UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, MARYLAND, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON; COMMONWEALTH OF MASSACHUSETTS; and the DISTRICT OF COLUMBIA, *Plaintiffs*, v. E. SCOTT PRUITT, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; RYAN A. FISHER, as Acting Assistant Secretary of the Army for Civil Works; and UNITED STATES ARMY CORPS OF ENGINEERS, *Defendants*.	Case No. 18-cv-1030 (JPO)
NATURAL RESOURCES DEFENSE COUNCIL, INC. and NATIONAL WILDLIFE FEDERATION, *Plaintiffs*, v. ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants*.	Case No. 18-cv-1048 (JPO)

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (cont.)

Cases (cont.) **Page(s)**

Statutes

Regulations

TABLE OF AUTHORITIES (cont.)

Regulations (cont.) **Page(s)**

Other Authorities

TABLE OF AUTHORITIES (cont.)

Other Authorities (cont.) **Page(s)**

TABLE OF AUTHORITIES (cont.)

Other Authorities (cont.) **Page(s)**

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] submits this brief as *amicus curiae* in support of Plaintiffs' motions for summary judgment seeking vacatur of the Army Corps of Engineers ("Corps") and Environmental Protection Agency's ("EPA") (together "agencies") rule inserting an "applicability date," into the "Clean Water Rule: Definition of 'Waters of the United States'" ("2015 Clean Water Rule"), 80 Fed. Reg. 37,054 (June 29, 2015), which suspends the effectiveness of the 2015 Clean Water Rule for two years. *See Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule,* 83 Fed. Reg. 5200 (Feb. 6, 2018) ("Suspension Rule").[2]

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 appropriate use of cost-benefit analysis in the promulgation of federal regulations. Policy Integrity consists of a team of legal and economic experts, trained 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 eighty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational

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

[2] Under Federal Rule of Appellate Procedure 29(a)(4)(E), Policy Integrity states that 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.

regulatory decisions. And our economic fellow, Dr. Jeffrey Shrader, holds a Ph.D. in economics and has extensive experience in analyzing the effects of environmental policies. Particularly relevant to this case, Dr. Shrader has submitted comments on the proposed repeal of the 2015 Clean Water Rule,[3] as well as comments on the proposal to issue the Suspension Rule.[4] Further, Dr. Shrader co-authored a report on the proper valuation of economic harms that would result from a repeal of the 2015 Clean Water Rule.[5]

In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed several *amicus* briefs and comment letters regarding other agency actions suspending duly promulgated regulations, which are similar to the Suspension Rule at issue here. In those cases, Policy Integrity has focused on agency decisions that have ignored the harms, in the form of foregone benefits, of the actions. *See, e.g.*, Br. for Inst. for Policy Integrity as *Amicus Curiae, Nat. Res. Def. Council v. Nat'l Highway Transp. Auth.*, No. 17-2780 (2d Cir. Mar. 12, 2018) (National Highway Transportation Authority ("NHTSA") delay of penalties for violation of fuel economy standards); Br. for Inst. for Policy Integrity as *Amicus Curiae, Air Alliance Houston v. Envtl. Prot. Agency,* No. 17-1155 (D.C. Cir. Nov. 1, 2017) (EPA delay of the Chemical Disaster Rule); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Open Cmtys. Alliance v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017) (Department of Housing and Urban Development's ("HUD") delay of a rule aimed at improving housing for low-income families); Br. for Inst. for Policy Integrity as *Amicus Curiae,*

[3] Policy Integrity, *Comments on Proposed Recodification of the Definition of "waters of the United States"* (Sep. 27, 2017). Website urls for these documents and any other cited documents, that are available online, are provided in the table of authorities.

[4] Policy Integrity, *Comments on the Definition of "Waters of the United States" - Addition of Applicability Date to 2015 Clean Water Rule* (Dec. 13, 2017).

[5] Jason Schwartz & Jeffrey Shrader, *Muddying the Waters: How the Trump administration is obscuring the value of wetlands protection from the Clean Water Rule* (2017).

California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (Bureau of Land Management's ("BLM") delay of a rule preventing leaks of natural gas on public lands).

In several recent decisions, courts have generally agreed that agencies have caused harm by suspending regulations. *See California v. Bureau of Land Management*, 286 F. Supp. 3d 1054, 1069 (N.D. Cal. 2018) (finding rule delay arbitrary and capricious where agency "either deeply underestimate[d] the lost air quality and climate benefits, or overestimate[d] the reduction in compliance costs" caused by its action); *Open Cmtys. Alliance*, 286 F. Supp. 3d at 174 (finding risk of irreparable harm because the delay would deprive plaintiffs of the benefits of HUD's original rule); *California*, 277 F. Supp. 3d at 1123 (ruling that BLM's "failure to consider the benefits of compliance with the provisions that were postponed, as evidenced by the face of the Postponement Notice," rendered its action arbitrary and capricious); *see also* Order, *Natural Res. Def. Council v. NHTSA*, No. 17-2780 (2d Cir. Apr. 23, 2018) (vacating rule delaying emissions penalties, with opinion to follow).

Like the agencies in those cases, EPA and the Corps have similarly ignored the harms of their actions in issuing the Suspension Rule. Policy Integrity's expertise in cost-benefit analysis and experience with assessing the value of the 2015 Clean Water Rule as well as with cases challenging agency suspensions, all give Policy Integrity a unique perspective from which to evaluate Plaintiffs' claims that the Suspension Rule is arbitrary and capricious.

SUMMARY OF ARGUMENT

The agencies' assessment of both the costs and benefits of the Suspension Rule was erroneous. When agencies suspend regulations, they cause harm, in the form of forgone benefits that would have been obtained had the suspension not been issued. The 2015 Clean Water Rule was designed to provide significant benefits each year and suspending the rule now causes society

to lose those benefits. Long-standing principles of rational decisionmaking require agencies to address and explain the imposition of such harm. But rather than address the harm of the Suspension Rule, the agencies claimed that the Suspension Rule generates no lost benefits because the 2015 Clean Water Rule had been stayed by the U.S. Court of Appeals for the Sixth Circuit and the Suspension Rule therefore simply continues that "legal status quo." 83 Fed. Reg. at 5200. But the Sixth Circuit stay was set to expire days after the promulgation of the Suspension Rule, as the agencies acknowledged. *Id.* at 5202. Absent the Suspension Rule, the 2015 Clean Water Rule would have come back into effect. Because the Suspension Rule kept the 2015 Clean Water Rule from coming back into effect it changed the legal status quo. It did not continue the status quo.

The fact that a separate thirteen-state stay issued by a district court remains in place does not change this analysis. The agencies had an obligation to explain the Suspension Rule's impact on the benefits of the 2015 Clean Water Rule, regardless of the temporary impact of a court stay. In any event, if the agencies thought it was appropriate to take that thirteen-state stay into account, doing so would not have relieved the agencies of the duty to analyze the impact of the Suspension Rule in the remaining thirty-seven states where the Suspension Rule indisputably canceled the benefits of the 2015 Clean Water Rule.

The agencies' claim that the Suspension Rule will provide benefits in the form of reduced uncertainty is also flawed. For one, the claim is contradicted by the agencies' separate assertion that the Suspension Rule will have no effect because it continues the "legal status quo." *Id.* at 5200. Both of those statements cannot be true. Second, the regulatory regime that the agencies have restored through the Suspension Rule is one that was marked by chaotic and unclear jurisdictional boundaries. The 2015 Clean Water Rule had clarified that chaotic environment. Suspending the 2015 Clean Water Rule in turn will only bring back a regime of uncertainty. And third, by ignoring

the procedural rules that apply to agency rulemaking, the agencies have turned a stable regulatory regime into one that is changeable, thus contributing to, rather than reducing, uncertainty.

ARGUMENT

The Suspension Rule is subject to review under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2); *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 765-66 (4th Cir. 2012) (holding that a suspension is a rulemaking); *see also* Mem. of Law in Supp. of Pl. Mot. for Summ. J. at 10, ECF No. 55 ("NRDC Br."); States Mem. of Law in Supp. of their Mot. for Summ. J. at 3, ECF No. 64-1 ("States Br."). Under the arbitrary and capricious standard, an agency must "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); *see also Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (applying *State Farm* to a suspension). In addition, when an agency reverses course through a suspension or repeal, it must provide a "reasoned explanation" for dismissing the "facts and circumstances that underlay" the original rule. *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). In this case, the agencies have not met this burden.

I. The Agencies' Claim that the Suspension Rule Imposes "No Economic Costs" Is Arbitrary and Capricious

The Suspension Rule stayed the protections of the 2015 Clean Water Rule, causing a cost in the form of forgone benefits. Those forgone benefits are an important "aspect of the problem," which the agencies must consider and address. *State Farm*, 463 U.S. at 43; *accord California*, 277

F. Supp. 3d at 1122 (BLM's failure to consider forgone benefits was arbitrary and capricious).[6] The agencies' refusal to consider those forgone benefits rested on an inaccurate description of the status quo and was "thus unreasonable." *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017).

A. The Suspension Rule Has Caused Forgone Benefits

When an agency cancels or suspends a regulation, it removes the protections and benefits that the regulation would have provided to society—causing a cost in the form of forgone benefits. As Circular A-4 (a guide for agencies on regulatory cost-benefit analysis issued by the Office of Management and Budget under President George W. Bush)[7] recognizes, the timing of a rule's compliance dates may "have an important effect on its net benefits." Office of Mgmt. & Budget, OMB Circular A-4 at 7 (2003) ("Circular A-4"). For example, a delay of an emissions limit can cause "significant deleterious effects on the environment." *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 36 (D. D.C. 2012) (vacating agency stay for failure to comply with APA procedures); *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 during the time it took EPA to reissue the rule). As multiple agencies, including EPA and the Department of Defense, the Corps' parent agency, have recognized in other recent rulemakings, suspending a rule causes

[6] *See also Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions."); *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").

[7] The Trump administration has instructed agencies to follow Circular A-4 when setting baselines. *See* Office of Mgmt. & Budget, Guidance Implementing Executive Order 13771 at pt. V (April 5, 2017). See the table of authorities for the website urls for these documents and many others.

forgone benefits by postponing "what would have been the benefits of implementing" the original rule during the period of the suspension. *See* Federal Policy for the Protection of Human Subjects: Delay, 83 Fed. Reg. 2885, 2889 (Jan. 22, 2018).[8]

Here, the suspension of the 2015 Clean Water Rule will result in substantial forgone net benefits, in the form of increased wetland loss and other harms. As plaintiffs explain, the 2015 Clean Water Rule protects more wetlands than would be protected without the rule. NRDC Br. at 13, 23. And in giving up those protections, society will face forgone benefits including lost wetland services such as water quality maintenance, flood control, hunting and recreational activities.[9] The costs of those protections were justified by the greater benefits of protecting more wetlands, under any of the scenarios studied by the agencies. 80 Fed. Reg. at 37,101 (reporting that in both of two economic scenarios analyzed, the estimated annual benefits exceed the estimated annual costs).

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[8] *See also* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,056-57 (Dec. 8, 2017) (BLM acknowledging that suspension of a rule meant to reduce natural-gas leaks at oil and gas facilities mining on public lands would cause forgone benefits); Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494, 43,497-98 (Sept. 18, 2017) (EPA estimating the forgone annual benefits of suspending an emissions rule); Proposed Extension of Applicability Dates, Definition of the Term "Fiduciary," 82 Fed. Reg. 12,319, 12,320 (Mar. 2, 2017) (Department of Labor estimating that the proposed two-month delay would lead to investor losses of $147 million in the first year and $890 million over ten years). The citations in this section to recent regulatory suspensions do not constitute an endorsement of any aspect of the impact analyses or justifications for the suspensions beyond the decision to analyze forgone benefits compared to a regulatory baseline, but merely an acknowledgment that EPA's approach in this case is at odds with its own practice and the practices of other agencies, even during this Administration.

[9] *See* Clean Water Rule RIA at 44-45, 73-75 (describing the studies that the agencies relied on to place a monetary value on the benefits of protecting wetlands); *See also* Klaus Moeltner & Richard Woodward, *Meta-Functional Benefit Transfer for Wetland Valuation: Making the Most of Small Samples*, 42 Envtl. Res. Econ. 89, 95 (2009) (conducting a meta-analysis and describing the existence value of wetlands); Schwartz & Shrader, *Muddying the Waters*, *supra* n. 5; Policy Integrity, *Comments on the Proposed Recodification of the Definition of "waters of the United States,"* at 1–11 (2017).

For example, under one of the scenarios that the agencies studied, their analysis demonstrated that the 2015 Clean Water Rule yielded benefits of $339 million per year while only leading to $158 million in costs. *See* EPA & Army Corps, *Economic Analysis of the EPA-Army Clean Water Rule* at x-xi (2015) ("Clean Water Rule RIA").[10] The agencies have now caused those benefits to be lost for the next two years, until February 6, 2020. *See* 83 Fed. Reg. at 5201. Even if, as the agencies claim, the Suspension Rule will be in place for only a "relatively short period of time," the agencies are wrong to claim that it would only have a "limited" impact. EPA & Army Corps, *Memorandum on the Consideration of Potential Economic Impacts of the Addition of an Applicability Date to the 2017 Clean Water Rule* at 5 (2018) ("2018 Econ. Memo").[11] When factoring in avoided compliance costs, the loss of net benefits ranges from $32 million to $336 million per year. To be sure, the agencies plan to issue a rule replacing the 2015 Clean Water Rule by the end of the two-year period covered of the Suspension Rule, *see* 83 Fed. Reg. at 5206, but that repeal may not be successful, and, in any event, during the entire time of the suspension, costly losses of wetlands will continue to occur.

[10] The agencies conducted an analysis of the economic impacts of the Clean Water Rule under two scenarios with different assumptions regarding the application of the rule. Within each scenario the agencies calculated a high and low range of costs and benefits, varying the assumed discount rate used. Clean Water Rule RIA at ix. In all cases, the benefits outweighed the costs. The agencies determined that for scenario 1, annual costs ranged from $158 to $307 million and annual benefits ranged from $339 million to $350 million. *Id.* at 53-54. For scenario 2, annual costs ranged from $236 million to $465 million and annual benefits ranged from $555 million to $572 million. *Id.* at 54. All values are in 2014 dollars.

[11] The agencies prepared the 2018 Econ. Memo to explain their analysis of the economic impacts of Suspension Rule and made it available in the docket. *See* 83 Fed. Reg. at 5207.

B. The Agencies' Claim that the Impact of the Suspension Rule Should be Assessed as Though the 2015 Clean Water Rule Would Have Remained Stayed Is Arbitrary and Capricious

As acknowledged by the agencies, a preliminary step to identifying the economic impact of a regulatory action is to "clearly establish a baseline for the analysis." 2018 Econ. Memo (citing EPA, *Guidelines for Preparing Economic Analyses* (2010) ("EPA Guidelines"). The baseline is meant to be an accurate description of the world, absent the regulation at issue, which allows an agency to calculate the economic impacts of the regulation. *See* Circular A-4 at 18. Here, the agencies justify the claim that the Suspension Rule will not cause any costs by asserting that the "baseline" is the "legal status quo." 83 Fed. Reg. at 5202-03, 5207. But the agencies' description of the "legal status quo" was inaccurate.

1. The Agencies' Description of the "Legal Status Quo" Is Mistaken

The agencies were wrong to assert that the "legal status quo" included the Sixth Circuit stay of the 2015 Clean Water Rule. *See* 2018 Econ. Memo at 3-4. The status quo is "the last actual, peaceable uncontested status which preceded the pending controversy." *North Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). In this case, the last peaceable status was a world where the Sixth Circuit stay was about to be vacated. Two weeks before the agencies issued the Suspension Rule, the Supreme Court had held that the Sixth Circuit did not have jurisdiction to issue that stay and the stay was set to expire imminently. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). Indeed, in promulgating the Suspension Rule on January 30, 2018, the agencies acknowledged this fact, explaining that, as a result of the Supreme Court decision, the "Sixth Circuit case will be dismissed and the nationwide stay will expire." 2018 Econ. Memo at 4. On February 28, 2018, the Sixth Circuit vacated the nationwide stay. *In re U.S. Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018).

Rather than continue that status, the Suspension Rule "disrupt[ed] it," by reversing what should have been the effect of the Supreme Court's decision. *See California*, 277 F. Supp. 3d at 1120 (finding that agency's delay of a rule just five months after the effective date and "[a]fter years of developing the Rule and working with the public and industry stakeholders, . . . plainly did not 'maintain the status quo'"). EPA's own Guidelines indicate that agencies should include future regulations that are "imminent" or "reasonably anticipated with a high degree of certainty" in their baseline calculations. EPA Guidelines at 5-13. The expiration of the nationwide stay was "imminent" and "reasonably anticipated" following the Supreme Court's decision. *Id.* at 5-13. Indeed, it was certain. The Sixth Circuit had no jurisdiction to enter the stay because the Supreme Court had said so. *See National Ass'n of Mfrs.* 138 S. Ct. at 634.

In fact, in the Suspension Rule itself, the agencies contradicted their own description of the "legal status quo." In a separate claim in the Suspension Rule, the agencies asserted that the Rule will have "unquantifiable benefits" by providing "regulatory certainty." 83 Fed. Reg. at 5202; 2018 Econ. Memo at 4. But if the Suspension Rule merely continue the Sixth Circuit's stay, as the agencies claimed, 83 Fed. Reg. at 5200, then the Suspension Rule could not produce any "unquantifiable benefits," *id.* at 5202-01. Either the Suspension Rule *does something* to provide regulatory certainty, or it *does nothing* and maintains the status quo. It cannot do both. The agencies' reasoning is internally inconsistent and thus arbitrary and capricious. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that unexplained inconsistency is "a reason for holding an interpretation to be an arbitrary and capricious change"); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding the agency's action arbitrary and capricious due to the internal inconsistencies in the agency's reasoning).

2. The Existing Thirteen-State District Court Stay Does Not Excuse the Agency from Analyzing the Suspension Rule's Significant Nationwide Forgone Benefits

To justify the "baseline" analysis, the agencies also separately pointed to a thirteen-state temporary injunction that was granted by the U.S. District Court for the District of North Dakota in 2015. 2018 Econ. Memo at 4; see *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D. N.D 2015). But that court stay applies to only thirteen states and thus it cannot justify the agencies' complete failure to analyze the forgone benefits of the Suspension Rule. The agencies failed to even address this issue, rendering the rule arbitrary and capricious. *State Farm*, 463 U.S. at 43 (An agency rule is arbitrary and capricious where the agency fails to address an "important aspect" of the problem.).

Indeed, the record would have made it possible for the agencies to have estimated the economic impact of the Suspension Rule for the largest category of costs and benefits that was studied—the cost and benefits of wetlands mitigation—as compared to a baseline that included the temporary stay in thirteen states. In the agencies' economic analysis, the agencies relied on published economic studies of what amount of money people would be willing to pay in order to prevent wetlands from being destroyed. Clean Water Rule RIA at 44-45 (2015). Those studies demonstrate that people are willing to pay to prevent wetland destruction both in their state and in their region. The agencies thus broke down the wetlands mitigation information into regional and state-by-state estimates to create a blended estimate of the benefits of wetlands mitigation in the 2015 Clean Water Rule. *Compare* Clean Water Rule RIA at 52 (providing regional summaries) *with* Supporting Documentation – Analysis of Jurisdictional Determinations for Economic Analysis and Rule at 52 (pdf pages) (2015) ("Supporting Documentation") (providing regional summaries and state-by-state data); *see also* Clean Water Rule RIA at 49-50 (describing methodology of state-by-state and regional analysis). Using this data, the agencies could have

calculated an estimate showing the forgone wetlands mitigation benefits for the thirty-seven states, where absent the Suspension Rule, the 2015 Clean Water Rule would have remained in effect. The agencies could have similarly provided proportional estimates for the other categories of forgone benefits in the 2015 Clean Water Rule. *See, e.g.*, Clean Water Rule RIA at 48 (describing agency's approach to estimating state-by-state and regional benefits of wetland mitigation). Failure to take even these minimal steps leaves an important feature of the Suspension Rule unaddressed.

Moreover, the outcome of the North Dakota litigation is far from certain and the 2015 Clean Water Rule remains on the books despite the thirteen-state court stay. EPA guidance clearly states that the baseline for analysis includes "other regulations promulgated by EPA"—which includes the 2015 Clean Water Rule. EPA Guidelines at 5-1. In providing this instruction, the Guidelines make no exception for a rule that is subject to a court stay. Stays are, by definition, not permanent—they are meant to put a pause on regulation while a court resolves a legal challenge, and the outcome of that challenge is never guaranteed. If the stay is lifted, the 2015 Clean Water Rule will go back into effect. The agencies' finding that the Suspension Rule will cause "no costs" necessarily rests on an assumption that the 2015 Clean Water Rule will not go back into effect in those thirteen states during the time of the Suspension Rule. But the agencies never made any finding along those lines. Indeed, in their separate proposal to repeal the 2015 Clean Water Rule, the agencies themselves addressed the costs and benefits of the Clean Water Rule, despite the existence of the Sixth Circuit stay—essentially acknowledging that there was a possibility that the rule could come back into effect. EPA & Army Corps, *Economic Analysis for the Proposed*

Definition of "Waters of the United States" – Recodification of Pre-Existing Rules at 8-11 (2017).[12]

In any event, even assuming that the district court stay caused "uncertainty" in "whether the 2015 Rule would be in effect," 2018 Econ. Memo at 5, agency best practices indicate that the correct approach for addressing the uncertainty would have been to "consider measuring benefits and costs against alternative baselines"—where one alternative would include the thirteen-state stay and the other alternative would assume that the 2015 Clean Water Rule would go back into effect. Circular A-4 at 15; *see also* EPA Guidelines at 5-2 ("[I]f the impact of other rules currently under consideration fundamentally affects the economic analysis of the rule being analyzed, then multiple scenarios, with and without these rules in the baseline, may be necessary."). Yet, the agency failed to provide any analysis of a world where the 2015 Clean Water Rule would go back into effect.

In sum, the agencies' actions in ignoring the impact of the Suspension Rule on the benefits that would have accrued under the 2015 Clean Water Rule represented a sharp break from standard agency practice and violates longstanding principles of reasoned decisionmaking. Here, without the Suspension Rule, the 2015 Clean Water Rule would be in effect in thirty-seven states. The Suspension Rule did not maintain the "legal status quo"; it changed the status of the rule in those thirty-seven states. *See California*, 277 F. Supp. 3d 1120. Even for the remaining thirteen states covered by the North Dakota stay, the agency faces the possibility that the court stay will be lifted. The claim that the Suspension Rule will have no economic costs was "inaccurate and thus unreasonable." *Clean Air Council*, 862 F.3d at 10; *see also Nat. Res. Def. Council v. U.S. Forest*

[12] The agencies' analysis of the forgone benefits of the proposed repeal had separate problems. *See* Muddying the Waters, *supra* n. 5.

Serv., 421 F.3d 797, 811-12 (9th Cir. 2005) (faulting the Forest Service's reliance on "[i]naccurate economic information").

C. The Agencies' Remaining Justifications for Ignoring the Costs of the Suspension Rule Are Meritless

The agencies assert that they chose the "legal status quo" as the baseline because "some stakeholders raised concerns about the economic analysis" underlying the 2015 Clean Water Rule. 2018 Econ. Memo at 5. But those "concerns" do not justify a decision to ignore the forgone benefits of the Suspension Rule. The agencies are required to "supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. As part of that, the agencies must provide an explanation for "disregarding facts and circumstances that underlay" the 2015 Clean Water Rule. *Fox Television Stations, Inc.*, 556 U.S. at 516. The fact that "some" unnamed stakeholders have expressed unspecified "concerns" was hardly a reason to disregard the analysis regarding the 2015 Clean Water Rule's benefits. *See Pub. Citizen*, 733 F.2d at 102 (explaining that justifying a suspension on the ground that a better policy might be put in place in the future is "as silly as it sounds").

The agencies also asserted that the "legal status quo" baseline allows it to avoid the "possibility of double-counting" the avoided costs of the Suspension Rule and the avoided costs of a potential repeal. 2018 Econ. Memo at 5. But there is no need to disregard either the forgone benefits or avoided costs of the Suspension Rule in order to ensure that the agency not double-count those aspects on any future repeal. The proposed repeal and the Suspension Rule forgo costs and benefits during different periods of time: the Suspension Rule for the two year-duration of the suspension and the proposed repeal for the time after any repeal is finalized. If the repeal were finalized before February 2020, the agency could address the impact of the ongoing suspension on any costs and benefits of repeal. And the 2015 Clean Water Rule contains yearly cost and benefit

estimates, which could be used to calculate either one of those categories of costs and benefits. *See* Clean Water Rule RIA at 53-54.

II. The Agencies' Reliance on Regulatory Certainty to Justify the Suspension Rule Is Irrational

A. The Agencies' Analysis of the "Benefits" of the Suspension Rule Was Lopsided and Arbitrary and Capricious

The agencies issued the Suspension Rule for the purpose of ensuring "regulatory certainty" and claimed that the improvements in regulatory certainty would lead to "unquantifiable benefits." 83 Fed. Reg. at 5202, 5207. But the agencies relied on those alleged benefits while simultaneously ignoring expected costs—in the form of forgone benefits. As explained above, if there are benefits in reduced uncertainty it can only be because the Suspension Rule changes the status quo—in other words, because the Suspension Rule changes the number of jurisdictions where the 2015 Clean Water Rule will be in effect without the Suspension Rule. And if the Suspension Rule changes the status quo, by keeping the 2015 Clean Water Rule from coming into effect, then it reduces the number of wetlands that would otherwise be protected under the Clean Water Act and causes forgone benefits. When an agency decides to rely on a cost-benefit analysis to support its rulemaking, "a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). Here, the agencies committed a serious error in tipping the scales towards the Suspension Rule, "by promoting the possible benefits while ignoring the[] costs." *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983); *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (An agency cannot "put a thumb on the scale" by ignoring costs in order to achieve a desired outcome.). The agencies' lopsided reasoning here was arbitrary and capricious.

B. The Agencies Undermined the Regulatory Certainty that the 2015 Clean Water Rule Provided

In any event, the agencies' claim that the Suspension Rule promotes regulatory certainty, 83 Fed. Reg. at 5202, was without merit. The 2015 Clean Water Rule had helped resolve regulatory uncertainty, and the Suspension Rule will lead to *more* regulatory uncertainty in the application of the Clean Water Act, not less. The original purpose of the 2015 Clean Water Rule was to reduce widespread uncertainty about the reach of Clean Water Act jurisdiction. *See* 80 Fed. Reg. at 37,056, 37,085. Prior to the 2015 Clean Water Rule, two Supreme Court cases in 2001 and 2006 had caused significant uncertainty because they "unsettled prior clarity regarding the allowable extent of [Clean Water Act] jurisdiction." Clean Water Rule RIA at iv; *see also* 80 Fed. Reg. at 37,056 (describing the need to clarify and simplify the process of identifying waters protected under the Clean Water Act). In response to those decisions, the agencies issued guidance documents in an attempt to clarify the reach of the Clean Water Act, but these documents "did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations." 80 Fed. Reg. at 37,056. As a result, the agencies needed to make case-specific jurisdictional determinations, a "resource intensive process" that could "result in inconsistent interpretation of Clean Water Act jurisdiction and perpetuate ambiguity over where the CWA applies." *Id.*

The 2015 Clean Water Rule was designed to address this uncertainty and establish clear rules governing decisions about the reach of CWA jurisdiction. *Id.* at 37,055. The 2015 Clean Water Rule made "the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science" through "clearer definitions and increased use of bright-line boundaries." *Id.* Now that the Suspension Rule has been issued, the jurisdictional uncertainty that the 2015 Clean Water Rule would have mitigated

will return. And in reverting to the pre-2015 era of jurisdictional uncertainty, the agencies cannot claim to be improving regulatory certainty. *See also* States Br. at 19-20.

C. In Flouting Procedural Rules, the Agencies Have Generated Regulatory Uncertainty

In addition, the agencies themselves have contributed to a general atmosphere of regulatory uncertainty in disregarding the statutory and procedural rules that apply to agency decisionmaking. *See* NRDC Br. at 17 (explaining that the agency's disregard for rulemaking procedures has caused regulatory uncertainty). As summarized above and in plaintiffs' briefs, the agencies have disregarded several fundamental administrative procedures that govern agency decision-making. For example, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC*, 136 S. Ct. at 2125. But in ignoring the forgone benefits and the duty to explain why it is appropriate to return to the regulatory landscape in existence before the 2015 Clean Water Rule, the agencies have defied this rule. *See, e.g.*, States Br. at 18-19. In addition, as plaintiffs have demonstrated, during the notice and comment phase of the rulemaking, the agencies improperly barred the public from even addressing whether the agency should return to the pre-2015 Clean Water Rule regime during the period of the Suspension Rule. *See id.* 13-16.

Generally speaking, the procedures the agencies ignored here make changing course difficult and, in that way, help promote regulatory certainty. As the court explained in the North Dakota litigation over the Clean Water Rule, "though [the agencies] have inherent authority to reconsider past decisions," their capacity to issue final decisions based on that reconsideration is "constrained by the Administrative Procedure Act." *See* Order at 15, *North Dakota v. EPA*, No. 15-59 (D. N.D. Mar. 23, 2018) (citing Bethany Davis Noll & Denise Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 Energy L.J. 269,

273-84 (2017)), ECF No. 185. When industry and the public can count on agencies going through these steps before changing the regulatory landscape, investment and innovation flourish. *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 116 (2018) (explaining how the rules governing regulatory change make such change more difficult and thus promote regulatory certainty, innovation, and investment). But when industry sees an unpredictably changeable landscape, companies may decrease investment and shift away from that area. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112, 156-57 (2011) (explaining that erratic legal change carries its own costs). For example, in an annual survey of utility executives, executives listed regulatory uncertainty as the "single greatest challenge" to preparing for an inevitable market shift towards renewable energy.[13]

In disregarding the rules that govern agency decisionmaking, the agencies have contributed to an environment of regulatory uncertainty that risks reducing the very investments they seek to promote. *See* 2018 Econ. Memo at 4. Indeed, the agencies cite an article by Christian Engau and Volker Hoffman to support the claim that "changes" in the interpretation of the Clean Water Act will cause harmful regulatory uncertainty, and that the Suspension Rule will thus lead to "unquantified benefits" in the form of regulatory certainty. 2018 Econ. Memo at 4. But one of the authors' main recommendations for reducing regulatory uncertainty is to ensure that the policymaking process is transparent and to provide standard and structured procedures that companies can all use to influence the process. *See* Christian Engau & Volker H. Hoffmann, *Effects of regulatory uncertainty on corporate strategy—an analysis of firms' responses to uncertainty*

[13] David Roberts, *The Power Sector Craves Stability. Trump Has Brought it Chaos*, VOX (Mar. 9, 2018).

about post-Kyoto policy, 12 Envtl. Sci. Policy 766, 774 (2009). Violating the principles that apply to agency decision making, in the way that the agencies did here, does not serve that end.

CONCLUSION

For the foregoing reasons, the Court should grant the motions and vacate the Suspension Rule.

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Respectfully submitted,

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