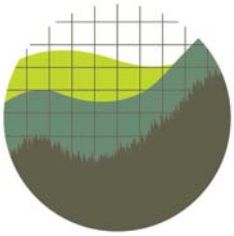

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

July 6, 2017

VIA ELECTRONIC SUBMISSION

Attn: Ronald Jordan, United States Environmental Protection Agency, Engineering and Analysis Division; (202) 564-1003; jordan.ronald@epa.gov

Re: Docket ID No. EPA-HQ-OW-2009-0819; Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] submits the following comments on the Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 26,017 (June 6, 2017) ("Proposed Stay"), proposing to suspend the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838 (Nov. 3, 2015) ("Effluent Rule").

Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comments:

I. EPA lacks legal authority to issue the Proposed Stay.
II. The Proposed Stay cannot cure EPA's failure to seek public comment on a prior indefinite stay.
III. The Proposed Stay is arbitrary and capricious because EPA failed to provide a reasoned explanation for it.

[1] This document does not purport to present New York University School of Law's views, if any.

I. EPA Lacks Legal Authority to Issue the Proposed Stay.

In its notice of proposed rulemaking, EPA was required to include "reference to the legal authority under which the rule is proposed."[2] But the Proposed Stay cited no relevant authority as its basis.[3] As the D.C. Circuit confirmed this week, EPA has no "inherent authority" to stay a rule, but "must point to something in either" the Clean Water Act or the Administrative Procedure Act ("APA") "that gives it authority to stay" the Effluent Rule.[4] EPA has not cited any such authority and the proposed stay is invalid.

Even if EPA had cited the APA, the APA has limited application and does not apply to EPA's plans here. First, under § 705, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."[5] The plain reading of § 705 demonstrates that it does not authorize a stay that would remain in effect after the completion of judicial review. EPA has proposed that this stay would continue even after the litigation in the Fifth Circuit over the rule ends.[6] Thus, § 705 is plainly inapplicable.

Second, § 705 does not allow EPA to stay the rule *after* its effective date. Section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review."[7] It does not allow an agency to stay a rule that is already in effect.[8] The final Effluent Rule went into effect more than a year and a half ago, on January 4, 2016,[9] and thus cannot now be stayed under § 705.

Third, even if EPA had authority to issue a stay under § 705, EPA could do so only if it can show (1) the likelihood that petitioners will prevail on the merits of their petitions for review and (2) the likelihood that the petitioners "will be irreparably harmed absent a stay."[10] In addition, EPA must address the "prospect that others will be harmed if the court grants the stay" and "the public interest in granting the stay" before granting it.[11] Because EPA failed to analyze these factors in its proposal, it cannot invoke § 705.

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[2] 5 U.S.C. § 553(b)(2).
[3] 82 Fed. Reg. at 26,018.
[4] *Clean Air Council v. Pruitt*, 2017 U.S. App. LEXIS 11803, *14 (D.C. Cir. July 3, 2017).
[5] 5 U.S.C. § 705.
[6] 82 Fed. Reg. at 26,018.
[7] *See Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324 *2 (D.C. Cir. Jan. 19, 1996) (per curiam).
[8] *Id.* at *3.
[9] 80 Fed. Reg. at 67,838.
[10] *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012) (collecting cases); *Jeffrey v. Office of Pers. Mgmt.*, 28 M.S.P.R. 434, 435–36 (Merit Systems Protection Board 1985).
[11] *Sierra Club*, 833 F. Supp. 2d at 30; *Jeffrey*, 28 M.S.P.R. at 435–36.

II. The Proposed Stay Cannot Cure EPA's Failure to Seek Public Comment on EPA's Previous Stay of the Effluent Rule.

Under the APA, agencies must provide "interested persons" with notice of its proposed action and "an opportunity to participate in the rule making through submission of written data, views, or arguments."[12] It is well settled that an effective date is an "essential part of any rule" and that a decision to postpone a rule's effective date or compliance deadlines is an action that is subject to those notice-and-comment requirements.[13] Indeed, when an agency puts off compliance indefinitely, courts have recognized that such a suspension is "tantamount to a revocation" and should be subject to the same notice-and-comment requirements as a repeal under the APA.[14] As the Secretary of Labor recently acknowledged, the requirement that agencies seek public comment on delays "is not red tape."[15] That requirement exists so "that agency heads do not act on whims, but rather only after considering the views of all Americans."[16]

The Proposed Stay would be EPA's second postponement of the Effluent Rule. In April 2017, EPA indefinitely stayed the Effluent Rule and that stay is still in effect ("First Stay").[17] That First Stay is "invalid for failure to comply with the APA" because it was not promulgated through notice-and-comment rulemaking. [18]

Now, EPA is seeking public comment on a second stay that would overlap with that First Stay or start immediately after the First Stay ends.[19] But providing for public comment on this "further postponement" does not cure EPA's failure to seek public comment on the First Stay.[20] And so long as an invalid stay remains in place, EPA cannot issue the Proposed

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[12] 5 U.S.C. § 553(c).
[13] *Nat. Resources Defense Council, Inc. v. EPA ("NRDC")*, 683 F.2d 752, 762 (3d Cir. 1982); *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983).
[14] *NRDC*, 683 F.2d at 763; *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984); *Sierra Club*, 833 F. Supp. 2d at 27.
[15] Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, Wall Street Journal (May 22, 2017).
[16] *Id.*
[17] Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) ("First Stay").
[18] *NRDC*, 683 F.2d at 768. Several environmental organizations have challenged that First Stay and summary judgment briefing is underway. *See Clean Water Action, et al. v. Pruitt*, No. 17-817 (D.D.C. May 3, 2017), ECF No. 1.
[19] 82 Fed. Reg. at 26,018.
[20] *NRDC*, 683 F.2d at 768; *see also Union of Concerned Scientists v. Nuclear Reg. Comm.*, 711 F.2d 370 (D.C. Cir. 1983) (challenge to the interim rule is not mooted by the subsequent rulemaking proceedings); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (post-promulgation comments are not a substitute for comment before promulgation).

Stay, even if it seeks public comment. EPA would need to lift the invalid stay first and then seek public comment on staying the rule "in the first place."[21]

This principle was explained by the Third Circuit in a previous case where EPA attempted to stay a discharge rule without notice and comment and then to propose a second stay for public comment.[22] In that case, the Third Circuit explained that "if the amendments had gone into effect, as they should have, on March 30, 1981, the question to be decided in the [second stay] would have been whether the amendments, which had been in effect for some time, should be suspended, and not whether they should be further postponed."[23] Because the public had not been offered the opportunity to comment on the suspension *before* the rule was suspended, the court ordered EPA to reinstate the original rule.[24]

Here, similarly, the public deserves the right to comment on whether the Effluent Rule "should be suspended, and not whether" the Effluent Rule "should be further postponed."[25] In order to comply with the notice-and-comment requirements (assuming EPA had statutory authority to stay the rule, but see *supra* at 2-3), EPA would need to reinstate the original deadlines of the Effluent Rule and then publish a proposed postponement for public comment.

III. The Proposed Stay Is Arbitrary and Capricious Because EPA Failed to Provide a Reasoned Explanation for It.

The Proposed Stay is arbitrary and capricious. It is well settled that the stay is an agency action that is subject to review under the arbitrary and capricious standard in the APA.[26] As the D.C. Circuit has made clear, when an agency decides to change course by suspending a regulation, the agency must "cogently explain" the basis for a suspension, under the same standard that applies to any other rulemaking.[27] Under that standard, an agency must (1) "examine the relevant data" and (2) "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[28]

In addition, the APA requires EPA to provide that explanation in its proposal. The public must have a "meaningful opportunity" to comment on a proposed rulemaking.[29] And an

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[21] *NRDC*, 683 F.2d at 768.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 769.
[25] *Id.*
[26] *See, e.g., Sierra Club*, 833 F. Supp. 2d at 18; *Clean Air Council*, 2017 U.S. App. LEXIS 11803, at *6-10; *see also* 5 U.S.C. § 706(2).
[27] *Pub. Citizen,* 733 F.2d at 98 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. ("State Farm")*, 463 U.S. 29, 48 (1983).
[28] *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).
[29] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3rd Cir. 2011).

agency must "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[30] Providing important information after the notice of proposed rulemaking does not allow the public sufficient time and opportunity to analyze and respond to the proposal.[31]

EPA's proposal failed to meet this standard. First, EPA failed to acknowledge that the Proposed Stay would impose costs, in the form of the forgone benefits of the Effluent Rule. Second, EPA failed to explain why those costs were justified or whether the stay was authorized under the Clean Water Act. Third, EPA failed to explain why the Proposed Stay is not also a "significant regulatory action," when the Effluent Rule was a "significant regulatory action."

A. EPA must examine the costs of the Proposed Stay before finalizing the stay.

An important category of "relevant data" that an agency must examine is the costs of the new rulemaking.[32] In fact, it is difficult "for a regulatory agency to make a rational decision without considering costs in some way" because "[a]ll individuals and institutions naturally and instinctively consider costs in making any important decision."[33] And the Clean Water Act expressly requires EPA to consider costs when issuing standards like the Effluent Rule.[34]

Costs are just as relevant when issuing a regulation as when suspending the regulation.[35] Agencies must use the "same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[36] And Executive Order 12,866, the governing executive order on regulatory decisionmaking,[37] instructs agencies to adopt a "regulation" or "rule" "only upon a reasoned determination that the benefits of the intended regulation justify its

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[30] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).
[31] *Prometheus Radio Project*, 652 F.3d at 453.
[32] *See Michigan*, 135 S. Ct. at 2707 (emphasizing that courts should pay attention to the "disadvantages of agency decisions").
[33] Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 Admin. L. Rev. 1237, 1247 (2002). *See also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 493 (1989) (Rational regulations look at the benefits of a rule and assess those benefits "in comparison to the costs.").
[34] 33 U.S.C. § 1314(b)(2)(B).
[35] *See Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (considering the costs of a repeal "is common sense and settled law"); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (finding that the agency properly calculated the costs of amending a regulation).
[36] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015); *see also F.C.C. v. Fox Television Stations, Inc. ("Fox")*, 556 U.S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action").
[37] *See* Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs," part II (Apr. 5, 2017) ("Guidance on Executive Order 13,771"), *available at* https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation.

costs."[38] That provision applies to suspensions. Executive Order 12,866 makes clear that the provision covers any "regulation" or "rule" that "the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency."[39] And a stay falls under this provision because it "represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties."[40]

One category of costs imposed by a new rule suspending an existing regulation is the forgone benefits of that existing regulation. A 2003 guidance document issued by the Office of Management and Budget under President George W. Bush makes clear that the timing of a rule's compliance dates may "have an important effect on its net benefits."[41] And it is clear that a delay of an emissions limitation can cause "significant deleterious effects on the environment."[42]

An agency is as obligated to consider forgone benefits as it is to consider any other form of cost.[43] The fact that the costs of suspending a rule are harms to the environment and public health rather than compliance burdens on industry does not excuse a failure to consider those costs. As the Supreme Court explained, agencies must calculate the "costs" of their actions, whether they are compliance costs that industry will bear or "harms that regulation might do to human health or the environment."[44] Executive Order 12,866 similarly instructs agencies to consider "any adverse effects . . . on health, safety and the natural environment" when assessing a regulation's costs.[45]

Here, EPA had calculated the costs and benefits of the Effluent Rule when issuing it and thus had the data at hand to determine the societal costs that the Proposed Stay would impose. The Effluent Rule was projected to yield $451 million to $566 million per year in benefits, in the form of lowered cancer risks, increased childhood IQs, lowered risks of

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[38] Executive Order No. 12,866 § 1(b)(6), 58 Fed. Reg. 51,735 (Sept. 30, 1993) ("Executive Order 12,866").
[39] *Id.* § 3(d).
[40] *Clean Air Council*, 2017 U.S. App. LEXIS 11803, at *7.
[41] Office of Mgmt. & Budget, OMB Circular A-4 at 7 (2003) ("Circular A-4"), *available at* https://www.whitehouse.gov/omb/circulars_a004_a-4. The Trump administration has instructed agencies to follow Circular A-4. *See* Guidance on Executive Order 13,771 at 11, *supra*.
[42] *See Sierra Club*, 833 F. Supp. 2d at 36; *see also Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (describing substantial emissions that vacating EPA's emissions limit would impose).
[43] *See, e.g.*, *New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits would justify forgoing the promised air benefits); Circular A-4 at 19 (instructing agencies to monetize "foregone benefits" when calculating the costs and benefits of the alternatives under consideration).
[44] *Michigan*, 135 S. Ct. at 2707; *see also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 326-27 (D.C. Cir. 1992) (holding that agency should have considered indirect costs in the form of safety risks associated with a smaller size of more fuel-efficient cars).
[45] Executive Order 12,866 § 6(a)(3)(C)(ii).

cardiovascular disease, and decreased damages to ecosystems and surface water quality, as well as many other important unmonetized benefits.[46] Thus, the cost of suspending the Effluent Rule, in the form of these forgone benefits, is $451 million to $566 million per year.

Instead of addressing the forgone benefits of the Effluent Rule, EPA has claimed that the Proposed Stay simply "preserve[s] the regulatory status quo."[47] But that mispresents the "status quo." The status quo is a world where the Effluent Rule has been final and in legal effect for more than a year, after an exhaustive multi-year process.[48] Facilities have spent that time preparing to implement the Effluent Rule, raising capital, planning and designing systems, procuring equipment, and constructing and testing systems.[49] The fact that the Effluent Rule's compliance deadlines are in the future does not change the fact that those deadlines are the law of the land.

Standard agency cost-benefit principles do not allow EPA to exclude the benefits of the Effluent Rule from the "status quo" simply because those benefits have yet to accrue. The standard way to assess the economic impact of a new rule, including a suspension, is to first establish a baseline, which is the agency's "best assessment of the way the world would look absent the proposed action"—in this case, the Proposed Stay.[50] In calculating that baseline, EPA's guidelines call for the agency to include all anticipated effects of promulgated rules in its assumptions, even if those other rules have not been fully implemented.[51] Indeed, when issuing the Effluent Rule itself, EPA used a baseline that reflected the impacts from "other relevant environmental regulations."[52]

Once the baseline has been determined, the agency can calculate what the new action's expected costs are by measuring its effects against the baseline. For example, when the Department of Labor recently proposed to postpone the Fiduciary Rule for two months, it calculated the costs of the two-month delay by analyzing how much the benefits from two months of the original rule were worth.[53] Here, the baseline for the Proposed Stay would include the benefits from the Effluent Rule and, when calculating the costs of the First Stay, a loss of those benefits would need to be considered.

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[46] *See* 80 Fed. Reg. at 67,873-75, 67,877-78.
[47] 82 Fed. Reg. at 26,018.
[48] 80 Fed. Reg. at 67,844.
[49] *Id.* at 67,854.
[50] Circular A-4 at 15.
[51] EPA, *Guidelines for Preparing Economic Analyses* ("*Guidelines*") at 5-3, 5-13 (2010) *available at* https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses.
[52] 80 Fed. Reg. at 67,855.
[53] *See* Proposed Extension of Applicability Dates, Definition of the Term "Fiduciary"; Conflict of Interest Rule, 82 Fed. Reg. 12,319, 12,320 (March 2, 2017).

Generally speaking, including the full impacts of other rules in the baseline is helpful to the regulated industry because it allows the agency to "focus on the incremental economic effects of the new rule or policy without double counting benefits" when measuring the new rule's effects.[54] In other words, once the benefits of other rules are included in the baseline, even if those benefits will not accrue until far into the future, an agency cannot impose a new rule justified by the same benefits. Indeed, the regulated industry often relies on this principle in challenges to new regulations.[55]

It is only rational to calculate the baseline in the same manner when repealing or suspending deadlines.[56] If agencies are going to take the unrealized future benefits of rules into account when deciding whether to issue a new regulation, then those unrealized future benefits should be taken into account when agencies repeal or suspend a regulation. The Proposed Stay is arbitrary and capricious because EPA failed to "examine the relevant data" about the Effluent Rule's forgone benefits.[57]

B. EPA failed to provide a reasoned justification for imposing the costs of the Proposed Stay.

In addition to examining "relevant data" in the form of the societal costs of the Proposed Stay, EPA is required to "articulate a satisfactory explanation" for imposing those costs.[58] EPA must also explain why its action is "permissible under the statute."[59] Here, EPA cited the "capital expenditures that facilities" would need to undertake as the basis of the Proposed Stay.[60] But that explanation fails to satisfy the standard for two reasons.

First, EPA failed to explain in its proposal why or whether saving facilities from making those "capital expenditures" is justified in light of the costs that the Proposed Stay would impose, in the form of the forgone benefits of the Effluent Rule. Given EPA's claim that "capital expenditures" justify the suspension, EPA should explain when those expenditures would be incurred, provide information about the magnitude of the expenditures, and

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[54] *Guidelines* at 5-3.
[55] *See, e.g.*, Original Br. of Industry Pet'rs at 69-71, *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (Dec. 5, 2016), ECF. No. 00513783903 (relying on this principle to make an unrelated argument about disclosures in the Effluent Rule); Pet'r Nat'l Mining Ass'n Br. at 41, n.19, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (arguing that EPA improperly counted benefits that result from reductions in a separate regulation).
[56] *See* Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763, 1793 (2002) (costs and benefits should receive equal treatment).
[57] *State Farm*, 463 U.S. at 43.
[58] *Id.*
[59] *See Fox*, 556 U.S. at 515; *see also* 5 U.S.C. § 706(2); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).
[60] 82 Fed. Reg. at 26,018.

explain whether the expenditures are equal to or greater than the amount of forgone benefits from the Effluent Rule.[61]

As explained above, EPA calculated the benefits of the Effluent Rule and thus could calculate the forgone benefits in the Proposed Stay.[62] Had EPA looked at the data, it could have determined whether the amount of "capital expenditures" at issue was so high as to justify suspending the full benefits of the rule. Alternatively, had EPA limited the duration of the suspension by setting new compliance deadlines, EPA could have calculated the forgone benefits of the Effluent Rule for that period of time and compared them to avoided compliance costs during the same period.[63] Given EPA's previous finding that many plants would incur "no cost at all,"[64] it may be unlikely that EPA could support such a judgment, but the point is that EPA must take this fundamental step and allow the public to comment on the information, before finalizing any stay.

Second, in addition to explaining whether and why "capital expenditures" avoided by the Proposed Stay justify foregoing the benefits of the Effluent Rule, EPA must explain why a stay is "permissible" under the Clean Water Act.[65] Instead of providing any explanation, EPA stated that it was beginning only a "review" of petitioners' objections to the Effluent Rule.[66] Though EPA mentioned petitioners' "wide-ranging and sweeping objections" to the Effluent Rule, EPA specifically refrained from stating whether it agreed with any of those objections.[67]

That explanation is insufficient to justify a stay. The Effluent Rule was issued after EPA spent more than two years gathering a copious record about the costs and benefits of the proposed standards and technology and reviewing more than 200,000 public comments.[68] EPA's desire to "review" "new data" on the performance of technology that plants may install[69] provides no basis for believing that the record underlying EPA's prior decision was faulty, that EPA's interpretation of the statute has changed, or that the "new data" support a

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[61] *See Home Builders*, 682 F.3d at 1040 (holding that "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable").
[62] *See* EPA, Benefit and Cost Analysis for Steam Electric Power Generating ELGs, chap. 11 (2015), available at https://www.epa.gov/sites/production/files/2015-10/documents/steam-electric_benefit-cost-analysis_09-29-2015.pdf.
[63] *See Davis Cty.*, 108 F.3d at 1458 (discussing "substantial" emissions that would be caused by an eighteen-month delay).
[64] 80 Fed. Reg. at 67,887.
[65] *Fox*, 556 U.S. at 515.
[66] 82 Fed. Reg. at 26,018.
[67] 82 Fed. Reg. at 26,017.
[68] 80 Fed. Reg. at 67,844.
[69] *See* 82 Fed. Reg. at 26,017.

different outcome.[70] EPA must provide a justification for suspending the compliance deadlines "before engaging in a search for further evidence."[71] And EPA needs to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[72] "Without showing that the old policy is unreasonable," for EPA to say that "no policy is better than the old policy solely because a new policy might be put into place in the indefinite future is as silly as it sounds."[73]

Moreover, under the Clean Water Act, Congress directed EPA to ensure that facilities commit "the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges."[74] The only limit on that requirement is that the standards must be "technologically and economically achievable."[75] Here EPA previously found that the Effluent Rule should be finalized because the required expenditures were economically achievable.[76] As a result of those findings, EPA has a statutory duty to issue new standards.[77] The fact that the Effluent Rule "may have an effect on industry facilities" and require them to comply with standards that EPA itself has found are necessary under the Clean Water Act does not provide a ground for suspending the rule's deadlines.[78] The agency must explain its authority to issue the Proposed Stay in light of its previous finding that the Effluent Rule is economically achievable.

C. EPA failed to explain why the Proposed Stay is not a significant regulatory action under Executive Order 12,866.

Finally, the Proposed Stay failed to explain EPA's change of course with regard to Executive Order 12,866. In promulgating the Effluent Rule, EPA determined that the rule is an "economically significant regulatory action" under Executive Order 12,866, with monetized benefits of $451 million to $566 million per year.[79] That order defines "significant regulatory action" to include "any regulatory action that is likely to result in a rule that may . . . [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, . . . the environment, [or] public health or safety."[80] But in the Proposed Stay, EPA twice asserted without explanation that a suspension of the Effluent

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[70] *See Fox*, 556 U.S. at 515.
[71] *State Farm*, 463 U.S. at 52; *Pub. Citizen*, 733 F.2d at 98 (agency's decision to suspend its program while it "further studied" an alleged problem with the program was arbitrary and capricious).
[72] *Fox*, 556 U.S. at 515.
[73] *Pub. Citizen*, 733 F.2d at 102.
[74] *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 74 (1980); *see also* 33 U.S.C. § 1311(b)(2).
[75] 33 U.S.C. § 1311(b)(2)(A).
[76] 80 Fed. Reg. at 67,887; *see also id.* at 67,865.
[77] *See* 33 U.S.C. § 1314(b).
[78] *See Sierra Club*, 833 F. Supp. 2d at 36.
[79] 80 Fed. Reg. at 62,887.
[80] Executive Order 12,866 § 3(f).

Rule "is not a significant regulatory action as that term is defined in Executive Order 12866."[81] Such a policy reversal demands "a reasoned analysis for the change" to include, at a minimum, that the agency "display awareness that it *is* changing its position."[82] Here, EPA neither acknowledged the reversal nor explained how a rule foregoing the economic, environmental, and public health benefits of a significant regulatory action could itself be anything other than a significant regulatory action subject to the requirements of Executive Order 12,866.

EPA should lift the illegal First Stay, withdraw the Proposed Stay, and reinstate the Effluent Rule's compliance deadlines.

Respectfully,

Bethany Davis Noll, *Senior Attorney*
John Muller, *Research Assistant*

[81] 82 Fed. Reg. at 26,018.
[82] *Fox*, 556 U.S. at 515.