IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

PETITIONER'S COMBINED MOTION FOR STAY PENDING REVIEW OR SUMMARY DISPOSITION AND VACATUR

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is a challenge to EPA's latest attempt to kill an unwanted rule of a prior administration not through formal repeal, but rather through serial delays that effectuate the same result. This Court emphatically rejected EPA's previous attempt at this same gambit: "EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule." *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018). It should do so again since EPA has committed the very same legal violation.

The delayed rule here is the Lead and Copper Rule Revisions ("LCRR"), and the delay challenged here (hereafter, the "Delay Rule") is EPA's second delay of the LCRR's effective date: the first was from March 16 to June 17, and the Delay Rule now does so from June 17 to December 16, 2021. It is undisputed that the LCRR would have tightened standards for lead and copper levels in drinking water under the Safe Drinking Water Act ("SDWA") and the effect of the Delay Rule is to restore prior, less-stringent standards. EPA also acknowledges that had the LCRR gone into effect there would have been material health benefits: in particular, reductions in the pernicious brain damage in children caused

by lead in drinking water, and further that the Delay Rule will prevent those health benefits from being realized.

The Delay Rule is not just bad policy whose permanent harms will be largely borne by children. It is also profoundly unlawful. It directly violates this Court's holding in *Air Alliance* and does precisely what this Court prohibited: *de facto* repealing a rule through delays. But it suffers from multiple other legal deficiencies that also require invalidation.

Two of those deficiencies concern EPA's analysis of costs and benefits, which the SDWA mandates by statute. 42 U.S.C. §300g-1(b)(3)(C)(i)-(ii). *First*, under *EPA*'s *own estimates* the costs of the Delay Rule actually appear to exceed its benefits. Specifically, at a 3% discount rate, the value of health benefits foregone ($10-29 million) actually *exceed* the economic costs avoided by delay ($8-15 million)—thus violating both the SDWA's cost-benefit analysis requirement and engaging in quintessential arbitrary-and-capricious decision-making by doing more harm than good (even under the agency's own rose-colored analysis).

In contrast, at a 7% discount rate, the cost-benefit calculus is mildly positive. The correct discount rate is thus completely dispositive of both SDWA and APA compliance. But EPA does not expend *even a single word*

explaining why a 7% discount rate is superior to a 3% rate here, thus failing entirely to offer a reasoned explanation for its actions. Indeed, given the nature of the harms—*i.e.,* permanent injury to the brains of children causing life-long developmental issues—there are strong reasons to believe a lower discount rate is warranted. An agency must do more than simply beg the question of whether a rule does more harm than good: it must at least offer a reasonably convincing answer that it does not.

Second, the Delay Rule's putative *raison d'être* is to avoid the LCRR imposing compliance costs on operators of drinking water systems (typically States and their subdivisions). But EPA admits that the effect of the Delay Rule will be to replace the prior certainty of the LCRR with uncertainty, requiring operators to prepare for multiple contingencies. In the Delay Rule itself, "EPA recommends that states consider each of these possibilities [total repeal, no changes, and modifications to the LCRR] in their planning and resource allocation decision-making." 86 Fed. Reg. 31939, 31942. And it is axiomatic that it is more expensive to prepare for *multiple* contingencies than it is to prepare for one certain outcome, particularly where the former admittedly includes the

possibility of the latter. Thus, while the Delay Rule's putative purpose is to *reduce* compliance costs, EPA itself acknowledges that it is likely to *increase* them.

Finally, the Delay Rule violates the SDWA's requirement that EPA "shall, *not less often than every 6 years*, review and revise, as appropriate, each national primary drinking water regulation." 42 U.S.C. §300g-1(b)(9) (emphasis added). Lead and copper standards were last revised in 2007, and neither the LCRR nor the Delay Rule documents any subsequent review since then. EPA thus began violating the re-review mandate in 2013, and has continued to do so ever since. The LCRR finally would have cured that long-standing violation of subsection (b)(9) by providing *years-overdue* review and revision. But the Delay Rule reinstates and exacerbates the pre-existing statutory violation, which is yet another basis for vacating it.

In addition to a likelihood of success on the merits for the reasons set forth above, all of the other stay factors are present. The States will suffer irreparable harm, both from permanent medical injuries to their residents and through irrecoverable financial harms, including Medicaid expenditures from those injuries and increased compliance costs from the

Delay-Rule-imposed regulatory uncertainty. The balance of harms/public interest further support issuance of a stay, particularly given the acknowledged adverse health impacts of the Delay Rule.

The States recognize that, given the timetable here, the effect of granting a stay pending review would be tantamount to a summary vacatur of the Delay Rule. The States therefore recognize that this Court may prefer to consider their arguments formally as such, and respectfully request summary vacatur in the alternative.

BACKGROUND

A. Safe Drinking Water Act

The SDWA is a comprehensive statute designed to address one of the most enduring and pernicious issues that has plagued humanity for millennia: the presence of contaminants and infectious agents in drinking water. The SDWA "requires the EPA to promulgate drinking water regulations designed to prevent contamination of public water systems." *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1269 (D.C. Cir. 1994).

Under the SDWA, EPA is required "to establish maximum contaminant level goals [] and national primary drinking water

regulations [] for contaminants that, in the judgment of the Administrator, may have any adverse effect on the health of persons and that are known or anticipated to occur in public water systems."[1]

Goals under the SDWA are just that: not specifically enforceable requirements. Instead, they are "health goals which are based solely upon considerations of protecting the public from adverse health effects of drinking water contamination." 56 Fed. Reg. at 26,462

Regulations, however, impose binding requirements that should seek to attain, "to the extent feasible," the goals set by the EPA. 56 Fed. Reg. at 26,462. Regulations can either set specific maximum levels for particular contaminants or require treatment techniques to address them. 42 U.S.C. §300g-1(b)(7)(A).

In establishing regulations, EPA is required to conduct cost-benefit analysis. *See* 42 U.S.C. §300g-1(b)(3)(C)(i)-(ii). For treatment techniques, EPA must consider *inter alia* "health risk reduction benefits and costs likely to be experienced as the result of compliance with the treatment technique." *Id.* §300g-1(b)(3)(C)(ii).

[1] 56 Fed. Reg. 26,460, 26,462 (June 7, 1991)

The SDWA also imposes a six-year periodic review mandate. *Id.* §300g-1(b)(9). EPA is thus required to "not less often than every 6 years, review and revise, as appropriate, each national primary drinking water regulation." *Id.* "[E]ach revision shall maintain, or provide for greater, protection of the health of persons." *Id.*

B. The Lead And Copper Rule

Lead and copper are two prominent contaminants in drinking water. 56 Fed. Reg. at 26,463. EPA "has set the maximum contaminant level goal for lead in drinking water at zero because lead is a toxic metal that can be harmful to human health even at low exposure levels."[2] "[T]he best available science … shows there is no safe level of exposure to lead."[3]

EPA recognizes that "exposure to lead in the environment continues to be a concern, especially for vulnerable populations such as children and pregnant women." LCRR, 86 Fed. Reg. 4198, 4199 (Jan. 15, 2021).

Lead exposure causes severe health consequences, especially in children. Lead exposure:

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[2] EPA, Basic Information About Lead In Drinking Water, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#regs.

[3] *Id.*

- "[I]s known to present serious health risks to the brain and nervous system of children";
- "[C]auses damage to the brain and kidneys and can interfere with the production of red blood cells that carry oxygen to all parts of the body"; and
- "[H]as acute and chronic impacts on the body."

84 Fed. Reg. 61,684, 61,690 (Nov. 13, 2019); *accord* Delay Rule, 86 Fed. Reg. 31,939, 31,941 (June 16, 2021).

Notably, "[t]he most robustly studied and most susceptible subpopulations are the developing fetus, infants, and young children." *Id.* "Even low level lead exposure is of particular concern to children because their growing bodies absorb more lead than adults do, and their brains and nervous systems are more sensitive to the damaging effects of lead." *Id.* at 31,941-42.

To address these severe potential harms, EPA published the Lead and Copper Rule (the "LCR") on June 7, 1991. *See* 86 Fed. Reg. at 4207. "The rule established a [SDWA regulation] for lead and copper consisting of treatment technique requirements that include [corrosion control treatment], source water treatment, lead service line replacement [], and

[public education].” *Id.* Since its initial promulgation, the LCR has undergone revisions in 2000, 2004, and 2007. *See* 86 Fed. Reg. at 4207. Neither the LCRR nor the Delay Rule discuss formal revisiting of the LCR standards since 2007.

C. The 2021 Lead And Copper Rule Revision

On November 13, 2019, EPA published a notice of proposed rulemaking, detailing proposed revisions to the LCR. 84 Fed. Reg. at 61,684. In the proposed rule, EPA noted that it had “sought input over an extended period on ways in which the Agency could address the challenges to achieving the goals for the LCR” and described the engagements it has had with various “small water systems, state and local officials, the Science Advisory Board and the National Drinking Water Advisory Council (NDWAC).” 84 Fed. Reg. at 61,686.

The EPA initially provided 60 days for comment, and later extended that by an additional thirty days. *See* 84 Fed. Reg. 69,695. Almost 700 comments were submitted.

On January 15, 2021, EPA issued the LCRR, which “includes a suite of actions to address lead contamination in drinking water that, taken together, will improve the LCR and further reduce lead

exposure…, resulting in an enduring positive public health impact." 86 Fed. Reg. at 4200.

The LCRR focuses on six key areas: (1) identifying areas most impacted, (2) strengthening treatment requirements, (3) systematically replacing lead service lines, (4) increasing sampling reliability, (5) improving risk communication, and (6) protecting children in schools. 86 Fed. Reg. at 4200-01.

The revised requirements "provide greater and more effective protection of public health by reducing exposure to lead and copper in drinking water," and "will better identify high levels of lead, improve the reliability of lead tap sampling results, strengthen corrosion control treatment requirements, expand consumer awareness and improve risk communication." 86 Fed. Reg. at 4198. Additionally, the LCRR "requires, for the first time, community water systems to conduct lead-in-drinking-water testing and public education in schools and child care facilities" and "will accelerate lead service line replacements by closing existing regulatory loopholes, propelling early action, and strengthening replacement requirements." 86 Fed. Reg. at 4198.

The LCRR provided an effective date of March 16, 2021 and a compliance date of January 16, 2024. 86 Fed. Reg. at 4198.

D. The Delay Rules

On his first day in office, President Biden issued an Executive Order directing agency heads to review certain regulations. Exec. Order 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021). The same day, the White House identified the LCRR as one such action to review. *See* 86 Fed. Reg. at 31,940. The White House also issued a memo to agency heads entitled, "Regulatory Freeze Pending Review," which "direct[ed] agencies to consider postponing the effective date of regulations, like the LCRR, that ha[d] been published in the Federal Register, but ha[d] not taken effect, for the purpose of reviewing any questions of fact, law, and policy the rules may raise."[4]

On March 13, 2021, and just three days before the LCRR was set to take effect, the EPA issued a final rule delaying the effective date of the LCRR from March 16, 2021 until June 17, 2021. 86 Fed. Reg. 14,003. The final rule stated that the "[s]ole purpose" of the delay was "to enable EPA to take public comment on a longer extension of the effective date for EPA

[4] 86 Fed. Reg. 14,003 (Mar. 12, 2021).

to undertake its review of the rule in a deliberate and thorough manner." 86 Fed. Reg. at 14,003. Notably, this rule was issued without providing an opportunity for comment.

On the same day that the EPA published its first delay rule, it also published a "proposed rule," which would delay the LCRR's effective date even further—from June 17 to December 16, 2021.[5] The proposed rule would also delay the original January 16, 2024 compliance date until September 16, 2024. 86 Fed. Reg. at 14,063. The proposed rule allowed for a thirty-day comment period, during which several commenters expressed concerns regarding delaying the benefits of the LCRR. *See, e.g.*, 86 Fed. Reg. at 31,943 (noting "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").

The EPA finalized the Delay Rule on June 16, 2021, which explains that the "delay will allow sufficient time for EPA to complete its review of the rule in accordance with those directives and conduct important consultations with affected parties." 86 Fed. Reg. at 31,939-40.

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[5] 86 Fed. Reg. 14,063 (Mar. 12, 2021).

E. Procedural History

On July 29, 2021, Petitioners, the States of Arizona, Louisiana, Ohio, Oklahoma, and Texas, filed a timely petition for review in this Court challenging the Delay Rule. On August 17, 2021, Petitioners requested that EPA stay the Delay Rule pending review, which EPA denied on the next day. Petitioners now seek a stay pending review from this Court, or, alternatively, summary vacatur.

LEGAL STANDARD

This Court applies a four-factor standard for evaluating a request for a stay pending judicial review: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

ARGUMENT

I. The States Are Likely To Succeed On The Merits.

The Delay Rule must be vacated because it violates the APA and multiple provisions of the SDWA. *See* 5 U.S.C. §706(2)(A). EPA did not

provide any valid basis for issuing the Delay Rule, which is tantamount to a repeal of the LCRR, and failed to provide any reasoned explanation for its sudden change in position. EPA also failed to follow the SDWA's cost-benefit analysis and six-year review mandates. The States are thus likely to prevail on the merits.

A. The Delay Rule Violates the APA Because It Is An Unlawful Repeal Of The LCRR And Is Arbitrary And Capricious.

1. The Delay Rule Functionally Repeals The LCRR.

The Delay Rule effectively operates as a repeal of the LCRR—but without complying with the APA's requirements for effecting an actual repeal. Orders substantially delaying a rule's effective date "are tantamount to amending or revoking a rule," *Clean Air Council*, 862 F.3d at 6, and must be reviewed with the same "rigor" as any other rule, *see State v. BLM*, 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

Here, EPA's Delay Rule effectuates a substantial delay of the LCRR without any proposed replacement. EPA has not disavowed a third delay, which is now a virtual certainty given that EPA has yet to promulgate any proposed replacement (and is plainly disinclined to allow the LCRR

to go into effect unamended). Indeed, there is every reason to believe that EPA will continue to delay the LCRR indefinitely until it ultimately promulgates a replacement rule. Thus, just as in *Air Alliance*, EPA is "employ[ing] delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits." 906 F.3d at 1065. It is equally unlawful here.

Moreover, this Court has made plain that "a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." 906 F.3d at 1067 (quoting NRDC *v. NHTSA*, 894 F.3d 95, 111-12 (2d Cir. 2018)); *see also BLM*, 286 F. Supp. 3d at 1064 (agency "cannot use the purported proposed future revision, which has yet to be passed, as a justification for the Suspension Rule.").

But that is precisely the Delay Rule's purpose. EPA referred to itself as being engaged in a "reconsideration of other aspects of the LCRR" and explained that it will use the delay period so that it can "decide[] to withdraw the LCRR" or "decide[] it is appropriate to modify the LCRR." 86 Fed. Reg. at 31,943, 31,946. All of that is to say that EPA is delaying

the LCRR for the sole purpose of reconsidering it—*i.e.*, precisely what the APA, the SDWA, and *Air Alliance* all deny it authority to do.

To be sure, EPA tends to dress up its reconsideration as being more about "consult[ing] with stakeholders." *See, e.g.*, 86 Fed. Reg. at 31,941. But EPA never identifies any issues with the previous stakeholder consultations, nor is there any conceivable basis to delay the LCRR's effective and compliance dates pending that consultation *except for reconsideration*. The repeated references to stakeholder consultation are thus a thin veneer to conceal (poorly) the underlying—and unlawful—intent to delay the LCRR merely to reconsider it.

2. The Delay Rule Fails To Explain Its Departure From The LCRR's Findings

EPA also fails to adequately explain why it has chosen to depart from the detailed findings of the LCRR as to the desirability of the rule, and why it should have gone into effect in March 2021, as EPA originally intended for it to do.

When there is a change in policy, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide "a reasoned explanation … for disregarding facts

and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 516.

That has not occurred here. EPA did not even begin to examine or explain its departure from the myriad findings in the LCRR surrounding the technical aspects of the LCRR. EPA reiterated stakeholder concerns with some of the findings, but nowhere did EPA explain why those findings were no longer true or relevant. This is insufficient. *See Air Alliance*, 906 F.3d at 1065.

In regard to why the delay is necessary, EPA's primary reason appears to be its reconsideration of the LCRR and its continued stakeholder engagement. *See supra* at 16. But the Delay Rule does not offer any convincing reason for why it cannot continue its review while the LCRR is in effect. S*ee, e.g.*, *Air Alliance*, 906 F.3d at 1067 ("Agencies regularly reconsider rules that are already in effect.").

The only possible reason provided is EPA's desire to "avoid imposing unnecessary costs on water systems and states." 86 Fed. Reg. at 31,943. But, as explained below, the Delay Rule actually imposes *additional* compliance costs by injecting new legal uncertainty and the need for contingency planning into the mix.

B. The Delay Rule's Cost-Benefit Analysis Violates The SDWA And Is Arbitrary And Capricious.

1. Under EPA's Own Analysis, The Foregone Benefits Potentially Exceed The Foregone Costs.

EPA's own cost-benefit analysis demonstrates that costs of the Delay Rule potentially exceed its benefits and the agency offers no persuasive explanation of why that is not the case. By begging—but not answering—the question of whether the Delay Rule imposes costs exceeding its benefits, EPA has violated both the APA and the SDWA's explicit cost-benefit requirement. *See* 42 U.S.C. §300g-1(b)(3)(C)(i)-(ii).

Because of the nature of delay, the costs and benefits are flipped from a typical regulatory analysis: here the "costs" of delay are the foregone health benefits that the LCRR would have otherwise obtained absent the delay, while the "benefits" are the compliance costs thereby avoided. EPA analyzed those costs and benefits using both 3% and 7% discount rates as follows:

EPA's Cost-Benefit Analysis For Delay: 86 Fed. Reg. at 31,944-45			
	Without Delay	**With Delay**	**Change**
Discount Rate			
3%	Costs: $161-$335 M Benefits: $223-$645 M	Costs: $153-$320M Benefits: $213-$616M	Costs: **Decrease $8-$15 million** Benefits: **Decrease $10-$29 million**
7%	Costs: $167-$372M Benefits: $39-$119M	Costs: $155-$346M Benefits: $37-$111M	Costs: **Decrease $12-$26 million** Benefits: **Decrease $2-$8 million**

As Table 1 indicates, under EPA's *own analysis*, the decrease in benefits ($10-29 million) from the Delay Rule actually *exceeds* the resulting decrease in costs ($8-15 million) at a 3% discount rate at both the upper and lower bounds (by $2 million and $14 million, respectively). At a 3% discount rate, the Delay Rule thus imposes costs anticipated to exceed benefits, which violates both (1) the SDWA's mandate to consider costs and benefits before setting regulations and (2) the APA, as knowingly taking action that causes more harm than good is, by definition, arbitrary and capricious.

In contrast, at a 7% discount rate, the numbers are positive: the foregone compliance costs ($12-$26 million) exceed the foregone health benefits ($2-$8 million).

The upshot is that the bare rationality of EPA's Delay Rule necessarily hinges on the proper discount rate to be used, which is dispositive here. If a 3% discount rate is correct, then EPA's Delay Rule is necessarily unlawful.

But despite this issue being *completely dispositive*, EPA remarkably does not offer *any* reasoning why a 7% discount rate is superior to a 3% one. In doing so, EPA has "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Moreover, even if EPA had attempted to explain why a 7% discount rate were appropriate, there are strong reasons to doubt that it could be sustained. The nature of the harms at issue (permanent brain damage) strongly suggests a lower discount rate may be appropriate. There is, for example, no reason to believe that children use their brains 7% less each year as they grow. Moreover, the Biden Administration has specifically endorsed a 3% (or lower) discount rates for their social cost of carbon

regulations.[6] It is doubtful that EPA could take the position that the harms at issue here are less important.

Although EPA does not analyze the proper discount rate whatsoever, it does offer this statement: "[T]he estimated change in the monetized incremental annualized social costs and benefits of the delay in the compliance date are *approximately of equal size* over the 35-year period of analysis ($7 to $27 million for costs and $3 to $29 million for benefits in 2016 dollars)." 86 Fed. Reg. at 31,944-45 (emphasis added).

In essence, instead of analyzing the dispositive 3%-vs-7% issue whatsoever, EPA threw up its hands and declared: "Close enough for government work!" But the APA demands more than that.

2. EPA's Analysis Of The Year One Costs Is Arbitrary And Capricious.

Similarly, EPA's analysis of the savings in compliance costs in this year (year one) from the Delay Rule contradicts itself and is thus arbitrary and capricious. Specifically, EPA states: "the expected first year

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[6] February 2021 Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990, available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

(post rule effective date) expenditures by systems and states would be between $57-60 million, in 2016 dollars. *These first-year expenditures* to prepare for regulatory compliance with the LCRR *could be unnecessary if EPA determines to initiate a rulemaking to withdraw or significantly revise the LCRR*[.]" 86 Fed. Reg. at 31,9445 (emphasis added).

By replacing regulatory certainty (*i.e.*, having the LCRR rule in effect) with regulatory uncertainty (*i.e.*, potential replacement (or not) of the LCRR rule with any number of new possibilities), EPA's actions will *increase* compliance costs, rather than decrease them. Notably, EPA itself acknowledges this elsewhere: "EPA recommends that *states consider each of these possibilities* [total repeal, no changes, and modifications to the LCRR] in their planning and resource allocation decision-making." 86 Fed. Reg. at 31,941.

By replacing the certainty of the LCRR with the uncertainty of multiple possibilities—which EPA acknowledges must now *all* be prepared for—EPA's conclusion that the Delay Rule will decrease year-one compliance costs is arbitrary and capricious. EPA's explicit contention that the planning costs of preparing for a single known standard is *higher* than having to plan for that same standard *plus*

myriad *additional* possible standards falls well below the minimum rationality that the APA demands.

C. The Delay Rule Violates The SDWA's Six-Year Review Requirement And Provides No Explanation For Doing So.

Additionally, the Delay Rule further exacerbates EPA's long-standing failure (briefing cured by the LCRR) to engage in the review and revision process mandated by the SDWA. EPA provides no explanation, let alone a reasoned one, for doing so.

Pursuant to the SDWA, "[t]he [EPA] Administrator shall, not less often than *every 6 years, review and revise*, as appropriate, each national primary drinking water regulation." 42 U.S.C. §300g-1(b)(9) (emphasis added). Yet while EPA has conducted formal reviews for other regulations, it has expressly excluded the LCR from the last two review cycles. And prior to the LCRR, the last revision of the LCR occurred in 2007. *See* 86 Fed. Reg. at 4207.

As to the review process, EPA has not given detailed information about review of the LCR in the last two completed review cycles. In its announcement of completion of the second six-year review, which occurred between 2003 and 2009, EPA stated that the LCR "did not need

a detailed assessment because [it was] the subject of recent or ongoing rulemaking activity."[7] Indeed, the LCR was last revised in 2007.

EPA, however, also excluded the LCR from its third six-year review (2010-16), finding that inclusion of lead and copper in the review would be "redundant" given that EPA was at that time considering long term revisions to the LCR.[8]

But EPA could not ignore the SDWA's explicit six-year-review provision merely by pointing to potential future action that would not occur within the six-year window. EPA's rationale thus simply read the six-year provision of subsection (b)(9) out of existence. In any event, the forthcoming LCRR was EPA's only conceivable method of satisfying the subsection (b)(9) requirement.

After expressly excluding the LCR from multiple rounds of formal, Congressionally mandated review, EPA eventually signaled that it thought revisions were appropriate by issuing a notice of proposed

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[7] EPA, *Fact Sheet: Announcement of Completion of EPA's Second Review of Existing Drinking Water Standards*, https://www.epa.gov/sites/default/files/2014-12/documents/815f09002.pdf.

[8] 82 Fed. Reg. 3518 (Jan. 11, 2017).

rulemaking in November 2019 and issuing the LCRR in January 2021. By adopting a revised standard, EPA finally came into compliance with the six-year requirement, after being in violation of it since 2013 (*i.e.*, for eight years, or longer than the re-review period itself).

But the effect of the Delay Rule is to reinstate that prior violation with respect to lead and copper, which has now become even more severe. With the LCRR being rendered a legal nullity until at least December 16 (and likely forever), EPA is now back in violation of subsection (b)(9) since it has not revised lead and copper standards since 2007, and has never engaged in any analysis that could satisfy the six-year-review mandate.

Even if the Court were to find that the Delay Rule did not directly violate the SDWA's six-year review requirement in a directly actionable manner, at a minimum EPA's failure to address the six-year mandate in the Delay Rule was arbitrary and capricious. EPA cites only once to SDWA's review and revision mandate—and tellingly that reference does not even mention the six-year mandate. Instead, it cites subsection (b)(9) solely as the subsection that "authoriz[es] EPA to review and revise national primary drinking water rules 'as appropriate." 86 Fed. Reg. at

31,946. But that cherry-picked quotation notably omits the six-year-review requirement entirely.

EPA's omission of any explanation its affirmative reinstatement of its prior violation of its obligation to "review and revise" is arbitrary and capricious, and thus also violates the APA.

II. EPA's Delay Of The LCRR Will Irreparably Harm Petitioners.

The Delay Rule has harmed and will continue to harm States in multiple ways. *First*, States will suffer due to EPA's failure to implement the strengthened public health protections of the LCRR. The States' residents will directly experience negative health consequences, including permanent brain damage—which is irreparable harm by any understanding of the term. *See* Ensign Decl. Exs. A-D. The States will further suffer economic injury in the form of increased Medicaid and special education spending to address the adverse health consequences that EPA explicitly acknowledges will occur as a result of the Delay Rule—which it estimated at as high at $29 million. *See id.*; *id.* Ex. Ex. B at *846 (calculating reduction social welfare spending for each person with reduced lead exposure in childhood to be $691 per year); Table 1, *supra* at 19.

Because of sovereign immunity, the States cannot recover such costs from EPA or the federal government more generally. And it is well-established that irrecoverable injuries are irreparable injuries. *See East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Temple Univ. v. White*, 941 F.2d 201, 214-15 (3d Cir. 1991).

Second, the States will suffer increased compliance costs as a result of the regulatory uncertainty that the Delay Rule will occasion and EPA acknowledges. The States and their subdivisions operate numerous drinking water systems. Indeed, EPA's own analysis acknowledges that the compliance costs will fall on states, and EPA has explicitly admitted that "*states* [should] consider *each of these possibilities* [total repeal, no changes, and modifications to the LCRR] in their planning and resource allocation decision-making[.]" 86 Fed. Reg. at 31,941 (emphasis added). Such irrecoverable compliance costs are also irreparable injury.

III. The Balance Of Equities And The Public Interest Support Petitioner's Request For A Stay.

The balance of harms and public interest also favor the States. Notably, EPA's own cost-benefit analysis suggests as much (particularly

if EPA is unwilling to assert the superiority of a 7% discount rate). *Supra* at 18-21. It is also axiomatic that preventing permanent brain injuries in children is in the public interest, which Congress has already recognized in enacting the SDWA. The public interest also favors remedying violations of the law. *See*, *e.g.*, *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

CONCLUSION

The Court should grant Petitioner's motion for a stay pending judicial review of EPA's unlawful delay of the effective and compliance dates of the LCRR. In the alternative, the Court should grant the motion for summary disposition on the merits, and vacate the Delay Rule.

August 24, 2021

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I hereby certify that on this 24th day of August, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic filing.

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