

EPA, National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates

April 9, 2021

Comment:

EPA's proposal is procedurally and substantively deficient and should not be finalized. These deficiencies are as follows:

The proposed suspension of the LCRR is arbitrary and capricious under the APA because it fails to consider all aspects of the problem. "An agency's view... may change.... But an agency changing its course must supply a reasoned analysis." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

The Agency's proposed suspension of the effective date of the LCRR for six months and delay of compliance dates by nine months is tantamount to a repeal of the LCRR for that period of time. *See Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) ("[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards."). Yet the Agency has failed to analyze the effects of suspending the LCRR on human health, including on children and the vulnerable populations that LCRR was designed to benefit. "Without considering both the costs *and* the benefits of postponement of the compliance dates, the [Agency's] decision failed to take this 'important aspect' of the problem into account and [is] therefore arbitrary." *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017).

The Agency has failed to address the substantive reasons it provided in the final LCRR for setting the compliance dates as it did in the final LCRR and explaining why it now believes compliance with the new requirements by September 2024 is preferable to compliance by January 2024. *Air All. Houston v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) ("[N]othing in the Delay Rule explains EPA's departure from its stated reasoning in setting the original effective date and compliance dates.").

Furthermore, the Agency has failed to explain why in its judgment it is preferable on the merits for the requirements that existed before the LCRR to apply from the period between January 2024 and September 2024 instead of the requirements in LCRR. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (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.").

The Agency has failed to consider or explain why it is worth forgoing the benefits of the rule for this nine-month period in exchange for the agency "to evaluate the rule and determine whether to initiate a process to revise components of the rule," which it could fully undertake without such a delay. "EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits." *Air All. Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018). "EPA nowhere explains how the effectiveness of the rule would prevent EPA from undertaking notice and comment or other tasks for reconsideration . . . ." *Id.* at 1066-67.

It is insufficient for the Agency to base a delay or suspension of the LCRR on the potential that it may propose changes to the rule in the future. *See Air All. Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018) (“The overarching statutory purpose and design of the [Clean Air Act], as well as the statutory context . . . reject an interpretation that EPA can further delay a final rule for reconsideration when it has neither explained it has reached a different conclusion about preventing accidental releases nor offered new evidence to support a different conclusion, but has delayed a final rule based on speculation about future amendments.”).

The proposed suspension shares no similarities with the narrowly tailored approach taken by EPA when changing the *earliest* compliance dates for two parts of the 2015 effluent limitations guidelines rule for the steam electric sector. *See Clean Water Action v. EPA*, 936 F.3d 308, 316 (5th Cir. 2019) (upholding EPA rule to “postpone two earliest compliance dates for the two specific waste streams, while retaining ... the ultimate compliance deadline specified in the 2015 Rule for those waste streams”). The approach taken here—a blanket delay of compliance dates by nine months, is not well-tailored or grounded in the record of the LCRR.

Because 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, the Agency has failed to provide a meaningful opportunity for the public to comment. *See S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018).

The proposed suspension also is deficient because the Agency did not consult with the US Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act (ESA) on its proposed suspension. The proposed suspension likely falls within the definition of “action” under the ESA. The Agency has failed to consider the impacts of its suspension on threatened or endangered species and critical habitat.

The proposed suspension also is deficient because the Agency did not undertake an analysis under the National Environmental Policy Act (NEPA) of its suspension. The proposed suspension likely falls within the definition of “major federal action” under NEPA.

The proposed suspension also is deficient because the Agency did not consult with the Advisory Council on Historic Preservation under National Historic Preservation Act on the effect of the suspension on historic properties. The proposed suspension likely falls within the definition of “federal undertaking” under the NHPA.

EPA should not finalize the proposal; rather, it should address the deficiencies identified herein.

[End of comment]