IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLEAN WATER ACTION, *et al.* *Plaintiffs*, v. E. SCOTT PRUITT, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, in his official capacity and U.S. ENVIRONMENTAL PROTECTION AGENCY, *Defendants*.	Civil Action No. 17-cv-00817 ECF Case

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] submits this brief as *amicus curiae* in support of plaintiffs' motion for summary judgment seeking vacatur of the 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) ("Indefinite Stay").

INTEREST OF AMICUS CURIAE

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on environmental and economic issues.

An area of special concern for Policy Integrity is the proper use of cost-benefit analysis in the promulgation of federal environmental regulations. Policy Integrity has expertise in the proper scope and estimation of costs and benefits and the application of economic principles to regulatory decisionmaking. Our director, Richard L. Revesz, has published more than fifty articles and books on

[1] This brief does not purport to represent the views of New York University School of Law, if any.

environmental and administrative law, including several works that address the legal and economic principles that inform rational regulatory decisions.

Policy Integrity has filed *amicus curiae* briefs addressing agency analysis of costs and benefits in many cases. For example, Policy Integrity filed briefs in the Supreme Court and U.S. Court of Appeals for the D.C. Circuit addressing the Environmental Protection Agency's ("EPA") calculation of costs and benefits in its regulation of mercury emissions from power plants. *See* Br. for Institute for Policy Integrity as *Amicus Curiae*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015); Br. for Institute for Policy Integrity as *Amicus Curiae*, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Jan. 25, 2017). Policy Integrity also filed a brief in the D.C. Circuit discussing the cost-benefit analysis EPA prepared in connection with its recent revision to national ozone standards. *See* Br. for Institute for Policy Integrity, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. Aug. 4, 2016). And Policy Integrity has submitted comments on proposed repeals and stays issued by EPA and other agencies, which are similar to the Indefinite Stay at issue in this case.[2] Policy Integrity's expertise in cost-benefit analysis and experience with these cases gives it

[2] *See, e.g.*, Policy Integrity Comments on Dep't of Interior's Proposed Repeal of the Coal Valuation Reform (May 4, 2017); Policy Integrity Comments on EPA's Proposed Further Delay of the Effective Date of amendments to the Risk Management Program (May 19, 2017).

a unique perspective from which to evaluate plaintiffs' claim that the Indefinite Stay is arbitrary and capricious.[3]

QUESTION PRESENTED

Did EPA's failure to seek public comment on the Indefinite Delay and failure to consider the costs of the delay, in the form of forgone benefits to human health and the environment, violate the Administrative Procedure Act?

BACKGROUND

A. Statutory Background

Under the Clean Water Act, EPA is required to issue technology-based standards regulating discharges of pollutants such as toxic metals. EPA sets the standards by issuing "effluent limitation guidelines" that are based on the "best available technology economically achievable" by the class of dischargers. 33 U.S.C § 1311(b); *see also id.* § 1314(b)(2)(B). "[I]f appropriate," EPA is required to revise the effluent limitation guidelines "at least annually." *Id.* § 1314(b); *see also* Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point

[3] No publicly held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public. Additionally, no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

Source Category, 80 Fed. Reg. 67,838, 67,842-43 (Nov. 3, 2015) ("Effluent Rule"). The standards are then incorporated into the National Pollutant Discharge Elimination System permits issued by States and EPA. *See id.* at 67,842.

EPA is required to choose an effluent standard that is "technologically and economically achievable." *Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 265-66 (5th Cir. 1988). EPA must also "take into account" several other factors, including facility age, costs, and "non-water quality environmental impact (including energy requirements)." 33 U.S.C. § 1314(b)(2)(B). Once EPA has considered those factors, it must set the standards at the most stringent level that is economically achievable in the industry as a whole. *See American Petroleum Inst.*, 858 F.2d at 265; *Kennecott v. EPA*, 780 F.2d 445, 448 (4th Cir. 1985); *see also Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 516 (2d Cir. 2005). This requirement reflects Congress's judgment that facilities must commit "the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges." *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 74 (1980); *see also* 33 U.S.C. § 1311(b)(2).

B. The Effluent Rule

Since 1982, EPA has provided effluent standards for power plant discharges of total suspended solids, copper, oil and grease, and iron. *See* 80 Fed. Reg. at 67,840-41; 40 C.F.R. § 423.12(b)(3)-(4). In 2013, EPA found that steam electric power plants were discharging significant levels of other toxic metals, including

arsenic, mercury, and selenium, in their wastestreams, due largely to increased use of air pollution control systems designed to control sulfur dioxide air emissions. Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Proposed Rule, 78 Fed. Reg. 34,432, 34,439 (June 7, 2013). The toxic metals discharged in plants' wastewater lower IQ in children, increase cancer and cardiovascular risks, and poison fish and other aquatic life and wildlife. 80 Fed. Reg. at 67,838. EPA found that it was appropriate and necessary to update the guidelines because there were "technologies readily available to reduce or eliminate the discharge" of the toxic metals, but the control systems in use at most plants did not "reflect relevant process and technology advances." 78 Fed. Reg. at 34,435-39; *see also* 80 Fed. Reg. at 67,844-45 (summarizing significant advancements in available technology since the proposal).

In 2015, EPA issued the final Effluent Rule establishing technology-based limits on discharges of arsenic, mercury, selenium, and nitrogen. *See* 80 Fed. Reg. at 67,840–41. EPA projected that the Effluent Rule would prevent 1.4 billion pounds of pollution from entering the nation's waters every year and yield an estimated $451 million to $566 million per year in monetized benefits, which reflected (1) reduced IQ loss for children in utero and under seven, (2) reduced cardiovascular disease and cancer risk in adults, (3) improved ecosystems with benefits to fishing, swimming, camping, hunting, and boating, and (4) improved surface water quality. *Id.* at 67,873-

75, 67,877-78; *see also* Pls.' Mem. Supp. Mot. Summ. J. at 32-33, ECF. No. 20 ("Pls.' Mem."); Decl. Barbara Gottlieb ¶¶ 6-28 (describing the health risks caused by wastewater discharges), ECF No. 20-25.[4]

EPA also found that the Effluent Rule would yield unmonetized benefits including "other cancer and non-cancer health benefits, reduced cost of drinking water treatment, avoided ground water contamination corrective action costs, reduced vulnerability to drought, and reduced aquatic species mortality from reduced surface water withdrawal." 80 Fed. Reg. at 67,881; *see also* Decl. Elizabeth Stanton ¶¶ 16-17, ECF No. 20-23 ("Stanton Decl."). EPA further concluded that the rule would "significantly improve water quality by reducing pollutant concentrations by an average of 56 percent within the immediate receiving waters of steam electric power plants," among other benefits. 80 Fed. Reg. at 67,874.

In addition to finding that the Effluent Rule would generate large health and welfare benefits, EPA assessed the rule's financial impacts on power plants and found that it was economically achievable. *Id.* at 67,855, 63-68. EPA estimated that the "vast majority" of power plants "will incur annualized costs amounting to less than one percent of revenue," and that, as a result, those plants were "unlikely to face economic impacts." *Id.* at 67,865. Only a small fraction of plants had costs over

[4] *See also* EPA, Benefit and Cost Analysis for Steam Electric Power Generating ELGs (2015), ROA Doc. No. 12843 ("Benefit and Cost Analysis").

one percent, leading EPA to conclude that the rule is "economically achievable for the industry as a whole." *Id.*; *see also* Stanton Decl. ¶¶ 23-26.

The final Effluent Rule took effect on January 4, 2016. 80 Fed. Reg. at 67,838. Power plants were required to come into compliance "as soon as possible" on or after November 2018 and no later than December 31, 2023. *Id.* at 67,854; 40 C.F.R. §§ 423.13(g)–(k), 423.16(e)–(i).

After the rule was finalized, several parties filed petitions for review, which were consolidated in the U.S. Court of Appeals for the Fifth Circuit. *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (5th Cir.).

C. EPA's Reconsideration and Indefinite Stay

On March 24, 2017, the Utility Water Act Group, a petitioner in the Fifth Circuit litigation, filed a petition with EPA requesting a stay of the Effluent Rule's compliance deadlines and asking EPA to reconsider the rule.[5] A few weeks later, on April 5, 2017, the Advocacy Office of the U.S. Small Business Administration ("Advocacy Office") filed a petition seeking similar relief from EPA.[6]

[5] Utility Water Act Group's Petition for Rulemaking to Reconsider and Administratively Stay the Effluent Rule (May 24, 2017), ROA Doc. No. 12844.

[6] Letter from M. Clark to S. Pruitt (Apr. 5, 2017), ROA Doc. No. 12848.

On April 12, 2017, EPA informed the Utility Water Act Group and the Advocacy Office that it would reconsider the Effluent Rule and postpone the rule's compliance deadlines.[7] That same day, citing section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, EPA issued the Indefinite Stay that is the subject of this litigation, postponing the Effluent Rule's compliance deadlines indefinitely. 82 Fed. Reg. at 19,005.

According to EPA, "justice required" the postponement, "in light of the capital expenditures that facilities incurring costs" under the Effluent Rule "will need to undertake in order to meet" the deadlines. *Id*. EPA did not provide notice or an opportunity to comment before postponing the deadlines indefinitely. *See id.* at 19,006. EPA did not mention the benefits of the Effluent Rule or explain why EPA was justified in delaying indefinitely those benefits. And EPA did not provide any substantive explanation for suspending the deadlines in the Effluent Rule, stating instead that it was "not making any concession of error with respect" to the Effluent Rule. *Id.* at 19,005.

The Indefinite Stay delayed the deadlines on the Effluent Rule, "pending judicial review." *Id.* EPA also promised to seek an abeyance in the Fifth Circuit litigation "while the Agency reconsiders the Rule." *Id.* EPA did not say when, if

[7] Letter from S. Pruitt to H. Johnson and M. Clark (Apr. 12, 2017), ROA Doc. No. 12849.

ever, that reconsideration process would be completed, nor did EPA provide any new compliance deadlines. *See id.*

Shortly after issuing the Indefinite Stay, EPA moved for a 120-day abeyance in the Fifth Circuit, citing its pending reconsideration of the rule. Resp'ts. Mot. to Hold Proceedings in Abeyance ¶ 6, *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (5th Cir. Apr. 14, 2017). EPA argued that its reconsideration of the rule "might result in further rulemaking that would revise or rescind the rule" and "thereby obviate the need for judicial resolution" of the case. *Id.* ¶ 8. The Fifth Circuit granted the motion and stayed further proceedings for 120 days, until August 12, 2017. Order, *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (5th Cir. Apr. 24, 2017).

D. District Court Proceedings and Further Developments

On May 3, 2017, plaintiffs filed a complaint in the U.S. District Court for the District of Columbia, seeking (1) a declaration that the Indefinite Stay is arbitrary and capricious and (2) an order vacating the Indefinite Stay and directing EPA to reinstate the Effluent Rule's original deadlines. *See* Compl., *Clean Water Action, et al. v. Pruitt*, No. 17-817 (D.D.C. May 3, 2017), ECF No. 1. On June 13, 2017, plaintiffs filed a motion for summary judgment seeking an order vacating the Indefinite Stay. Pls.' Mot. Summ. J., *Clean Water Action, et al. v. Pruitt*, No. 17-817 (D.D.C. June 14, 2017), ECF. No. 20.

On June 6, 2017, EPA proposed a second, overlapping indefinite postponement of the compliance deadlines, this time through notice-and-comment rulemaking. 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). Comments on the second stay are due on July 6. *Id.* In the proposal, EPA explained that under section 705 of the APA, the first Indefinite Stay was authorized only pending judicial review of the Effluent Rule in the Fifth Circuit and that a second stay was necessary to prevent the Effluent Rule from taking effect "in the event" that the Fifth Circuit litigation ends while EPA is still reconsidering the Effluent Rule. *Id.* at 26,018. EPA did not cite any statutory authority for the second stay and again failed to mention the forgone benefits of the Effluent Rule. *See id.* EPA proposed that the second stay was justified on the ground that facilities would have to incur "imminent planning and capital expenditures" during the time for reconsideration, if the deadlines were not postponed. *Id.* EPA did not provide any information about how imminent or extensive those expenditures would be. *Id.*

SUMMARY OF ARGUMENT

Under the APA, EPA was required to allow the public to comment on the Indefinite Stay, take the public's views into account, and provide the public with a reasoned explanation for postponing the Effluent Rule's deadlines. But EPA failed

to seek public comment on the Indefinite Stay. And EPA failed to provide an adequate explanation for its decision in two important respects.

First, EPA failed to examine the costs of the Indefinite Stay. Costs can come in the form of compliance costs that industry must pay or in the form of forgone health and welfare benefits, which society must pay. Either way, EPA must acknowledge, calculate, and examine them. But here, EPA failed to even acknowledge the costs of forgoing the Effluent Rule's benefits.

Second, EPA failed to provide an adequate explanation for imposing those costs. As the basis for the Indefinite Stay, EPA cited the "capital expenditures" that facilities would have had to incur under the Effluent Rule while EPA was reconsidering the rule. But EPA failed to explain why saving facilities from making those "capital expenditures" was justified in light of the societal costs of the Indefinite Stay. EPA has already calculated the benefits of the Effluent Rule and could easily tally the societal costs, but EPA ignored the issue completely. In addition, EPA failed to demonstrate that its action was permissible under the Clean Water Act. As a result, the Indefinite Stay must be vacated.

ARGUMENT

THE INDEFINITE STAY VIOLATED THE ADMINISTRATIVE PROCEDURE ACT AND SHOULD BE VACATED

Under the APA, agencies must provide "interested persons an opportunity to participate in the rule making through submission of written data, views, or

arguments." 5 U.S.C. § 553(c). The agency must also "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. ("State Farm")*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). EPA failed to comply with these requirements.

A. EPA's Indefinite Stay Violated the APA's Notice and Comment Requirements

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 is an action that is subject to the APA's notice-and-comment requirements. *Nat. Resources Defense Council, Inc. v. EPA ("NRDC")*, 683 F.2d 752, 762 (3d Cir. 1982). This rule applies to a decision to postpone compliance dates as well. *See Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983). 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. *NRDC*, 683 F.2d at 763; *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 27 (D.D.C. 2012).

As the Secretary of Labor recently acknowledged, the requirement that agencies seek public comment on delays "is not red tape." Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, Wall Street Journal

(May 22, 2017). That requirement exists so "that agency heads do not act on whims, but rather only after considering the views of all Americans." *Id.*

Here, EPA postponed the Effluent Rule's deadlines "pending judicial review," and promised to seek an abeyance to put off judicial review. 82 Fed. Reg. at 19,005. EPA did not set new deadlines. *Id.* The Effluent Rule had been finalized after years of study and public comment. 80 Fed. Reg. at 67,841, 67,844. But in putting off the rule's deadlines, EPA failed to provide the public with notice of the decision or seek public comment on it. *See NRDC*, 683 F.2d at 760 (reversing a final agency rule taken without notice and comment). Had EPA sought public comment on the delay, it is possible that the comments would have demonstrated to EPA that "the regulated community and the public would be best served" by adhering to the existing deadlines. *Id.* at 766 (internal quotation marks omitted). Because the Indefinite Stay materially altered the deadlines in the Effluent Rule without notice and comment, effectively revoking them, the Court must vacate the Indefinite Stay and reinstate the original deadlines. *Id.* at 766; *see also* Pls.' Mem. at 34, 39.[8]

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[8] The fact that EPA is now seeking public comment on a second overlapping stay, *see* 82 Fed. Reg. at 26,017, will not cure EPA's failure to seek public comment on whether a stay was appropriate "in the first place." *NRDC*, 683 F.2d at 768. If EPA were allowed to cure the failure to seek public comment in that way, EPA could substitute the "procedures in connection with the further postponement" for the procedures required for "an initial postponement" and "circumvent the APA," something that the law does not allow. *Id. See also Union of Concerned Scientists v.*

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

Even if EPA had complied with the notice-and-comment requirement, the Indefinite Stay would still be arbitrary and capricious because EPA cannot change the compliance dates of the Effluent Rule without providing a "reasoned explanation" for the change. As an initial matter, there can be no dispute that the suspension is an agency action that is subject to review under the arbitrary and capricious standard in the APA. *See Sierra Club*, 833 F. Supp. 2d at 18; *see also* 5 U.S.C. § 706(2). 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." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

EPA's explanation failed to meet this standard. EPA failed to acknowledge that the Indefinite Stay would impose costs, in the form of the forgone benefits of the Effluent Rule. In addition, EPA failed to explain why those costs were justified or whether the stay was authorized under the Clean Water Act.[9]

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).

[9] In addition, as plaintiffs demonstrated in their motion for summary judgment, the Indefinite Stay is invalid because (1) EPA cannot change the

1. EPA failed to examine the costs of the Indefinite Stay

An important category of data that an agency must examine is the costs of the new rulemaking. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasizing that courts should pay attention to the "disadvantages of agency decisions"); Executive Order No. 12,866 §(1)(b)(6), 58 Fed. Reg. 51,735 (Sept. 30, 1993) ("Executive Order 12,866") (instructing agencies to consider the costs of a rule in order to make "a reasoned determination that the benefits of the intended regulation justify its costs.").[10] 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." Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 Admin. L. Rev. 1237, 1247 (2002).[11] Indeed, the Clean Water Act

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effectiveness date or compliance dates in the Effluent Rule *after* the effectiveness date of the rule has passed, and (2) EPA cannot suspend those dates without addressing the four-part injunction test. *See* Pls.' Mem. at 19, 28.

[10] Executive Order 12,866 "remains the primary governing [Executive Order] regarding regulatory planning and review" under the current administration. Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation ("Guidance on Executive Order 13,771").

[11] *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.").

expressly requires EPA to consider costs when issuing standards like the Effluent Rule. 33 U.S.C. § 1314(b)(2)(B).

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. *Pub. Citizen,* 733 F.2d at 98 (internal quotation marks omitted). And under that standard, in order to explain the change, the agency should rationally address the costs of the change. *See, e.g.*, *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); *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."); Executive Order No. 12,866 §(1)(b)(6).

One category of costs imposed by a new rule suspending an existing regulation is the forgone benefits of that existing regulation. *See Sierra Club*, 833 F. Supp. 2d at 36 (noting the "significant deleterious effects on the environment" that a delay can cause); *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). An agency is as obligated to consider forgone benefits as it is to consider any other form of cost. *See e.g., State of N.Y. v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to

explain how economic benefits would justify foregoing the promised air benefits); Office of Mgmt. & Budget, OMB Circular A-4 at 19 (2003) ("Circular A-4") (instructing agencies to monetize "foregone benefits" when calculating the costs and benefits of the alternatives under consideration).[12]

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." *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). 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. Executive Order 12,866 § 6(a)(3)(C).

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

[12] The current administration has instructed agencies to follow Circular A-4, originally issued under President George W. Bush. *See* Guidance on Executive Order 13,771 at 11, *supra*.

Indefinite 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 cardiovascular disease, and decreased damages to ecosystems and surface water quality, as well as many other important unmonetized benefits. *See* 80 Fed. Reg. at 67,873-75, 67,877-78; Pls.' Mem. at 6-7. Thus, the cost of suspending the Effluent Rule is $451 million to $566 million per year in the form of increased cancer risks, lowered childhood IQs, greater risks of cardiovascular disease, and damages to ecosystems and surface water quality, plus many other important unmonetized costs.

Instead of addressing the forgone benefits of the Effluent Rule, EPA claimed that the Indefinite Stay simply "preserve[s] the regulatory status quo." 82 Fed. Reg. at 19,005. 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. 80 Fed. Reg. at 67,844. Facilities have spent that time preparing to implement the Effluent Rule, raising capital, planning and designing systems, procuring equipment, and constructing and testing systems. *Id.* at 67,854. 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 Indefinite Stay. Circular A-4 at 15. 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. EPA, *Guidelines for Preparing Economic Analyses* ("*Guidelines*") at 5-3, 5-13 (2010). Indeed, when issuing the Effluent Rule itself, EPA used a baseline that reflected the impacts from "other relevant environmental regulations." 80 Fed. Reg. at 67,855.

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. *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). Here, the baseline for the Indefinite Stay would include the benefits from the Effluent Rule and, when calculating the costs of the Indefinite Stay, a loss of those benefits would need to be considered.

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. *Guidelines* at 5-3. 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. *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).

It is only rational to calculate the baseline in the same manner when repealing or suspending deadlines.[13] 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

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[13] *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).

suspend a regulation. The Indefinite Stay should be vacated as arbitrary and capricious because EPA failed to "examine the relevant data" about the Effluent Rule's forgone benefits. *State Farm*, 463 U.S. at 43.

2. EPA failed to provide a reasoned justification for imposing the costs of the Indefinite Stay

In addition to examining "the relevant data" in the form of the societal costs of the Indefinite Stay, EPA is required to "articulate a satisfactory explanation" for imposing those costs. *State Farm*, 463 U.S. at 43. EPA must also explain why its action is "permissible under the statute." *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009); *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). Here, EPA cited the "capital expenditures that facilities" would need to undertake "while the litigation is pending and the reconsideration is underway" as the basis of the Indefinite Stay. 80 Fed. Reg. at 19,005. But that explanation fails to satisfy the standard for two reasons.

First, EPA failed to explain why or whether saving facilities from making those "capital expenditures" was justified in light of the costs that the Indefinite Stay would impose, in the form of the forgone benefits of the Effluent Rule. Given that EPA claimed that "capital expenditures" justified the suspension, EPA should have explained when those expenditures would be incurred, their magnitude, and whether

they were equal to or greater than the amount of forgone benefits from the Effluent Rule. *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").

EPA calculated the benefits of the Effluent Rule and thus could calculate the foregone benefits in the Indefinite Stay. *See* Benefit and Cost Analysis, chap. 11. 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. *See Davis*, 108 F.3d at 1458 (discussing "substantial" emissions that would be caused by an eighteen-month delay). Given EPA's previous finding that many plants would incur "no cost at all," 80 Fed. Reg. at 67,887, it may be unlikely that EPA could support such a judgment, but the point is that EPA completely failed to take even this minimal (but important) step.

Second, in addition to explaining whether and why "capital expenditures" avoided by the Indefinite Stay justified forgoing the benefits of the Effluent Rule, EPA was also required to explain why a stay is "permissible" under the Clean Water Act. *Fox Television Stations, Inc.*, 556 U.S. at 515. Instead of providing any

explanation, EPA stated that it was beginning only a "review" of petitioners' objections to the Effluent Rule. 82 Fed. Reg. at 19,005. 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. *Id.*

That explanation was insufficient. 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. 80 Fed. Reg. at 67,844. EPA's desire to "review" "new data" on the performance of technology that plants may install, *see* 82 Fed. Reg. at 19,005, 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" supports a different outcome. *See Fox*, 556 U.S. at 515. EPA must provide a justification for suspending the compliance deadlines "before engaging in a search for further evidence." *State Farm*, 463 U.S. at 51; *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). And EPA needs to provide "a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515. "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." *Public Citizen*, 733 F.2d at 102; *see also* Pls.' Mem. at 19-20 (requiring agency to justify a stay under the four-part test for an injunction).

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." *Nat'l Crushed Stone Ass'n*, 449 U.S. at 74; *see also* 33 U.S.C. § 1311(b)(2). The only limit on that requirement is that the standards must be "technologically and economically achievable." 33 U.S.C. § 1311(b)(2). Here EPA previously found that the Effluent Rule should be finalized because the required expenditures were economically achievable. 80 Fed. Reg. at 67,887; *see also id.* at 67,865; Stanton Decl. ¶¶ 23-26. As a result of those findings, EPA had a statutory duty to issue new standards. *See* 33 U.S.C. § 1314(b). 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. *See Sierra Club*, 833 F. Supp. 2d at 36. The agency's failure to adequately explain its authority to issue the Indefinite Stay here renders the stay arbitrary and capricious.

CONCLUSION

This Court should grant plaintiffs' motion for summary judgment, vacate the Indefinite Stay, and reinstate the original compliance dates in the Effluent Rule.

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Respectfully submitted,

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