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

PETITIONERS' COMBINED REPLY IN SUPPORT OF STAY/SUMMARY VACATUR AND RESPONSE TO RESPONDENTS' CROSS-MOTION TO DISMISS

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CWA	Clean Water Act, 33 U.S.C. §1251 *et seq*. (1972)
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
LCRR	Lead and Copper Rule Revisions, 86 Fed. Reg. 4,198
Mot.	Petitioners' Combined Motion for Stay Pending Review or Summary Disposition and Vacatur (Aug. 24, 2021)
Opp.	EPA's Combined Opposition to Motion for Stay or Summary Vacatur and Cross-Motion to Dismiss (September 16, 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

INTRODUCTION AND SUMMARY OF ARGUMENT

Given this Court's controlling decision in *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018), EPA understandably wishes to avoid this Court's scrutiny as to the substantive merits of the Delay Rule. It therefore places enormous weight on standing arguments. But EPA's jurisdictional arguments are no better than its merits ones. And both fail under *Air Alliance*.

As an initial matter, standing here is self-evident from the face of the Delay Rule itself, which both expressly identifies states as the primary regulated parties and the harms that will be imposed on them.

More generally, EPA advances the remarkable contention that because the States could "choose" to enact more stringent requirements themselves, they lack standing to challenge EPA's delay of more-stringent federal standards. But EPA tellingly *never* contends that it would be costless for the States to create, implement, and enforce independent standards—particularly in the shadow of EPA's looming actions. And those costs are quintessential injuries-in-fact.

Moreover, accepting that reasoning would typically render states powerless to challenge federal regulations as insufficiently protective,

which is hardly the prevailing practice of this Court or others. Indeed, EPA made the *exact same* "states have a choice" standing argument in *Air Alliance*, and this Court unanimously rejected it. The Court should do so again.

Indeed, by EPA's reasoning, even the residents of Flint, Michigan would lack Article III standing to challenge EPA regulation of lead in drinking water. They could, after all, always "choose" to drink bottled water rather than drinking from their tap water that became dangerously contaminated with lead through, *inter alia*, EPA's incompetent oversight. But, as here, such a "choice" would hardly be costless.

On the merits, EPA's defense of the Delay Rule founders on all fronts for four reasons. *First*, the Delay Rule violates *Air Alliance*, which EPA completely misreads. The holding of that case is not—as it is in EPA's instant retelling—that if an agency wishes to delay the effective date of a rule pending reconsideration of it, that it must merely also delay the compliance date. Instead, it makes plain that "a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." *Id.* at 1067 (quoting *NRDC*

v. NHTSA, 894 F.3d 95, 111-12 (2d Cir. 2018)). But that is precisely what EPA is doing here—again. EPA admits (at 1) that the whole point of the Delay Rule is to permit it to reconsider the LCRR.

Second, EPA's defense of the Delay Rule's cost-benefit analysis is equally infirm. EPA *admits* (at 23) that the applicable discount rate (3% versus 7%) is dispositive of whether costs exceed benefits. It further admits that it did not even attempt *whatsoever* to answer that controlling question. But having correctly identified the central question as to its compliance with the SWDA explicit cost-benefit mandate and the APA, EPA's express refusal to answer it violates both statutes.

EPA instead attempts to take refuge in "qualitative" factors (at 24). But that is both unlawful here and rests on unexplained apparent values that are simultaneously inexplicable and bizarre. The *only* such "qualitative" factor that EPA actually identifies (at 24 n.14) is "stakeholder engagement," which in its view apparently outweighs preventing *permanent brain injuries in children*. EPA probably does not actually hold such aberrational views, but that is its only apparent "qualitative" defense here.

Third, and more generally, EPA never answers the core irrationality underlying the Delay Rule: while it putatively is motivated by *saving* the States from compliance costs, it actually *exacerbates* them. While EPA claims that the Delay will save year-one compliance costs, it admits the States now must plan for *multiple contingencies* in that first year, rather than a single one. Those irreconcilable premises—which EPA answers only with a terse footnote—render the Delay Rule arbitrary and capricious.

Fourth, the Delay Rule violates the SDWA's requirement of re-reviewing standards every six years. With the LCRR now on ice, the last such review occurred in 2007 and EPA has long been in violation of it.

ARGUMENT

I. Petitioners Have Standing To Bring This Action

A. The States' Standing Is Self-Evident Here

As an initial matter, the States' standing is "self-evident" under this Court's precedents. "In many if not most cases" a petitioner's standing is self-evident, especially "if the complainant is 'an object of the action (or forgone action) at issue[.]'" *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (citation omitted). That is just so here.

The Petitioning States are plainly the direct objects of the Delay Rule. That rule repeatedly acknowledged that "systems and states" are the objects of the regulatory action. *See, e.g.*, 86 Fed. Reg. 31,939, -42, -43, -44. That alone establishes the State's standing. In response, EPA offers (at 12) only a citation-less *ipse dixit* that the States' "standing is not self-evident." That does not suffice.

B. The Delay Rule Inflicts Proprietary Injury

In any event, the States' standing is also established through the proprietary injury. *See Air Alliance*, 906 F.3d at 1059 ("'[T]here is no difficulty in recognizing [a state's] standing to protect proprietary interests[.]'") (citation omitted)). As explained previously (at 26), residents in the States will directly experience serious negative health consequences from lead exposure as a result of the Delay Rule. And Petitioners will therefore incur increased Medicaid and special education spending to address those injuries that EPA admits will occur.

EPA's response to these facts is remarkably evasive. EPA does not even *acknowledge* the existence of potential educational costs: the word "education" is simply nowhere to be found in its brief. And EPA's only response (at 14) to increased Medicaid expenditures is to rely on its

baseless "choice" argument that fails as discussed below. Nor does EPA ever address the supporting record evidence submitted by the States. *See* Ensign Decl. (Doc. #1911407) Exs. A-D; *see also* 2d Ensign Decl. Ex. E-I.

More generally, EPA does not actually *ever deny* that: (1) the Delay Rule will, *ceteris paribus*, cause permanent health injuries and (2) that, in turn, will impose additional Medicaid costs on the States. Those not-actually-denied healthcare costs establish Article III standing.

Petitioners will also incur increased compliance costs due to the new regulatory uncertainty that the Delay Rule has created. *See* Mot. at 22, 27. EPA's response never grapples with the fundamental problem presented here: the Delay Rule replaces regulatory certainty with uncertainty. That is not costless for States to plan for, and EPA never actually contends that it is. *See also infra* at 15-17. EPA's apparent logic that it is *cheaper* to plan for options X, Y, and Z (and all intermediate possibilities) than simply option X alone is untenable.

C. EPA's "Choice" Arguments Are Legally Flawed

EPA's standing argument rely on recasting the Delay Rule as "simply giv[ing] [Petitioners] a choice" of whether to adopt the LCRR now, or wait and see what EPA decides to do. Opp. at 13. Under EPA's

theory, because Petitioners could always adopt the LCRR standards themselves, they lack standing to challenge EPA's Delay Rule.

EPA, however, never contends that it would be costless for the States to adopt the LCRR standards themselves while waiting for EPA to act. The process of promulgating, implementing, and enforcing independent state mandates that diverge from the federal standard would impose at least some costs that themselves establish cognizable injuries-in-fact directly resulting from the Delay Rule.

Remarkably, EPA made a virtually identical argument in *Air Alliance*, contending that the petitioning states there "ha[d] *the option* to administer the Risk Management Program through delegation from EPA[,]" 2017 WL 6270691 at *38 (emphasis added)—just like the Petitioning States here theoretically have the "option" (though also not costless here) to impose parallel LCRR standards themselves. But this Court held that the petition states' proprietary injuries were cognizable even though, under EPA's instant theory, they would not be. *Air Alliance*, 906 F.3d at 1059. The same result should obtain here.

EPA's recycling of the *exact same* argument that this Court decisively rejected in *Air Alliance*—all without acknowledging that

rejection and simply swapping the word "choice" for "option"— warrants summary resolution.

II. Petitioners Are Likely To Succeed On The Merits

A. The Delay Rule Violates This Court's *Air Alliance* Decision

EPA expends multiple pages explaining why the Delay Rule was a "reasonable response" to the "competing interests" at play. Opp. at 2, 17-20. But the relevant issue is whether the Delay Rule was a *lawful* response. And, under *Air Alliance*, it plainly is not.

EPA forthrightly admits (at 1) that the purpose of the Delay Rule is to facilitate reconsideration of the LCRR: *i.e.*, it is "reviewing the revisions to decide whether to withdraw, modify, or keep them." But *Air Alliance* is perfectly clear 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*, 894 F.3d at 111-12); *see also State v. BLM*, 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018) (agency "cannot use the purported proposed future revision, which has yet to be passed, as a justification for the Suspension Rule"). In addition, "EPA may not employ delay tactics to effectively repeal a final rule[.]" *Air Alliance*, 906 F.3d at 1065.

But that is precisely what EPA is doing here: it is delaying the LCRR so that it can reconsider it, and using delay tactics to avoid the LCRR taking effect while evading the APA's requirements for actually repealing the LCRR. EPA has all but admitted its violation of *Air Alliance*. Seeking to avoid *Air Alliance*'s controlling effect here, EPA advances two dubious distinctions. Both fail.

First, EPA argues (at 20) that the delay rule *Air Alliance* did not "reset[] any compliance deadlines." But *Air Alliance* holds that EPA has *no authority* to delay a rule's effective date merely to reconsider it—not that it may do so as long as it *also* delays compliance deadlines. Thus, while EPA attempts (at 22) to distinguish *Air Alliance* because it "explained its reasons for the delay" here, the actual issue is one of *authority*, not explanation. And its explicit reconsideration-based explanation violates *Air Alliance*.

Second, it argues (at 21) that, unlike *Air Alliance*, "[t]his delay … is just a delay not a repeal" because it merely extends the compliance deadline by "9 months[,]" the "total interval by which EPA delayed the effective date," whereas the delay in *Air Alliance* was 20 months. But EPA tellingly never disavows further delays, even as the Petitioning

States predicted that one was "a virtually certainty." Mot. at 14. It is even more likely now: EPA has neither published a notice of proposed rulemaking nor disavowed its intent to reconsider the LCRR (and indeed reaffirmed that intent in its brief).

In this posture, it is virtually certain that further delay is forthcoming, particularly as there is essentially no chance that EPA will propose and finalize a new rule by December 16, 2021. EPA's evasiveness on this issue in response to the States is tantamount to a confession of likely future delay.

EPA cannot evade *Air Alliance* by breaking up the delays into smaller, purportedly-unchallengeable pieces. And if this Court doubts the inevitability of further delay, Petitioning States respectfully request that this Court order EPA to file an affidavit explaining the status of the reconsideration process and whether EPA believes additional delays are likely. Because EPA's defense is heavily premised on the delay being "only" 9 months, this Court should not accept that defense without actual confirmation of that implausible premise.

B. EPA's Refusal To Analyze The Proper Discount Rate Violates Both The SDWA's Express Cost-Benefit Mandate And The APA

EPA notably admits that the proper discount rate is completely dispositive of the quantitative cost-benefit analysis. It confesses that "whether cost savings outweigh reductions in quantified benefits depends on which discount rate applies," and that, at a 3% rate, the foregone health benefits—measured expressly by EPA in terms of *permanent brain damage*—actually exceed the foregone costs by up to $14 million.[1] Opp. at 23. But having identified the dispositive question, EPA completely failed—indeed refuses—to answer it. That violates both the APA and the SDWA.

By refusing to answer the proper discount rate, EPA has violated the EPA by "entirely fail[ing] to consider an important aspect of the problem[.]" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Indeed, that issue is not merely "important" here—it completely controls whether the Delay Rule actually advances or hinders the putative policy goals here. EPA tellingly does not

[1] That $14 million represents the monetized value of "estimated IQ point decrements." *See* 86 Fed. Reg. 4,198 at 4,269 (Jan. 15, 2021).

cite a single case in which a court has upheld agency action that identified an issue as controlling and then entirely failed (even refused) to answer it. There is no reason for this case to be the first.

EPA's refusal to analyze the dispositive rate issue also violates the SDWA's express cost-benefit analysis mandate. *See* 42 U.S.C. §300g-1(b)(3)(C). Because EPA *admits* that it cannot say with any certainty that estimated benefits actually exceed costs, EPA has violated that mandate. Indeed, EPA cites no case in which an agency "complied" with a cost-benefit mandate merely by stating that benefits might—*or might not*—exceed costs.

EPA protests (at 24)—without citation—that it "could not—favor one discount rate over the other." But it never explains why. Perhaps it believes that OMB regulations—which merely require it to perform cost-benefit analyses under the 3% and 7% rates—preclude it from further analyzing what rate is more appropriate to the issue at hand. But nothing in those regulations actually preclude it from doing so. While it may be good practice for the EPA to conduct cost-benefit analysis applying varying discount rates, the agency should still apply those estimates intelligently and explain its reasoning on why a particular discount rate

is appropriate. Here, the agency provided effectively zero explanation as to why the appropriate discount rate here would render the Delay Rule's net-benefits positive.

This Court has previously rejected an agency's discount rate choice when that choice carried "major consequences" and was not explained "intelligibly." *See NRDC v. Herrington*, 768 F.2d 1355, 1414 (D.C. Cir. 1985) (explain that an agency must "fix the rate carefully and explain its decision intelligibly"). But here the analysis of the proper discount rate is *outright non-existent*, rather than merely inadequate.

EPA also argues that it "did not ignore costs and benefits" because it "considered them qualitatively." Opp. at 24 (citing 86 Fed. Reg. at 31,945/1). But EPA's response identifies only a *single* such "qualitative" factor: "stakeholder engagement." Opp. at 24 n.14. And the single column of the Delay Rule that EPA cites only says this about such engagement: "EPA has determined not to do so [*i.e.*, allow the LCRR to become effective] at this time because it would pre-determine the outcome of the public stakeholder process." 86 Fed. Reg. at 31,945/1.

That is flatly wrong as legal matter: even if EPA allows the LCRR to become effective, that would not preclude reconsideration following

stakeholder engagement. There is thus no actual "pre-determin[ation]." That alone requires invalidation, as "[a]n order may not stand if the agency has misconceived the law." *Teva Pharm. USA Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006) (citation omitted).

But even if "stakeholder engagement" could conceivably have significant value mooting the applicable discount rate issue, EPA actually makes no effort to value it—which is particularly problematic as there was already *extensive* engagement that led to the LCRR. Indeed, the *only* apparent issue EPA takes (at 8) with the prior stakeholder engagement is the lack of "public meetings" and "targeted meetings." But there is no reason to believe those meetings are actually worth the $2-14 million that costs would otherwise exceed benefits at a 3% discount rate. EPA's "qualitative" considerations thus do not add up.

More fundamentally, EPA cannot simply invoke "qualitative benefits" as some magic talisman that renders all quantification irrelevant. That would render all cost-benefit mandates toothless. And even if EPA could, its qualitative analysis here is questionable at best: in essence, EPA has apparently determined that the value of stakeholder *meetings* has greater qualitative value than preventing *permanent brain*

injuries in children. Or at least that is what EPA's current arguments are necessarily premised upon. But EPA unsurprisingly will not offer any reasoning to that effect expressly, rendering its Delay Rule indefensible.

In the end, EPA's "qualitative" analysis consists of a single throwaway line about "stakeholder engagement" (1) premised on legal error about predetermination that would not actually exist and (2) that apparently views meetings as qualitatively more important than children's brains. That does not suffice.

For all of these reasons, EPA's refusal to analyze the appropriate discount rate violates both the SDWA and APA, and EPA's attempt to invoke "qualitative" benefits as a get-out-of-jail-free card fails on multiple independent levels. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency [relies] on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."). It further betrays an apparent indifference towards the severe harms caused by lead poising that EPA apparently feels are dwarfed by EPA's concerns about holding meetings with stakeholders.

C. EPA's Year-One Cost Analysis Is Arbitrary And Capricious

The States raised, as an entire subsection (at 21-23), that EPA's estimate of year one costs and benefits was arbitrary and capricious. In a nutshell: EPA's rationale that it was cheaper to plan for innumerable possible contingencies, rather than a known single standard, was absurd.

EPA's response is confined to a single unpersuasive footnote (at 24 n.15), arguing that "the uncertainty comes from review of the Revision Rule, not the Delay Rule." Two problems with that: *First*, there is no proposed rule revising the LCRR, and EPA's contention as to the source of the uncertainty is naked, evidence-free speculation. *Second*, the Delay Rule specifically identifies itself as the source of the uncertainty, declaring that, as a result of its enactment—and not some external consideration—"[S]tates 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. That acknowledgment is fatal to EPA's footnote-only defense.

D. EPA Violated The Six-Year Review Mandate

For the reasons explained in the States' Motion (at 23-26), the Delay Rule also violates 42 U.S.C. §300g-1(b)(9) by continuing EPA's

ongoing failure to engage in the mandated rule and revision process. EPA asserts (at 25) that this argument is waived because it was not raised explicitly in comments. This ignores the fact that the EPA raised this issue *themselves*—indeed, EPA relied on subsection (b)(9) as the *sole* authority for their issuance of the Delay Rule. *See* 86 Fed. Reg. at 31,946. Indeed, EPA's cherry-picked quotation of subsection (b)(9) tellingly gerrymanders out any reference to the six-year revision. *Id.* Those strategic omissions make plain EPA's awareness—and knowing disregard—of the six-year review provision.

At the very least, the agency has "already made known its general views [on 42 U.S.C. §300g-1(b)(9)] to the contrary." *Action For Children's Television v. FCC*, 564 F.2d 458, 469 (D.C. Cir. 1977). This Court has routinely recognized similar circumstances as within exceptions to any exhaustion or waiver requirement. *See, e.g.*, *All Am. Cables & Radio, Inc. v. FCC*, 736 F.2d 752, 761 (D.C. Cir. 1984) ("It would be highly artificial to deny All America judicial review simply because it did not file one additional paper with the Commission when there is not the slightest reason to believe that a petition for reconsideration would have caused a shift in the Commission's view of its powers."); *Wash. Ass'n for Television*

& Child. v. FCC., 712 F.2d 677, 682 (D.C. Cir. 1983) ("[I]t is not always necessary for a party to raise an issue, so long as the Commission in fact considered the issue.").

EPA next argues that Petitioners should have raised this claim in district court under the CWA citizen suit provision. But this Court has exclusive jurisdiction over *all* legal violations created by the Delay Rule. *See, e.g.*, *Telecomm. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984). Nor is there any sound reason to require a separate suit to which EPA has no apparent defense.

Finally, EPA argues that it complied with its statutory duty under 42 U.S.C. §300g-1(b)(9) by considering the Original Rule in its six-year review in 2017. But the effect of the Delay Rule is to prevent any such review/revision from taking effect, thus reinstating EPA's violation of subsection (b)(9). Because the Delay Rule renders the results of the 2017 review a legal nullity, EPA is now again in long-standing violation of subsection (b)(9).

III. A Stay Or Summary Vacatur Of The Delay Rule Continues To Be Warranted Here

Given the clarity of EPA's legal violations—particularly under *Air Alliance*—this Court should simply summarily vacate the Delay Rule.

But if does not do so, the remaining requirements for a stay pending review are easily satisfied here.

The Delay Rule itself identifies (and expressly quantifies) harms that the States will suffer if it is not stayed. And there is no dispute that such harms to the Petitioning States will be irrecoverable, thus establishing irreparable harm. *See* Mot. at 26-27. EPA does not meaningfully contend otherwise.

EPA is also wrong in suggesting (at 28) that a stay "would do more harm than good." But EPA's own incoherent cost-benefit analysis fails to establish as much and, using the discount rate that the Biden Administration has used for the social cost of carbon (3%-or-lower (Mot. at 20-21)), that is demonstrably false: a stay would have net positive benefits under EPA's own calculus. If EPA actually believes that a stay here would "do more harm than good" here, that all-but concedes that the social cost of carbon regulations are arbitrary and capricious. If EPA had any basis for reconciling its current balance-of-harms arguments with the Administration's social-cost-of-carbon regulations, EPA steadfastly refuses to provide it.

As to the public interest, it beggars belief that preventing permanent brain injuries in children is contrary to the public interest (particularly where the countervailing harms are purely economic). Even EPA lacks apparent conviction in that argument, as it feels compelled to concede (at 28) "that is not to say that any future benefits to children are worthless." They are, indeed, not "worthless." EPA's apparent callousness to those brain injuries to children—particularly in the wake of its inept oversight of the Flint debacle and its apparent greater valuation for "stakeholder meetings"—is now beyond parody.

What is actually worthless here is EPA's cost-benefit analysis that affirmatively refuses to analyze the dispositive issue of the proper discount rate, and implicitly endorses a substantially higher discount rate than the Administration uses globally elsewhere without the slightest explanation. Because EPA will not own the 7% discount rate that could render the Delay Rule defensible and in the public interest, its instant stay-factors arguments necessarily fail as well.

CONCLUSION

EPA's Delay Rule should either be summarily vacated or stayed pending this Court's review.

September 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. EPA's Combined Opposition to Motion for Stay or Summary Vacatur and Cross-Motion to dismiss was expressly filed pursuant to Circuit Rule 27(c). *See* EPA Opp. at 31. This document complies with the type-volume limit of Circuit Rule 27(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 3,883 words. It also complies with the type-volume limit of Circuit Rule 18(b) if that applies here instead.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office '19 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's COMBINED REPLY IN SUPPORT OF STAY/SUMMARY VACATUR AND RESPONSE TO RESPONDENTS' CROSS-MOTION TO DISMISS was filed on September 30, 2021 using the Court's CM/ECF system and, therefore, service was accomplished under counsel of record by the Court's system.

/s/ *Drew C. Ensign*
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