drinking water and proactive ways to reduce exposure. *See id.* at 31,944/2.)

Given these competing interests, there would never be a perfect solution. So in the Delay Rule EPA steered a middle course: It delayed the effective date by 6 months, from June 17 to December 16, 2021, and assured states that they would have enough time to submit any required primacy applications. *Id.* at 31,941/2-3. For regulated entities, EPA delayed the compliance date by 9 months, from January 16 to October 16, 2024. *Id.*

In this way, EPA gave itself some time to finish reviewing the Revision Rule and decide next steps. EPA also gave regulated entities and states some breathing room from their deadlines. And the modest delay minimizes any loss in the Revision Rule's expected benefits. *See id.* at 31,945/1. The Delay Rule also does not leave lead in drinking water unregulated, for the Original Rule remains in place and continues to protect the public. *Id.* Under the circumstances, EPA acted reasonably by narrowly tailoring the delay. *See Clean Water Action v. EPA*, 936 F.3d 308, 315-16 (5th Cir. 2019) (upholding narrowly tailored two-year delay of two compliance dates in Clean Water Act rule).

Petitioners disagree for three reasons. They argue that (1) under *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018) (per curiam), the Delay Rule is an unlawful repeal of the Revision Rule, Mot. at 14-17; (2) EPA's quantitative cost-

benefit analysis shows that the Delay Rule's costs might exceed its benefits, *id.* at 18-23; and (3) the Delay Rule violates the Safe Drinking Water Act's review-and-revise provision, *id.* at 23-26. They are wrong on all counts.

1. *Air Alliance* is distinguishable.

Petitioners put too much stock in *Air Alliance*, where the Court vacated EPA's delay of a rule's effective date. 906 F.3d at 1053; *see* Mot. at 1, 15-16. Beyond that superficial similarity, the facts of this case distinguish it from *Air Alliance* in key ways.

To begin, the Delay Rule does not "repeal" the Revision Rule. Mot. at 1-2, 14-15; *see Clean Water Action*, 936 F.3d at 313. In *Air Alliance* EPA delayed the effective date of a safety rule for chemical plants by 20 months—without resetting any compliance deadlines. 906 F.3d at 1056-57, 1067-68. On top of that, the agency all but said to not worry about compliance. *See id.* at 1057 ("'[c]ompliance with all of the rule provisions is not required as long as the rule does not become effective. The EPA did not propose and is not taking any action on any compliance dates at this time.'" (quoting EPA's rule)). The Court said that EPA not only delayed compliance, it "reduced or eliminated" lead time to achieve compliance—the delay, in short, was "calculated to enable non-compliance." *Id.* at 1065, 1064; *see id.* at 1064 (noting that the delay "removes both immediate and

future obligations"). The Court thus held that EPA "effectively repeal[ed]" the underlying rule. *Id.* at 1065.

The opposite is true here. Instead of leaving the compliance date in limbo and telling everyone to not worry about it, the Delay Rule extends that date by a finite interval: 9 months. *See* 42 U.S.C. § 300g-1(b)(9). That modest delay neither removes compliance obligations nor puts them off indefinitely. And it preserves lead time for regulated entities to achieve compliance. This delay, then, is just a delay, not a repeal.[9]

EPA also explained why delay of the compliance date is 9 months. That is the total interval by which EPA delayed the effective date, the only other date in the Revision Rule to be changed. 86 Fed. Reg. at 31,941/2. It was thus reasonable to delay the compliance date by the same interval. By contrast, in *Air Alliance* EPA said nothing about why it picked a 20-month delay of the effective date, and not some other interval. 906 F.3d at 1064. Worse still, in the underlying *Air Alliance* rule EPA had specifically analyzed and decided on lead times for compliance. *Id.* at 1063-65, 1067. Yet EPA gave no reasons for later departing from those lead times. *Id.* at 1065, 1067; Mot. at 16-17. That problem does not exist here. The Revision Rule never specifically considered the compliance date or

[9] *Clean Air Council v. Pruitt* does not hold that delay means repeal. 862 F.3d 1 (D.C. Cir. 2017); Mot. at 14. It says that delaying a rule's effective date is "tantamount to amending *or* revoking the rule." 862 F.3d at 6 (emphasis added).

lead time; it simply set that date as a function of the statute, at three years after promulgation. 42 U.S.C. § 300g-1(b)(10); *see* 86 Fed. Reg. at 4,198/1. So there are no earlier analyses or conclusions about lead times for EPA to depart from. And again, EPA explained its reasons for the delay. *See* 86 Fed. Reg. at 31,941/2, 31,943/1.[10]

2. The quantitative cost-benefit analysis is not dispositive.

Next, Petitioners spotlight EPA's quantitative cost-benefit analysis. Mot. at 18-21. They give the analysis far more weight than its results call for.

In this analysis, EPA looked at the Revision Rule's expected costs and quantified benefits, and calculated the effects of delaying compliance. 86 Fed. Reg. at 31,944/3-45/1. The delay would delay compliance spending, which, in present-value terms, means cost savings for regulated entities and states. *See id.* (These cost savings are the benefits of the Delay Rule.) On the flip side, delaying compliance would also delay the Revision Rule's quantified benefits. And that, in present-value terms, means a reduction in those benefits (which is the cost of the Delay Rule). *See id.*

[10] Note too that *Air Alliance* arose under the Clean Air Act. 906 F.3d at 1057, 1060-66. That statute allows EPA to delay a rule's effectiveness during agency reconsideration—but only for 3 months, not 20. *See id.* at 1061; 42 U.S.C. § 7607(d)(7)(B). The Safe Drinking Water Act has no analogous provision.

These present values are calculated using discount rates. The Office of Management and Budget directs EPA to use two discount rates here, 3 percent and 7 percent. *See* OMB, Circular A-4, at 33-34 (Sept. 17, 2003);[11] 86 Fed. Reg. at 4,278/3 (Revision Rule) (citing circular). These values aim to account for discount rates that may apply to different money streams. *See* Circular A-4, at 33.

Here are the results of EPA's quantitative cost-benefit analysis:

	Cost savings		**Quantified-benefit reduction**	
Discount rate	**Low estimate**	**High estimate**	**Low estimate**	**High estimate**
3 percent	$7 million	$15 million	$10 million	$29 million
7 percent	$12 million	$27 million	$3 million	$9 million

See Burneson Decl. Ex. 3 (cost-benefit calculations); 86 Fed. Reg. at 31,944/3-45/1.[12] As the chart shows, whether cost savings outweigh reductions in quantified benefits depends on which discount rate applies: At 3 percent, reductions exceed savings; at 7 percent, the reverse is true. And because there is inherent uncertainty in the actual discount rate,[13] EPA could not predict whether that rate would be closer to 3 percent or 7 percent.

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[11] *Available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf (last visited Sept. 15, 2021).

[12] Rounding differences account for minor discrepancies in Petitioners' figures. *See* Mot. at 19.

[13] The actual discount rate depends on a host of factors like the nature of money stream being discounted, its returns and tax treatment, and so on. *See* Circular A-4, at 33.

For that reason, EPA did not—could not—favor one discount rate over the other. *See* Mot. at 2-3, 20-21. So Petitioners are wrong to insist that the quantitative analysis can play a dispositive role in whether to delay the Revision Rule. *See id.* at 2-3, 18-20.

Still, EPA did not ignore costs and benefits. It considered them qualitatively. *See* 86 Fed. Reg. at 31,945/1. The agency looked at the savings on potentially unnecessary compliance spending and the value of stakeholder engagement, including better public awareness of lead exposure (a benefit not considered in the quantitative analysis).[14] Against these factors EPA weighed the delay in the Revision Rule's expected benefits. *See id.* at 31,942/2-43/3, 31,944/2, 31,945/1-2. Faced with these competing interests, EPA reasonably chose only a short delay of the effective and compliance dates.[15] And the quantitative analysis does not undercut this conclusion. *See id.* at 31,944/3-45/1.

3. Petitioners' review-and-revise argument is both waived and wrong.

Petitioners also argue that the Delay Rule violates the Safe Drinking Water Act's directive that EPA "shall, not less often than every 6 years, review and

[14] The quantitative analysis's inputs come from the Revision Rule's economic analysis, and thus does not account for the Delay Rule's other benefits, like stakeholder engagement. 86 Fed. Reg. at 31,944/3.

[15] Petitioners also fault EPA's analysis because EPA introduced uncertainty. Mot. at 21-23. Again, the uncertainty comes from review of the Revision Rule, not the Delay Rule. *See supra* Argument § I.B.

revise, as appropriate," each national drinking-water regulation. 42 U.S.C. § 300g-1(b)(9); *see* Mot. at 4, 23-26. The Court should reject that argument.

For one thing, nobody raised this argument in comments, so it is waived. *See* Burneson Decl. Ex. 4 (response to comments); *e.g.*, *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002). And Petitioners, having not commented at all (or, in Texas's case, commented in support), cannot now complain about the Delay Rule's silence on this issue. Mot. at 25; *cf. Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) ("as we have repeatedly made clear, agencies have no obligation to anticipate every conceivable argument about why they might lack such statutory authority").

For another, if Petitioners' contention is that EPA has a mandatory duty to review and revise its rules every six years and that it has violated this duty, they are in the wrong court. To pursue such a claim, they would need to give EPA 60 days' notice and then sue in federal district court. 42 U.S.C. § 300j-8(a)(2), (b)(2).

Besides, EPA did consider the Original Rule in its six-year review in 2017, and the next review is not due until 2023. 82 Fed. Reg. at 3,521 (Table IV-1); *see id.* at 3,522/1-25/3 (summarizing six-year-review protocol); *see also* 75 Fed. Reg. 15,500, 15,503 (Table IV-1) (Mar. 29, 2010) (2010 review). The 2017 review also noted that EPA was separately considering revisions to the Original Rule. 82 Fed.

Reg. at 3,526/3. Nothing in the law or the facts supports Petitioners' contention that EPA failed to do a six-year review. *See* Mot. at 23.

Petitioners are also wrong that the Delay Rule, by delaying the Revision Rule's effective date, "reinstates" EPA's alleged failure to revise the Original Rule since 2007. *Id.* at 25. The statute, which speaks to periodic revisions "as appropriate," rejects Petitioners' implicit view that a revision must happen every six years no matter what. 42 U.S.C. § 300g-1(b)(9). In any case, EPA revised the Original Rule in January, when it promulgated the Revision Rule. And the Delay Rule, as explained earlier, merely pushes back the Revision Rule's effective and compliance dates by a few months. It does not repeal the Revision Rule. *See supra* Argument § II.A.1.[16]

Petitioners, in short, are unlikely to succeed on the merits of their challenge.

B. Petitioners' alleged injuries are not irreparable.

The only kind of injury that can justify the extraordinary remedy of a stay is an irreparable one. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). An irreparable injury "must be both certain and great." *Id.* It must have such "*imminence*" that there is a "clear and present need for equitable

[16] Petitioners say that EPA is likely to delay the Revision Rule's effective date again in December. *See* Mot. at 14-15, 25. That is pure speculation. If they want to challenge any future EPA action, they can sue once it is final. But any claim now based on what Petitioners think EPA might do is unripe.

relief…." *Id.* (internal quotation marks omitted). Petitioners fall well short of that high bar.

First, they have not shown that they forgo "great" health-related savings from delays of the effective and compliance dates. Mot. at 26-27. That failure is all the more pronounced when it comes to the effective date. Here, that date is when the rule is added to the Code of Federal Regulations and, by itself, has no discernable effect on Petitioners' interests. *See* 86 Fed. Reg. at 31,941/2 n.1.

Second, Petitioners have not shown that their alleged injuries are imminent. Any state savings in health-related costs would not accrue until water systems comply with the Revision Rule. *Cf. id.* at 31,945/1. That is not slated to happen until, at the earliest, January 2024, the rule's original compliance deadline. A reduction in future savings—more than two years away—is not an "imminent" harm. So it cannot justify emergency relief.

Third, Petitioners' alleged injuries from lead exposure are avoidable. If Petitioners want the Revision Rule (or stricter requirements) to apply, then instead of waiting around and doing nothing, they can adopt the rule now. Petitioners, in other words, can give themselves the precise relief they seek from the Court. So there is no "clear and present" need for the Court to step in. *Wis. Gas*, 758 F.2d at 674 (internal quotation marks omitted).

C. A stay would harm others and not serve the public interest.

Not only is a stay unnecessary, it would do more harm than good. For regulated entities and primacy states that relied on the Delay Rule, a stay would pull the rug out from under them. It would rob water systems 9 months of lead time by reverting to the original January 2024 compliance date. *See* 86 Fed. Reg. at 31,943/1 (listing tasks that water systems must do in the Revision Rule's first year, such as develop implementation plans and train staff). And primacy states, denied their wait-and-see option, would have to start preparing primacy applications (which entails revising their own regulations). These harms are all the more unjustifiable because Petitioners are not injured by choices made by other states and their water systems under the Delay Rule.

Though Petitioners invoke harm to children as a public interest, they do not explain how emergency relief would help those children now. Mot. at 28. To the contrary, staying the Delay Rule would not bring about full compliance with the Revision Rule today (or even next year). Of course, that is not to say that any future benefits to children are worthless, only that those benefits should be weighed against a stay's immediate harm to other parties.

Even worse, a stay of the Delay Rule would exacerbate the problems posed by uncertainty. EPA's separate review of the Revision Rule would continue, stay or no. So a stay would just force states and regulated entities to start spending

money to adopt and comply with a rule before EPA decides whether to withdraw, revise, or keep it. That would not be in the public interest—or even Petitioners' own interest. *See* Mot. at 27.

Petitioners, unable to show any element needed to justify a stay pending review, fail to meet their burden. This Court should deny their motion.

III. Summary vacatur is also improper.

The Court should deny Petitioners' alternative request for summary vacatur. *Id.* at 5. Their petition is meritless. *See supra* Argument § II.A. Even if it were not, given that Petitioners can adopt the Revision Rule now, there is no emergency to justify skipping the normal "plenary briefing, oral argument, and the traditional collegiality of the decisional process" here. D.C. Cir. Handbook of Practice & Internal Procedures at 36.

CONCLUSION

If Petitioners want the Revision Rule to apply, they are free to adopt it now. This Court need not intervene to force them to do so, and certainly not on an emergency basis. In fact, because Petitioners lack standing, this Court cannot intervene at all. The Court should dismiss the petition for lack of jurisdiction or, at the very least, deny Petitioners' motion for a stay or summary vacatur.

Submitted on September 16, 2021.

Todd Kim
Assistant Attorney General

/s/ Sue Chen
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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that this document complies with Fed. R. App. P. 32(a)(5) and (6) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this document complies with D.C. Cir. R. 27(c) because according to Microsoft Word's count, it has 6,883 words, excluding the parts of exempted under Fed. R. App. P. 32(f).

Finally, I certify that on September 16, 2021, I electronically filed this document with the Court's CM/ECF system, which will serve each party.

/s/ Sue Chen
Sue Chen

NOT YET SCHEDULED FOR ORAL ARGUMENT

U.S. COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

States of Arizona, Louisiana, Ohio, Oklahoma, and Texas, Petitioners, v. U.S. Environmental Protection Agency and Michael S. Regan, Administrator, Respondents.	Case No. 21-1159

Declaration of Eric Burneson

I, Eric Burneson, declare under penalty of perjury:

1. I am the Director of the Standards and Risk Management Division in the Office of Ground Water and Drinking Water at the United States Environmental Protection Agency.

2. I am responsible for EPA's evaluation of unregulated drinking water contaminants, and for the review of national primary drinking water regulations in accordance with the Safe Drinking Water Act. I am also responsible for the development of national primary drinking water regulations and revisions to these regulations.

3. I oversaw the preparation of the challenged action, National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates, 86 Fed. Reg. 31,939 (June 16, 2021) (the Delay Rule). I supervised the development of the proposed Delay Rule, the review and consideration of the public comments, and the preparation of the final Delay Rule.

4. Attached as **Exhibit 1** is a true and correct copy of the April 12, 2021, comment letter submitted by the Texas Commission on Environmental Quality about the proposal for the Delay Rule.

5. Attached as **Exhibit 2** is a true and correct copy of the March 4, 2021, letter submitted by Alliance for the Great Lakes et al, in this matter.

6. Attached as **Exhibit 3** is a true and correct copy of EPA's Calculation of Impact to LCRR Final Rule Costs and Benefits as a Result of Delay of Compliance Date. This copy has been converted from its original Excel format into a PDF and paginated.

7. Attached as **Exhibit 4** is a true and correct copy of EPA's Public Comment and Response Document for the Delay Rule.

ERIC BURNESON Digitally signed by ERIC BURNESON Date: 2021.09.15 17:07:37 -04'00'

By: Eric Burneson
Director, Standards and Risk Management Division, Office of Ground Water and Drinking Water, United States Environmental Protection Agency

Dated: September 15, 2021

Exhibit 1

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 12, 2021

U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ-OW-2017-0300,
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: Docket ID No. EPA-HQ-OW-2017-0300, Comments Regarding the *National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates*

Dear Sir or Madam:

The Texas Commission on Environmental Quality (TCEQ) is providing the below comments regarding the *National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates*, Docket ID No. EPA-HQ-OW-2017-0300. As the state agency responsible for primacy of the Safe Drinking Water Act public drinking water provisions in Texas, TCEQ oversees more than 7,000 public water systems that provide drinking water to more than 29,000,000 Texans.

TCEQ has reviewed the EPA proposal and appreciates the opportunity to comment. The TCEQ agrees with the proposed regulatory action to delay the effective date of the Lead and Copper Rule Revisions (LCRR) to December 16, 2021, and the compliance date of the rule to September 16, 2024, to allow for EPA review of the regulations and consultation with stakeholders. TCEQ requests that the compliance date extension applies to LCRR in its entirety to simplify communication, reduce complexity and confusion, improve compliance by the regulated community, and provide additional time to obtain the data management tools and resources required to implement the rule.

As a primacy agency stakeholder, TCEQ looks forward to engaging with EPA during the delay while EPA evaluates the rule and determines whether to initiate revisions to components of the rule to address stakeholder concerns. TCEQ shares many of these concerns and supports review of the application of small system flexibility and its options, find and fix requirements, guidelines for goal-based replacement rates, the availability of data management tools to accomplish regulatory oversight, and expectations of the primacy agency when a school and/or child care facility experiences lead concentration results above the action level.

If you have any questions concerning the enclosed comments, please contact Ms. Cari-Michel La Caille, Deputy Director of the Water Supply Division at (512) 239-6479 or by e-mail at Cari-Michel.LaCaille@tceq.texas.gov.

Sincerely,

Toby Baker
Executive Director

Exhibit 2

March 4, 2021

Via e-mail

Jane Nishida, Acting Administrator
Radhika Fox, Acting Assistant Administrator for the Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460
Nishida.Jane@epa.gov
Fox.Radhika@epa.gov

RE: Revisions to Lead & Copper National Primary Drinking Water Regulations, Docket No. EPA-HQ-OW-2017-0300-1550

Dear Acting Administrator Nishida and Acting Assistant Administrator Fox:

We write on behalf of our millions of members and activists to urge EPA to suspend the March 16, 2021 effective date of the National Primary Drinking Water Regulation for Lead and Copper ("LCR"), 86 Fed. Reg. 4198 (January 15, 2021), for up to six months to review the rule and initiate a new rulemaking to fix it. This time would allow the Agency to hold public hearings to listen to people who are living in communities suffering from lead-contaminated drinking water about their recommendations for the rule. As you know, the agency was required to convene public hearings before adopting the LCR, according to the Safe Drinking Water Act (42 U.S.C. § 300g-1(d)) and EPA regulations (40 C.F.R. § 25.5), and communities affected by lead-contaminated water have asked the agency on previous occasions to hold hearings on the LCR. But the agency failed to do so and should take the opportunity to do so now.

Among the issues we ask the agency to review are whether the agency should set a Maximum Contaminant Level for lead, and, if it retains a treatment technique, whether it should strengthen that rule by, for example: (1) reducing the lead action level and strengthening the related monitoring requirements; (2) mandating lead service line replacements within 10 years for all water systems; (3) strengthening public education and public notification requirements; (4) providing better protections for customers served by small systems; and, (5) improving and expanding sampling, notification and response requirements for schools and childcare facilities.

We appreciate your attention to this important matter. Some of the undersigned organizations are petitioners, or lawyers representing petitioners, in litigation against EPA regarding the final rule revising the LCR. More specifically, Earthjustice represents Newburgh Clean Water Project, the NAACP, Sierra Club, and United Parents Against Lead, and NRDC counsel represent NRDC. *See Newburgh Clean Water Project v. EPA*, Nos. 21-1019, 21-1020 (D.C. Cir.). We are copying EPA's counsel for that litigation on this letter.

Sincerely,

Alliance for the Great Lakes
By Crystal Davis, Vice President of Policy & Strategic Engagement

Campaign for Lead Free Water
By Yanna Lambrinidou and Paul Schwartz

Childhood Lead Action Project
By Laura Brion, Executive Director

Clean and Healthy New York
By Bobbi Wilding, MS, Executive Director

Clean Water Action
By Lynn Thorp, National Campaigns Director

Clean Water for North Carolina
By Veronica Oakler, Executive Director

Defend Our Health
By Patrick MacRoy, Deputy Director

Earthjustice
By Suzanne Novak, Staff Attorney

Environment America
By John Rumpler, Clean Water Program Director

Environmental Working Group
By Olga Naidenko, VP, Science Investigations

Flint Rising
By Nayyirah Shariff, Executive Director

Food & Water Watch
By Mary Grant, Public Water for All Campaign Director

Fresh Water for Life Action Coalition
By Robert Miranda, Spokesperson

Freshwater Future
By Kristy Meyer, Associate Director

Get the Lead Out Coalition
By Thomas Welcenbach, GIS Professional and Policy Analyst

Green Inside and Out, Inc.
By Beth Fiteni, Director

Interfaith Earth Network of Southeastern Wisconsin
By Terry Wiggins, Advocacy Representative

Learning Disabilities Association of WNY
By Leah Bartlo, Director

Louisiana Environmental Action Network
By Wilma Subra, Technical Advisor

Merrimack Citizens for Clean Water
By Laurene Allen, Co-Founder

Midwest Environmental Advocates
By Tony Wilkin Gibart, Executive Director

NAACP
By Anthony P. Ashton, Director of Affirmative Litigation

Natural Resources Defense Council
By Erik Olson, Senior Strategic Director for Health & Food

Newark Water Coalition
By Anthony Diaz, Co-Founder

Newburgh Clean Water Project
By Deborah Brown, Co-Founder

New Mexico Environmental Law Center
By Dr. Virginia Necochea, Executive Director

New York League of Conservation Voters
By Joshua Klainberg, Senior Vice President

Ohio Environmental Council
By Melanie Houston, Drinking Water Director

Portland Advocates for Lead-Free Drinking Water
By Lorie McFarlane, Co-Founder

Portland Harbor Community Coalition
By Cassie Cohen, Executive Director

Sierra Club
By Dalal Aboulhosn, Deputy Legislative Director

United Parents Against Lead
By Queen Zakia Shabazz, Founder and Mother of a Lead Poisoned Son

U.S. PIRG
By Matt Casale, Environmental Campaigns Director

Water You Fighting For?
By Melissa Mays, Founder

Women for a Healthy Environment
By Michelle Naccarati-Chapkis, Executive Director

Zero Waste Washington
By Heather Trim, Executive Director

Individuals

Akeesha Daniels
Resident of East Chicago, Indiana

Liz Festa
Parent and Washington, D.C. Activist

Phyllis Gosa
Ashurst Bar Smith Community

Maritza Lopez
Resident of East Chicago USS Lead Superfund Site

Randy Speck
DC Advisory Neighborhood Commission 3/4G03

cc: Hubert Lee
U.S. Department of Justice, Environment and Natural Resources Division
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Exhibit 3

Calculation of the Impact to LCRR Final Rule Costs and Benefits as a Result of Delay of Compliance Date
This workbook provides the calculation that estimate the impact of a delay in the compliance date of the LCRR Final Rule by 9 months. Please note that because the economic models used (Safewater LCR) to estimate the cost and benefits of the final LCRR operate on an annual time step, to estimate the potential annualized impact of the delay in the compliance date, EPA selected the conservative assumption of delaying the regulatory costs
Source Data: Initial incremental monetized annualized cost and benefit values for the LCRR final rule come from the Economic Analysis for the Final Lead and Copper Rule Revisions, Exhibits 7-5 and 7-6.

USEPA. 2020. Economic Analysis for the Final Lead and Copper Rule Revisions. December 2020. Office of Water.
Period of Analysis: EPA has maintained the 35-year period of analysis used in the LCRR final rule impact
Calculations: In this workbook, EPA uses Microsoft Excel's net present value (NPV) and payment (PMT) financial functions to both verified the baseline LCRR final rule annual values and computed the impact of a one year, or one period, delay in the costs and benefits of the proposed extension of the LCRR compliance date.

Exhibits are from: USEPA. 2020. Economic Analysis for the Final Lead and Copper Rule Revisions. December 2020. Office of Water.

Exhibit 7-5: Comparison of Estimated Monetized National Annualized Incremental Costs to Benefits of the Final LCRR at 3 Percent Discount Rate

	Low Cost Scenario	High Cost Scenario
Annualized Incremental Costs	$160,571,000	$335,481,000
Annualized Incremental Benefits	$223,344,000	$645,276,000
Annual Net Benefits	**$62,773,000**	**$309,795,000**

Exhibit 7-6: Comparison of Estimated Monetized National Annualized Incremental Costs to Benefits of the Final LCRR at 7 Percent Discount Rate

	Low Cost Scenario	High Cost Scenario
Annualized Incremental Costs	$167,333,000	$372,460,000
Annualized Incremental Benefits	$39,353,000	$119,102,000
Annual Net Benefits	**($127,980,000)**	**($253,358,000)**

LCRR final rule low cost senario, 3 percent discount rate														
			Annualized Final LCRR Values Over Period of Analysis					Net Present Value			Net Present Value			
		Period of Ananlysis	no compliance shift		one period compliance shift			no compliance shift			one period compliance shift			
			cost	benefit	cost	benefit		cost	benefit		cost	benefit		
		1	160,571,000	223,344,000	-	-		3,450,224,414	4,799,041,680		3,294,330,240	4,582,202,845		
		2	160,571,000	223,344,000	160,571,000	223,344,000								
		3	160,571,000	223,344,000	160,571,000	223,344,000								
		4	160,571,000	223,344,000	160,571,000	223,344,000		Annualized Value			Annualized Value			
		5	160,571,000	223,344,000	160,571,000	223,344,000		no compliance shift			one period compliance shift			
		6	160,571,000	223,344,000	160,571,000	223,344,000		cost	benefit		cost	benefit		
		7	160,571,000	223,344,000	160,571,000	223,344,000		160,571,000	223,344,000		153,315,796	213,252,474		
		8	160,571,000	223,344,000	160,571,000	223,344,000								
		9	160,571,000	223,344,000	160,571,000	223,344,000								
		10	160,571,000	223,344,000	160,571,000	223,344,000		Annualized Imact of One Period Compliance Shift:						
		11	160,571,000	223,344,000	160,571,000	223,344,000		cost	benefit					
		12	160,571,000	223,344,000	160,571,000	223,344,000		(7,255,204)	(10,091,526)					
		13	160,571,000	223,344,000	160,571,000	223,344,000								
		14	160,571,000	223,344,000	160,571,000	223,344,000								
		15	160,571,000	223,344,000	160,571,000	223,344,000								
		16	160,571,000	223,344,000	160,571,000	223,344,000								
		17	160,571,000	223,344,000	160,571,000	223,344,000								
		18	160,571,000	223,344,000	160,571,000	223,344,000								
		19	160,571,000	223,344,000	160,571,000	223,344,000								
		20	160,571,000	223,344,000	160,571,000	223,344,000								
		21	160,571,000	223,344,000	160,571,000	223,344,000								
		22	160,571,000	223,344,000	160,571,000	223,344,000								
		23	160,571,000	223,344,000	160,571,000	223,344,000								
		24	160,571,000	223,344,000	160,571,000	223,344,000								
		25	160,571,000	223,344,000	160,571,000	223,344,000								
		26	160,571,000	223,344,000	160,571,000	223,344,000								
		27	160,571,000	223,344,000	160,571,000	223,344,000								
		28	160,571,000	223,344,000	160,571,000	223,344,000								
		29	160,571,000	223,344,000	160,571,000	223,344,000								
		30	160,571,000	223,344,000	160,571,000	223,344,000								
		31	160,571,000	223,344,000	160,571,000	223,344,000								
		32	160,571,000	223,344,000	160,571,000	223,344,000								
		33	160,571,000	223,344,000	160,571,000	223,344,000								
		34	160,571,000	223,344,000	160,571,000	223,344,000								
		35	160,571,000	223,344,000	160,571,000	223,344,000								

LCRR final rule low cost senario, 7 percent discount rate

Period of Ananlysis	Annualized Final LCRR Values Over Period of Analysis				Net Present Value		Net Present Value	
	no compliance shift		one period compliance shift		no compliance shift		one period compliance shift	
	cost	benefit	cost	benefit	cost	benefit	cost	benefit
1	167,333,000	39,353,000	-	-	2,166,572,849	509,529,748	2,010,186,868	472,751,243
2	167,333,000	39,353,000	167,333,000	39,353,000				
3	167,333,000	39,353,000	167,333,000	39,353,000				
4	167,333,000	39,353,000	167,333,000	39,353,000	**Annualized Value**		**Annualized Value**	
5	167,333,000	39,353,000	167,333,000	39,353,000	no compliance shift		one period compliance shift	
6	167,333,000	39,353,000	167,333,000	39,353,000	cost	benefit	cost	benefit
7	167,333,000	39,353,000	167,333,000	39,353,000	167,333,000	39,353,000	155,254,691	36,512,450
8	167,333,000	39,353,000	167,333,000	39,353,000				
9	167,333,000	39,353,000	167,333,000	39,353,000				
10	167,333,000	39,353,000	167,333,000	39,353,000	**Annualized Imact of One Period Compliance Shift:**			
11	167,333,000	39,353,000	167,333,000	39,353,000	cost	benefit		
12	167,333,000	39,353,000	167,333,000	39,353,000	(12,078,309)	(2,840,550)		
13	167,333,000	39,353,000	167,333,000	39,353,000				
14	167,333,000	39,353,000	167,333,000	39,353,000				
15	167,333,000	39,353,000	167,333,000	39,353,000				
16	167,333,000	39,353,000	167,333,000	39,353,000				
17	167,333,000	39,353,000	167,333,000	39,353,000				
18	167,333,000	39,353,000	167,333,000	39,353,000				
19	167,333,000	39,353,000	167,333,000	39,353,000				
20	167,333,000	39,353,000	167,333,000	39,353,000				
21	167,333,000	39,353,000	167,333,000	39,353,000				
22	167,333,000	39,353,000	167,333,000	39,353,000				
23	167,333,000	39,353,000	167,333,000	39,353,000				
24	167,333,000	39,353,000	167,333,000	39,353,000				
25	167,333,000	39,353,000	167,333,000	39,353,000				
26	167,333,000	39,353,000	167,333,000	39,353,000				
27	167,333,000	39,353,000	167,333,000	39,353,000				
28	167,333,000	39,353,000	167,333,000	39,353,000				
29	167,333,000	39,353,000	167,333,000	39,353,000				
30	167,333,000	39,353,000	167,333,000	39,353,000				
31	167,333,000	39,353,000	167,333,000	39,353,000				
32	167,333,000	39,353,000	167,333,000	39,353,000				
33	167,333,000	39,353,000	167,333,000	39,353,000				
34	167,333,000	39,353,000	167,333,000	39,353,000				
35	167,333,000	39,353,000	167,333,000	39,353,000				

LCRR final rule high cost senario, 3 percent discount rate

Period of Ananlysis	Annualized Final LCRR Values Over Period of Analysis				Net Present Value		Net Present Value	
	no compliance shift		one period compliance shift		no compliance shift		one period compliance shift	
	cost	benefit	cost	benefit	cost	benefit	cost	benefit
1	335,481,000	645,276,000	-	-	7,208,554,077	13,865,187,420	6,882,844,369	13,238,705,866
2	335,481,000	645,276,000	335,481,000	645,276,000				
3	335,481,000	645,276,000	335,481,000	645,276,000				
4	335,481,000	645,276,000	335,481,000	645,276,000	**Annualized Value**		**Annualized Value**	
5	335,481,000	645,276,000	335,481,000	645,276,000	no compliance shift		one period compliance shift	
6	335,481,000	645,276,000	335,481,000	645,276,000	cost	benefit	cost	benefit
7	335,481,000	645,276,000	335,481,000	645,276,000	335,481,000	645,276,000	320,322,701	616,119,992
8	335,481,000	645,276,000	335,481,000	645,276,000				
9	335,481,000	645,276,000	335,481,000	645,276,000				
10	335,481,000	645,276,000	335,481,000	645,276,000	**Annualized Imact of One Period Compliance Shift:**			
11	335,481,000	645,276,000	335,481,000	645,276,000	cost	benefit		
12	335,481,000	645,276,000	335,481,000	645,276,000	(15,158,299)	(29,156,008)		
13	335,481,000	645,276,000	335,481,000	645,276,000				
14	335,481,000	645,276,000	335,481,000	645,276,000				
15	335,481,000	645,276,000	335,481,000	645,276,000				
16	335,481,000	645,276,000	335,481,000	645,276,000				
17	335,481,000	645,276,000	335,481,000	645,276,000				
18	335,481,000	645,276,000	335,481,000	645,276,000				
19	335,481,000	645,276,000	335,481,000	645,276,000				
20	335,481,000	645,276,000	335,481,000	645,276,000				
21	335,481,000	645,276,000	335,481,000	645,276,000				
22	335,481,000	645,276,000	335,481,000	645,276,000				
23	335,481,000	645,276,000	335,481,000	645,276,000				
24	335,481,000	645,276,000	335,481,000	645,276,000				
25	335,481,000	645,276,000	335,481,000	645,276,000				
26	335,481,000	645,276,000	335,481,000	645,276,000				
27	335,481,000	645,276,000	335,481,000	645,276,000				
28	335,481,000	645,276,000	335,481,000	645,276,000				
29	335,481,000	645,276,000	335,481,000	645,276,000				
30	335,481,000	645,276,000	335,481,000	645,276,000				
31	335,481,000	645,276,000	335,481,000	645,276,000				
32	335,481,000	645,276,000	335,481,000	645,276,000				
33	335,481,000	645,276,000	335,481,000	645,276,000				
34	335,481,000	645,276,000	335,481,000	645,276,000				
35	335,481,000	645,276,000	335,481,000	645,276,000				

LCRR final rule high cost senario, 7 percent discount rate

Period of Ananlysis	Annualized Final LCRR Values Over Period of Analysis				Net Present Value		Net Present Value	
	no compliance shift		one period compliance shift		no compliance shift		one period compliance shift	
	cost	benefit	cost	benefit	cost	benefit	cost	benefit
1	372,460,000	119,102,000	-	-	4,822,490,025	1,542,093,666	4,474,396,567	1,430,783,386
2	372,460,000	119,102,000	372,460,000	119,102,000				
3	372,460,000	119,102,000	372,460,000	119,102,000				
4	372,460,000	119,102,000	372,460,000	119,102,000	**Annualized Value**		**Annualized Value**	
5	372,460,000	119,102,000	372,460,000	119,102,000	no compliance shift		one period compliance shift	
6	372,460,000	119,102,000	372,460,000	119,102,000	cost	benefit	cost	benefit
7	372,460,000	119,102,000	372,460,000	119,102,000	372,460,000	119,102,000	345,575,364	110,505,066
8	372,460,000	119,102,000	372,460,000	119,102,000				
9	372,460,000	119,102,000	372,460,000	119,102,000				
10	372,460,000	119,102,000	372,460,000	119,102,000	**Annualized Imact of One Period Compliance Shift:**			
11	372,460,000	119,102,000	372,460,000	119,102,000	cost	benefit		
12	372,460,000	119,102,000	372,460,000	119,102,000	(26,884,636)	(8,596,934)		
13	372,460,000	119,102,000	372,460,000	119,102,000				
14	372,460,000	119,102,000	372,460,000	119,102,000				
15	372,460,000	119,102,000	372,460,000	119,102,000				
16	372,460,000	119,102,000	372,460,000	119,102,000				
17	372,460,000	119,102,000	372,460,000	119,102,000				
18	372,460,000	119,102,000	372,460,000	119,102,000				
19	372,460,000	119,102,000	372,460,000	119,102,000				
20	372,460,000	119,102,000	372,460,000	119,102,000				
21	372,460,000	119,102,000	372,460,000	119,102,000				
22	372,460,000	119,102,000	372,460,000	119,102,000				
23	372,460,000	119,102,000	372,460,000	119,102,000				
24	372,460,000	119,102,000	372,460,000	119,102,000				
25	372,460,000	119,102,000	372,460,000	119,102,000				
26	372,460,000	119,102,000	372,460,000	119,102,000				
27	372,460,000	119,102,000	372,460,000	119,102,000				
28	372,460,000	119,102,000	372,460,000	119,102,000				
29	372,460,000	119,102,000	372,460,000	119,102,000				
30	372,460,000	119,102,000	372,460,000	119,102,000				
31	372,460,000	119,102,000	372,460,000	119,102,000				
32	372,460,000	119,102,000	372,460,000	119,102,000				
33	372,460,000	119,102,000	372,460,000	119,102,000				
34	372,460,000	119,102,000	372,460,000	119,102,000				
35	372,460,000	119,102,000	372,460,000	119,102,000				

Exhibit 4

Public Comment and Response Document for the Final Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates

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Introduction and Overview

Background

Consistent with President Biden's "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." (86 FR 7037, January 25, 2021) ("Executive Order 13990") and the White House memorandum, "Regulatory Freeze Pending Review" (86 FR 7424, January 28, 2021), EPA decided to review the LCRR, which was published in the Federal Register on January 15, 2021. EPA published a final rule on March 12, 2021 [86 FR 14003], which provided for a short delay of the LCRR's effective date to June 17, 2021, to allow the agency to seek comment on the proposal to extend the effective date further to December 16, 2021, allowing the agency adequate time to conduct a thorough review of the complex set of LCRR requirements to assess whether the regulatory changes are inconsistent with, or presents obstacles to, the policy set forth in Section 1 of the Executive Order 13990, and to consult with stakeholders, including those who have been historically underserved by, or subject to discrimination in, Federal policies and programs prior to the LCRR going into effect. In the proposal, EPA also sought comment on an extension of the compliance dates by nine months from January 16, 2024, to Sept. 16, 2024 (86 FR 14063; March 12, 2021).

In the proposed rule notice EPA solicited public comment on whether to extend the effective and compliance dates to engage with stakeholders during a review period to evaluate the rule and determine whether to initiate a process to revise components of the rule. EPA also sought comment on "the duration of the effective date and compliance date extensions and whether the compliance date extension should apply to the entire LCRR or certain components of the final rule." (86 FR 14065). Following publication of the proposed Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates, EPA accepted public comments for 30 days. EPA received fifty-three comments from individuals and organizations representing a wide range of stakeholders, including public water systems, states, other organizations, and private citizens. Each unique comment was read and considered in determining whether to extend the effective and compliance dates for the LCRR. A record of the comments received on the proposal, as well as EPA's responses to these comments are provided in this document. Copies of unique individual comments are also available as part of the public record and can be accessed through EPA's docket (EPA-HQ-OW-2017-0300 at www.regulations.gov). In addition, the materials referenced by EPA in this document are also available in the docket.

Document Organization

The remainder of this document is organized by general topic categories. Section 1, summarizes comments in favor of the extensions of the effective and compliance dates and provides EPA responses. Section 2, covers those comments that did not explicitly support the extensions of the effective and compliance dates and agency responses. Section 3, discusses comments received on regulatory components of Lead and Copper Rule Revisions and how EPA will utilize this information. Section 4 provides references.

1 Comments Generally in Favor of the Extensions of the Effective and Compliance Dates

1.1 Summary of Comments

1.2 Agency Response

2 Comments that Did Not Explicitly Support the Extensions of the Effective and Compliance Dates

EPA received a total of four comment letters indicating opposition to the extensions of the effective and compliance dates, and an additional two that did not explicitly support or oppose the delay in the effective and compliance dates of the LCRR. In general, the commenters opposing the extensions stated that delaying the effective and compliance dates would delay the public health improvements that would be achieved with implementing the LCRR, in part or in total, as finalized on January 15, 2021.

2.1 Summary of Comments

The Association of Metropolitan Water Agencies (AMWA) "has concerns that EPA's proposal to delay the effective date … would postpone the significant public health improvements that will be achieved by implementing the rule as finalized." They go on to state, "the benefits of this [delay] must be weighed against the costs of postponing the public health improvements that will be achieved when water systems begin to comply with the final rule in its current form." AMWA identifies the customer-initiated lead service line replacement provision, the lead service line inventory, and the school and child-care testing provisions as public health improvements that would be postponed by a delay of the rule effective and compliance dates. Also, the Kentucky and Tennessee Water Utility Councils (KY/TN WUC) of the American Water Works Association stated that they "are concerned that extending the dates of the Rule could delay the enhanced awareness, detection, communication, and elimination of potential lead exposure in communities." Another public commenter opposed the effective and compliance date extensions, arguing that EPA should instead simultaneously implement and revise the LCRR because of certain aspects of the rule that the commenter claims "would provide immediate public health benefits" – such as the LSL inventory and associated public notification requirements, as well as changes in the sampling requirements.

One anonymous commenter argued that the delay rule is tantamount to repeal of the rule and that EPA has not analyzed the effects on human health of the delay that the LCRR was designed to benefit. The commenter stated further that EPA failed to address the substantive reasons that EPA provided in the LCRR for setting compliance dates or explained why it is preferable for the LCR to apply rather than the LCRR between January 2024 and Sept. 2024. The commenter also claims that EPA failed to consider why it is worth forgoing the benefits of the rule for nine months in exchange for evaluation of the LCRR which, the commenter claims, could be done without delaying the compliance dates. The commenter also argues that EPA cannot delay a rule to effectively repeal it while side-stepping statutorily mandated processes. The commenter states that this "blanket delay" is not well-tailored and has no similarities to the narrowly tailored approach taken when EPA changed the earliest compliance dates in the 2015

effluent limitations guideline rule for the steam electric sector. The commenter also claims that the Agency has failed to provide a meaningful opportunity for the public to comment "[b]ecause of these substantive oversights, including the failure to consider the merits of the LCRR and the deficiencies of the preexisting requirements in its proposal that would allow those preexisting requirements to remain in effect for a longer period of time. In support of these arguments, the commenter cites the following cases in their comment: *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 57 (1983); *Nat. Resources Def. Council v. Abraham*, 355 F3d 179, 194 (2d Cir. 2004), *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017). *Air All. Houston v. EPA*,906 F.3d 1049, 1065-1067 (D.C. Cir. 2018), *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,515-16 (2009); *Clean Water Action v. EPA*, 936 F.3d 308, 316 (5th Cir. 2019); and *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018).

This comment letter also claims the delay of the rule is deficient because EPA did not consult the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act (ESA), undertake an analysis under the National Environmental Policy Act (NEPA), or consult with the Advisory Council on Historic Preservation under National Historic Preservation Act on the effect of the suspension on historic properties.

The KY/TN WUC opposed the delay of the LCRR effective and compliance dates noting that EPA has already conducted extensive outreach during the development of the LCRR, "EPA's thorough and extensive review and stakeholder engagement process resulted in a final Rule that strengthens every aspect of the current rule and accelerates actions that can reduce lead in drinking water." This concept of EPA having already conducted extensive outreach was echoed by AMWA, noting that the agency "has been discussing options for the rule with these communities, other stakeholders, and the public since at least 2010." However, AMWA "agrees that engagement with at-risk communities is critical." The commenter opposing the delay and arguing that EPA should simultaneously implement and revise the LCRR, also expressed support for EPA's effort to seek additional stakeholder input on the LCRR. Another comment letter, from the American Water Works Association (AWWA) recommended that EPA consider the extensive outreach that the agency has already conducted on the LCRR.

EPA received two comment letters that did not explicitly support or oppose the delay in the effective and compliance dates of the LCRR. One comment letter, jointly signed by the U.S. Conference of Mayors, the National League of Cities, and the National Association of Counties, indicated that the LCRR as published on Jan. 15, 2021 "satisfactorily addressed the local government perspective in both protecting public health and reducing lead contamination of drinking water." Another comment letter from AWWA requests that the effective and compliance dates be extended in an amount commensurate with the additional time used for stakeholder outreach. AWWA noted that the "[u]ncertainty … which is naturally generated through reconsideration efforts" will make it difficult for public water systems to prepare for compliance and make investments needed to meet the interrelated requirements of the rule, as such efforts may prove to be wasted or wasteful if the Rule ultimately changes in its particulars." Accordingly, AWWA requests that "all extensions to the effective date of the LCRR and any subsequent agency activity that seeks to change the LCRR should be accompanied by an extension to the compliance timeframes." AMWA, though opposing the delays in the LCRR implementation, also expressed support

for an extension of the compliance dates by nine months if EPA delays the June 17, 2021 effective date of the rule.

EPA received a comment letter from the Antonin Scalia Law School, Administrative Law Clinic taking issue with EPA's compliance with the Administrative Procedure Act (APA) in delaying the effective date of the LCRR. This comment letter appears to relate only to the final rule EPA issued on March 12, 2021 extending the effective date of the LCRR to June 17, 2021.

AWWA commented that any substantive changes to the LCRR should be preceded by a new proposed rule, citing the APA and Safe Drinking Water Act.

AWWA commented that the "deeply intertwined nature of the provisions within the final LCR and the resulting implications for water system implementation and risk reduction will very likely necessitate a complete evaluation of the implications of both changes in overall rule construct, as well as, what would appear to be small changes to the rule requirements."

2.2 Agency Response

See EPA's response in Section III, of the *Federal Register* notice for the National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates final rule.

In addition, EPA notes that Section I of the proposal included a discussion of the distinction between the effective date and the compliance dates for NPDWRs and the statutory basis for the compliance date (86 FR 14064). EPA explained that the purpose of the delay in the compliance dates is to maintain the interval between the original effective and compliance dates (86 FR 14064). The commenter does not identify any specific provision of the SDWA that EPA failed to follow in this rulemaking when the commenter suggests, citing *Air Alliance* that EPA is "side-stepping the statutorily mandated process for revising and repealing" a rule. EPA notes that it has not repealed a rule and the statutorily mandated process referred to in *Air Alliance* is significantly different than the requirements for revising a NPDWR under the SDWA.

EPA also disagrees with the characterization that the delay is not "well tailored" as compared to the approach EPA took when it changed the earliest compliance dates in the 2015 effluent limitations guideline rule for the steam electric sector. Similar to that 2015 rule, EPA is delaying the earliest compliance date in the LCRR. Moreover, EPA notes its rationale for delaying the compliance dates in the 2015 effluent limitations guideline rule – upheld by the court -- is similar to the delay of the compliance dates for the LCRR.

In response to the comment that EPA failed to provide a meaningful opportunity for the public to comment, EPA notes that the Agency sought comment on whether to extend the effective and compliance dates for the reasons provided in the proposal, the length of those extensions, as well as the scope of the compliance date extension (i.e. whether it should apply to the entire LCRR or certain components of the final rule) (86 FR 14065). EPA did not limit the scope of the comments and EPA has considered all comments received in reaching the conclusion to delay the effective and compliance dates. Moreover, as noted in the proposal, some stakeholders claim that the LCRR is less protective

than the existing rule and EPA explained that the purpose of the delay was to consider stakeholders concerns with the LCRR (86 FR 14064). EPA also notes that the commenter did not identify any specific "merits" of the LCRR or "deficiencies" of the LCR.

To the extent, if any, that the cases cited by the commenter cannot be distinguished, this rulemaking to extend the effective and compliance dates, is not inconsistent with the holdings. EPA's action in extending the compliance and effective dates is consistent with EPA's authority under the Safe Drinking Water Act and the requirements of the Administrative Procedure Act.

EPA also disagrees that the delay of the LCRR is deficient because EPA did not consult the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act (ESA), undertake an analysis under the National Environmental Policy Act (NEPA), or consult with the Advisory Council on Historic Preservation under National Historic Preservation Act on the effect of the suspension on historic properties. The ESA is not triggered because EPA's underlying action addresses human health as a matter of law; as a result, EPA lacks discretion to make ESA considerations the basis of the rule (see 50 CFR 402.03). Even if the ESA were to somehow apply, EPA does not anticipate that the rule, or extending its compliance and effective dates, would have any impact on federally-listed species or critical habitat. For similar reasons, the NHPA is not triggered. Finally, EPA has been exempted by the courts from complying with NEPA under the SDWA. See, e.g., 40 CFR Part 6.101.

The Antonin Scalia Law School, Administrative Law Clinic comment appears to relate only to the delay of the effective date from March 16, 2021 to June 17, 2021 and not to the proposed extension of the June 17, 2021 effective date or the compliance dates. Therefore, it is beyond the scope of this rulemaking. The comment highlights the proposed rulemaking to extend the effective date to December 16, 2021 – i.e., this rulemaking -- as an example of the agency using proper procedures to delay an effective date. To the extent, the comment letter is also asserting that this rule requires both notice and comment and a reasoned explanation of the delay in the effective date to Dec. 16, 2021 showing that the agency considered relevant aspects of the problem, EPA has met that standard by providing notice and seeking comment on the proposed delay of the effective and compliance dates to December 16, 2021 and October 16, 2024, respectively, as well as a reasoned explanation for the effective and compliance date delays. See section I of the preamble to the proposed rule and sections I-III of the final rule. The comment letter does not note any specific concern with or deficiency in EPA's rationale.

3 Comments on Regulatory Components of LCRR

3.1 Summary of Comments

Many commenters on the proposal to extend the effective and compliance dates also provided input on all aspects of the LCRR, including the action and trigger levels, LSL inventories, LSL replacement requirements, as well as the requirements for optimal corrosion control treatment, tap sampling, public education and notification, and school sampling, and EPA's compliance with both the substantive and procedural requirements for promulgation of a revised drinking water regulation, including the anti-

backsliding provision in SDWA Section 1412(b)(9) and the requirement to provide an opportunity for a public hearing in SDWA Section 1412(d).

3.2 Agency Response

The extent and breadth of these comments demonstrates the significant concern that stakeholders, from a range of perspectives, have with the LCRR and the procedures EPA followed in promulgating the rule, and thereby support EPA's determination to delay the effective and compliance dates of the rule. EPA appreciates this input on the LCRR and is further considering these comments as part of its re-evaluation process. The comments are included in the docket for this rulemaking, and have also been added to Docket EPA-HQ-OW-2021-0255 that EPA created for the LCRR virtual engagements to facilitate such further consideration.

4 References

The White House. 2021. Executive Order 13990. Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis. *Federal Register* 86 FR 7037. January 20, 2021. Washington, D.C.: Government Printing Office.

The White House. 2021. Fact Sheet: List of Agency Actions for Review: https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/

The White House. 2021. Memorandum for the Heads of Executive Departments and Agencies: Regulatory Freeze Pending Review *Federal Register* 86 FR 7424. January 28, 2021. Washington, D.C.: Government Printing Office.

USEPA. 2020. Economic Analysis for the Final Lead and Copper Rule Revisions. December 2020. Office of Water.