Deregulation Run Amok

Trump-Era Regulatory Suspensions and the Rule of Law

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

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Bethany A. Davis Noll
Alec Dawson

Institute for Policy Integrity
New York University School of Law
Wilf Hall, 139 MacDougal Street
New York, New York 10012

Bethany A. Davis Noll is Litigation Director at the Institute for Policy Integrity at NYU School of Law. Alec Dawson is Forest Campaigner at the Environmental Investigation Agency, United Kingdom, and a former Research Assistant at the Institute for Policy Integrity at NYU School of Law.

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Abstract

When President Donald Trump entered office he promised to aggressively reduce regulatory costs as quickly as possible, without regard to the many benefits regulations provide.[1] For approximately the first year and a half of the administration, that effort was focused on suspending regulations across many agencies.[2] But those suspensions flouted public input requirements, ignored statutory mandates, and failed to fully and honestly address the impact of the suspensions on valuable regulatory benefits conferred by the suspended rules. The suspensions have deprived the public of protections ranging from improved fair student lending practices, to low income housing access, to air pollution cuts, to protections from chemical exposures, to access to energy efficient appliances, and more. Many of these suspensions have been brought to court and the administration's win rate is abysmal.[3] But obtaining judicial relief against a suspension requires an extraordinary amount of resources. Agencies have been able to evade judicial review in a number of cases, while those without the resources to mount complex litigation are deprived of their rights. These actions have undermined the rule of law and caused the public to lose valuable protections. Further, regulatory uncertainty caused by the suspensions imposes costs of its own by causing companies to scramble to comply with changing requirements and potentially to forgo valuable investments.

Now that agencies are moving into a new era focused on repealing rules,[4] the legality of the suspensions remains relevant. The legal principles that apply to suspensions will continue to apply to the repeals, and the suspensions themselves affect repeal efforts. As a result, this Report seeks to provide a survey of the legality of Trump Administration suspensions.[5]

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Introduction

The Trump administration has targeted for repeal many regulations issued under President Obama.[6] But repealing rules takes time and work, not least because the Administrative Procedure Act (APA) requires agencies to follow notice-and-comment procedures to issue the repeals.[7] Thus, during the first year and a half of the Trump administration, the deregulatory push sought to suspend regulations without notice and comment.[8] This method quickly to relieved industry of the obligation of complying with those President Obama-era rules and avoided the burden of showing how the rule was reasonable in light of the record prepared to support the original rule or in light of the governing statute.[9] While the Environmental Protection Agency (EPA)[10] has been the agency most frequently employing these suspension tactics, many other agencies have used them as well, including the Food and Drug Administration,[11] the Department of Labor,[12] the Department of Transportation,[13] the Department of Health and Human Services,[14] the Department of Energy,[15] the Department of the Interior,[16] the Department of Homeland Security,[17] the Department of Education,[18] the Department of Agriculture,[19] the Federal Aviation Administration,[20] and the Department of Housing and Urban Development.[21]

But, when done legally, even suspensions take time and work. Under the APA, it is well-settled that in order to issue suspensions, agencies must go through notice and comment,[22] show that they have statutory authority for the suspension,[23] and provide a reasoned explanation to suspend rules.[24] Under the Trump administration, agencies have nonetheless flouted these rules in numerous circumstances.[25] Agencies have issued suspensions without seeking public input, failed to show how the suspensions comport with the agencies' statutory mandate, and ignored the societal benefits of the rules being suspended.

Several of these suspension efforts have already been vacated or enjoined by courts.[26] The scale of losses has demonstrated the resilience of the APA, even in an environment where agency rule-making has become overtly politicized.[27] But bringing court challenges to agency action is a resource- and time-intensive project. And therefore some of the suspensions were not challenged. Even where challenges were brought, several agencies finalized new suspensions or repeals while litigation was pending over the first suspension.[28] When that happened, the original suspension litigation could be dismissed as moot.[29] One court found that a suspension of a rule was illegal, but then refused to vacate the suspension because a repeal was imminent.[30] As one author has noted, because of the short-term quality of suspensions and the fact that the administration can either replace the rule or withdraw the delay, legal disputes over suspensions often end up unresolved.[31]

Using this strategy has allowed agencies to benefit from their illegal actions. The agencies have been able to effectively repeal rules through suspensions without complying with the governing statute and without addressing the record underlying the original rule. And by mooting out cases, agencies may avoid any declaration that a suspension was illegal, which prevents the creation of precedent to be used against agencies in future suspensions. Agencies can then use the suspension to put off the compliance deadlines and buy time to issue a final repeal rule. Many of the suspended rules went through exhaustive processes to show that the rules promised net benefits to society. Repealing them will thus cause net costs in the form of forgone benefits. But suspensions can tilt the cost/benefit analysis of a repeal to be more favorable to the agency by changing the baseline for analysis. For example, rather than starting from a world where companies have already made investments for compliance, suspensions allow companies to delay investing in compliance measures for duly promulgated rules. Without the suspension, a rule repeal that comes after a compliance deadline would not provide

the "benefits" of avoiding those industry compliance costs. Instead, those compliance investments would be sunk costs. But, by putting off the compliance deadlines, an agency can claim that it is saving the full cost of complying with the rule by repealing it. Similarly, an agency can take advantage of any uncertainty regarding how a rule will be implemented to justify the repeal of the rule, if the rule has not yet been implemented.[32] Overall, the myopic focus on cutting regulatory costs through suspensions has denied the public important regulatory benefits.[33]

In the process of achieving these ends, suspensions also risk causing regulatory uncertainty both by (1) suspending legal requirements that were expected to come into force[34] and (2) altering expectations about the rules that will apply to future regulation.[35] The rulemaking process is meant to provide "notice and predictability."[36] Fostering an atmosphere of regulatory uncertainty instead upends those goals, with implications for both industry and regulatory agencies. Companies that invested in compliance lose those investments.[37] Other companies may put off investment decisions until the uncertainty is resolved.[38] This uncertain regulatory environment may lead companies to put off investment decisions until the last minute, causing potential losses. In addition, when agencies fail to follow administrative procedures, companies may be faced with changes that come without warning, due to agencies suddenly deciding to reverse themselves (perhaps after a lawsuit), or court decisions reversing agency decisions. At the same time, regulators lose credibility, making it potentially more difficult to regulate in the future.[39] Any of these situations could affect a company's bottom line and potentially cause short-term job losses. Counterintuitively, this could damage a deregulatory agenda as well as a regulatory one.[40] To ensure that deregulatory rules have longevity, agencies must encourage robust participation and follow the law.

This Report surveys the notice-and-comment, statutory, and reasoned-decision-making requirements that apply to suspensions. In each of these categories, agencies under President Trump have ignored these basic requirements in the pursuit of cuts. For each topic, this Report also describes how these agency suspension rules are being analyzed by the courts. The Report then discusses how certain strategies have enabled the administration to sidestep basic requirements, exposing the weaknesses in an administrative-law system that relies on court enforcement, which can be exploited for political gain.

I. The Trump Administration's Disregard of the APA's Notice-and-Comment Requirements

Prior to the Trump administration, courts had already made clear that the APA's procedural requirements apply to postponements of effective dates and compliance dates. As the U.S. Court of Appeals for the D.C. Circuit explained when analyzing a delay issued under President Reagan, "[t]he suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under [the] APA."[41] An effective date, or compliance date, "is an essential part of any rule."[42] And suspensions have "palpable effects upon the regulated industry and public in general."[43] As a result, agencies should seek public comment on those changes. If an agency could change a rule's compliance deadlines or effective date without going through notice and comment, "it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing" the rule.[44]

Despite this clear law, many of the Trump administration's agency suspensions have been issued without following public notice-and-comment procedures, leading to numerous lawsuits.[45] Indeed, in several cases, the administration has withdrawn suspensions issued without notice and comment after being sued. For example:

- The EPA issued a memorandum promising that the agency would not enforce a 2016 rule limiting glider truck emissions.[46] After the agency was sued for failing to comply with the APA's notice-and-comment requirements,[47] the agency withdrew the memorandum.[48]
- The Fish and Wildlife Service delayed its listing of the endangered rusty patched bumblebee without notice and comment.[49] After being sued for failure to comply with notice-and-comment requirements,[50] the agency allowed the listing to become effective.[51]
- The Federal Highway Administration delayed a regulation that required agencies to measure greenhouse gas emissions along highways.[52] After being sued for failure to comply with notice-and-comment requirements,[53] the agency ended the suspension.[54]

But in other cases, agencies have persisted in the face of litigation, claiming that either the "good cause" exception, or section 705 of the APA, exempt them from complying with notice-and-comment requirements. This section will first discuss each of these claims, and then discuss cases where courts have ruled against the agencies advancing these claims.

A. Failure to Show "Good Cause" Under Section 553

Under the "good cause" exception to the APA's notice-and-comment requirements, Congress provided agencies with a way to move quickly where there is an urgent need to do so. The "good cause" provision allows an agency to issue a rule without notice and comment if it would be "impracticable, unnecessary, or contrary to the public interest."[55] But that exception does not extend to circumstances that arise simply because of an agency's shifting policy preferences. Thus, even prior to the Trump administration, it was settled that the burden is on the agency to establish that one of those exceptions was satisfied[56] and that the exceptions are exceedingly narrow.[57] Thus, the impracticality criteria is limited to circumstances when a rule would respond to an immediate threat or when immediate implementation of a rule would

affect public safety.[58] The public interest exception is limited to situations of "acute health or safety risk" or where "surprise to the industry is required to preempt manipulative tactics."[59] And the "unnecessary" exception is reserved for rules that are "insignificant in nature and impact, and inconsequential to the industry and to the public."[60]

Given these narrow standards, there are many circumstances when the good cause exception does not apply. For example, an agency's preference for how to expend resources "is not the type of exigent circumstance that comes within the narrow 'good cause' exception of section 553(b)(B)."[61] In addition, the exception does not cover cases where an agency sets its own deadline, and that deadline renders notice and comment impracticable.[62] If it did, "an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures."[63]

Despite these clear rules, the Trump administration has invoked several excuses as "good cause" for forgoing notice and comment, which clearly do not meet the requirements established by the courts. For example, soon after President Trump came into office, EPA cited imminent deadlines as the good cause exception for failing to seek public comment in delaying 30 different rules.[64] Many other agencies cited the same excuse in suspending the following rules:

- The Food and Drug Administration's ("FDA") rule providing that knowledge of off-label uses of tobacco products could make those uses "intended uses" of the products.[65]
- Occupational Safety and Health Administration's ("OSHA") rule establishing new permissible exposure limits for beryllium.[66]
- The National Highway Traffic Safety Administration's ("NHTSA") rule increasing civil penalties for violations of corporate average fuel economy ("CAFE") standards.[67]
- EPA's rule establishing reporting requirements for nanoscale chemical substances.[68]
- FDA's rule requiring nutrition labeling of standard menu items in restaurants.[69]
- Health & Human Service's ("HHS") rule aimed at improving privacy protections for substance use disorder patients.[70]
- FDA's rule explaining when the agency will refuse to accept a tobacco product submission.[71]
- NHTSA's rule setting minimum sound requirements for hybrid and electric vehicles.[72]

Agencies under Trump have also cited the fact of pending or ongoing review as "good cause." For example, EPA cited the need to review when delaying the aforementioned 30 rules when President Trump came into office.[73] Other agencies also cited the need for review as "good cause" for suspending the following rules without notice and comment:

- HHS's rule bundling payments for cardiac care and joint replacement under Medicare and Medicaid.[74]
- Federal Highway Administration's establishment of a greenhouse gas emissions measure as a part of its national performance management measures for the national highway system.[75]

Several agencies also cited President Trump's January 20, 2017 "stop-work order," which directed agencies to freeze rulemaking "as permitted by applicable law,"[76] as support for the argument that it was "unnecessary and contrary to the public interest" to seek public comment on their delays.[77] For example, the stop-work order was cited as "good cause" for suspending the effective dates of the following rules without notice and comment:

- Department of Energy's ("DOE") rule requiring certain test procedures for air conditioners and heat pumps.[78]
- Fish and Wildlife Service's rule regarding the endangered species status of the rusty patched bumble bee.[79]
- Bureau of Land Management's ("BLM") rule updating filing requirements for applications to drill for oil and gas.[80]
- DOE's energy efficiency standards for federal low-rise residential buildings.[81]
- DOE's whistleblower rule for nuclear power plant safety.[82]
- HHS rules bundling payments for cardiac care and joint replacement under Medicare and Medicaid.[83]
- DOE's energy conservation standards for ceiling fans.[84]

Some agencies have suspended rules without citing a specific "good cause" at all.[85] Other Trump agencies also pointed to limited resources to justify not going through notice and comment for suspensions.[86]

Courts have not been receptive to these agency attempts to use the "good cause" exception to get around notice-and-comment requirements. For example, the U.S. Court of Appeals for the Second Circuit vacated NHTSA's delay of the rule adjusting civil penalties for violations of CAFE standards, rejecting NHTSA's reliance on imminent deadlines.[87] In *Pineros y Campesinos Unidos Del Noroeste v. Pruitt*, the U.S. District Court for the Northern District of California rejected EPA's repeated suspensions of a pesticide rule, issued without notice and comment.[88] EPA attempted to justify its failure to seek public comment by pointing to the need to further review and reconsider the rule.[89] But the court reaffirmed the principle that the good cause exception is "extraordinarily narrow" and found that the agency's need to review fell short of this "exacting standard."[90] The court also held that a four-day notice-and-comment period for the last delay in the series[91] was inadequate.[92]

Similarly, the U.S. District Court for the District of Columbia vacated the Department of Homeland Security's delay of the Entrepreneur Rule, a rule that would have made it easier for international entrepreneurs to enter the country.[93] The agency had claimed that it issued the delay to carry out the stop-work order. But the court found that this argument was not persuasive because the agency did not announce the delay until six months after the order.[94] The court also rejected the agency's attempt to rely on limited agency resources and potential confusion if the Entrepreneur Rule were to come into effect.[95]

In another recent case, a different judge on the U.S. District Court for the District of Columbia held that the Department of Education's suspension of a rule designed to protect defrauded student borrowers was invalid because the agency had not provided any good cause to avoid public participation requirements under the Higher Education Act.[96] Each of these decisions reaffirmed preexisting law and made clear that the good cause exception does not apply to suspensions that are implemented simply to put off compliance while an agency reviews the rule.

B. Misapplication of Section 705 of the APA

Although notice-and-comment rulemaking is usually required to postpone effective dates of rules, section 705 authorizes an agency to "postpone the effective date" of a rule "pending judicial review," upon a finding "that justice so requires" the delay.[97] But even before Trump's presidency, it was clear that section 705 was not available after a rule has taken effect.[98] In addition, it was established that an agency's decision to suspend a rule must be grounded "on the existence or consequences of the pending litigation," not any pending reconsideration.[99] One lower court had also held that an agency must address the pending litigation threat using the standard for an injunction and 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."[100]

Nonetheless, agencies under President Trump delayed compliance dates in the following already-effective rules, without notice and comment, thus putting off valuable pollution restrictions and decreasing the amount of royalties paid to states and the federal government:

- BLM's rule governing the venting and flaring of natural gas.[101]
- Department of Interior's ("Interior") rule on the valuation of coal, oil and gas leases ("Valuation Rule").[102]
- EPA's rule setting effluent limitations guidelines and standards for steam electric power plants ("Effluents Rule").[103]
- A DOE rule on test procedures for air conditioners and heat pumps.[104]

In reviewing these suspensions, courts have rejected claims by the Trump administration that section 705 allowed agencies to suspend rules without notice and comment, after the rules have become effective. For example, in *California v. Bureau of Land Management*,[105] Interior argued that it could suspend a rule that was already effective because the rule's compliance dates were still in the future.[106] But effective dates and compliance dates are distinct.[107] Compliance dates are the dates when provisions of a rule require compliance actions.[108] The effective date is the date when a rule is officially added to the Code of Federal Regulations.[109] Indeed, some statutes set specific requirements for the different dates.[110] As a result, the court did not accept the agency's argument.[111]

In several other cases, agencies have invoked section 705 to suspend effective dates before those dates had passed, without notice and comment. But those suspensions raised their own concerns. For example, the Department of Education postponed the effective date of the Borrower Defense Rule, a rule providing debt relief for student borrowers, citing a pending lawsuit challenging the original rule.[112] But the lawsuit over the original rule sought to challenge only one provision of the rule, not the entire rule.[113] A federal district court recently found that the section 705 suspension was illegal because the agency failed to tie the suspension to the pending litigation.[114]

II. Suspensions Issued Without Statutory Authority

Another long-settled principle of administrative law is that "administrative agencies may act only pursuant to authority delegated to them by Congress."[115] This requirement applies to rule amendments, rule delays, and rule suspensions.[116] Yet few of the administration's suspensions have been issued with any explanation of how the suspension is consistent with the applicable statute. And many of the rules have been issued without any citation to specific statutory authority allowing the agency to suspend rules.

For example, EPA suspended the Chemical Disaster Rule, a rule aimed at reducing the risk of chemical disasters, citing only general rulemaking authority.[117] In other cases, agencies have cited non-statutory authority to issue suspensions. For example, agencies have relied on Trump's stop-work order as authority to suspend the following rules:

- USDA's rule setting new animal welfare requirements for organic livestock and poultry.[118]
- HHS's rule imposing penalties for overpricing on entities in a drug pricing program.[119]
- Federal Aviation Administration's ("FAA") rule changing the requirements for air carriers in relation to reporting mishandled baggage.[120]
- Fish and Wildlife Service's rule establishing the endangered species status of the rusty patched bumble bee.[121]

Of the four rules listed above, one was further suspended until July 2019, again with no mention of the statutory authority,[122] and two came into force after the suspensions expired.[123]

Just like suspensions that were issued without notice and comment, courts have rejected many of these agency suspensions, finding that the agencies lacked statutory authority for the suspensions. For example, when EPA suspended a rule setting limits on methane emissions at oil and gas facilities,[124] claiming authority under section 307 of the Clean Air Act, the D.C. Circuit found that section 307 did not authorize the suspension. Section 307 only allows suspensions pending reconsideration of rules where an objection is raised that would have been impracticable to raise during the period of public comment and that is central to the outcome of the rule.[125] The court found that those narrow criteria were not met and that EPA therefore had no authority to suspend the methane limits.[126]

The D.C. Circuit similarly vacated EPA's suspension of the Chemical Disaster Rule for lack of statutory authority.[127] The court held that EPA did not have general rulemaking authority for the suspension.[128] In addition, EPA had originally issued the Chemical Disaster Rule under Section 7412(r)(7) of the Clean Air Act[129] and the court found that EPA had made no attempt to show how the suspension was authorized by that provision of the statute, among other problems.[130] The suspension contained no provisions that advanced the statute's goal of preventing accidental chemical releases; instead the suspension thwarted those "objectives contrary to EPA's prior determinations in a rulemaking."[131]

In another example, EPA delayed the effective date of a rule limiting formaldehyde emissions from composite wood products.[132] But in *Sierra Club v. Pruitt*, the U.S. District Court for the Northern District of California held that the statute did not allow the agency to extend compliance with the formaldehyde standards past a statutorily mandated 180-day deadline.[133]

Indeed, in some cases, just the existence of a lawsuit has caused agencies to drop suspensions—suggesting that some agencies recognize that their suspensions cut corners and that they were only willing to proceed with them as long as they did not get challenged. For example, EPA suspended implementation of a rule restricting harmful ozone pollution.[134] After being sued for acting outside of its statutory authority,[135] the agency withdrew the suspension.[136] EPA also suspended a rule limiting methane emissions at landfills. After being sued for lack of statutory authority,[137] the agency allowed the methane limits to come back into effect.[138] DOE suspended energy conservation standards for ceiling fans.[139] After being sued for violating its statutory mandate,[140] the agency announced implementation of the standards.[141] These decisions have confirmed the centrality of the statutory authority requirement that applies to agencies issuing suspensions. But these actions also required litigation to force the agency to retract the illegal suspensions.

III. Suspensions Issued Without a Reasoned Explanation

Case law from before the Trump era also made clear that suspensions, like any rule amendment, are governed by the arbitrary and capricious standard of the APA.[142] Under this standard, an agency seeking to roll back a rule must show that "there are good reasons for the new policy."[143] 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."[144] Courts will reverse where an examination of the agency's explanation reveals that the agency failed to consider "an important aspect of the problem."[145] One important aspect of the problem that agencies must address is the economic impact (i.e. of the costs *and* the benefits) of those rules.[146] Moreover, when changing or repealing a rule, the Supreme Court has held that an agency must consider (1) the alternatives adopted in the previous rule, (2) facts underlying the previous rule, and (3) reliance interests.[147] Under that standard, where an agency has considered costs and benefits in issuing the original rule, the agency must address those economic considerations in any suspension or repeal.[148] In addition, it is settled law that the desire to reconsider a rule is not a sufficient justification for a suspension.[149]

In the rush to issue suspensions under the Trump administration, agencies have attempted to dodge this reasoned explanation requirement in a variety of ways. For example, agencies have offered the need for review as a justification for a suspension without addressing the circumstances that led to the rule's issuance in the first place.[150] Agencies have claimed that the administration's regulatory freeze order justifies the suspensions.[151] In addition, agencies have cited the costs of compliance as a justification for a suspension, without mentioning the forgone net benefits of the rollback.[152]

Several courts have ruled against these agency decisions. Most recently, the D.C. Circuit held that EPA's suspension of the Chemical Disaster Rule was arbitrary and capricious because EPA had not explained why it needed to suspend the rule in order to reconsider it, in addition to the lack of statutory authority discussed above.[153] As the court explained, reconsideration alone is insufficient to justify a suspension.[154] Moreover, the court made clear that EPA was required to provide a reasoned explanation for forgoing the benefits of the Chemical Disaster Rule and for suspending compliance efforts with future compliance deadlines during the period of the suspension.[155]

In another example, the U.S. District Court for the Northern District of California found that Interior acted arbitrarily and capriciously in not considering the forgone benefits caused by suspending a rule limiting methane emissions.[156] The agency had also failed to consider the reasons that spurred the agency to issue the rule in the first place.[157] Later, Interior made a second attempt to suspend the same methane rule and California successfully obtained a preliminary injunction against that suspension.[158] In that second case, the court rejected the agency's argument that a rule suspension did not need to provide as much of a justification as for a repeal.[159] The court concluded that the agency's justification for the suspension contradicted the agency's previous conclusions, and that the plaintiffs were likely to succeed in showing that the suspension was arbitrary and capricious.[160]

Just like with the notice-and-comment requirement and the statutory authority requirements, agencies have dropped suspensions after being sued. For example, EPA delayed the publication of training materials for farmers exposed to poisonous pesticides without considering the harms to farmworkers and their families from pesticide exposure during the delay. After being sued for illegally delaying the release of those materials,[161] the agency published[162] the training materials. These cases have confirmed that the reasoned explanation requirements continue to apply to agency suspension decisions.

IV. Challenges Facing Advocates

As the previous sections demonstrate, agencies have suffered a significant number of losses in efforts to issue suspensions. Yet despite those losses, not all suspension efforts have failed. This section will discuss some reasons for this, and then turn to the ramifications of the agencies' suspension practices for the regulated community and policymakers.

A. Strategies for Evading Review

Despite obvious questions of legality, not all suspensions have been vacated. This section will discuss two reasons suspension rules might survive. First, there are several barriers that stand in the way of lawsuits being brought in the at all: standing, resource constraints, and timing. Second, even when lawsuits are brought, the government has developed a skilled game of "whack-a-mole," where an agency withdraws the illegal suspension rule and replaces it with a different rule with different problems.

1. Barriers

A large number of rule suspensions that have not been challenged in court. For example, no party sued after OSHA, a sub-agency at the Department of Labor, suspended a rule on beryllium exposure.[163] And no party sued after the Department of Labor suspended a rule defining who is a fiduciary of an employee benefit plan, though the agency suspended this rule twice, both times without citing legal authority for the suspension.[164] Similarly, no lawsuit was filed when the Department of Transportation suspended a rule requiring railways to have system safety programs, without using notice-and-comment procedures.[165]

There are at least three major reasons why litigation might not be brought to challenge an illegal suspension. The first reason is that it may be difficult to find plaintiffs with standing. Although the law grants states and organizations standing in a wide range of circumstances,[166] to have standing a plaintiff must be able to show a particularized injury traceable to the challenged action.[167] This may be more difficult to show in the case of rule suspensions than with final repeals of rules because suspensions are transitory and, generally do not outright repeal the rule on their face. As a result, agencies can argue that the suspension itself is not yet causing harm.[168] Of course, courts have not always agreed with these agency arguments. Suspensions may have the *effect* of repealing the rule and can cause significant amounts of harm even in the short-term, and thus courts have found that several sets of challengers have standing to sue even in the face of these arguments.[169] But this issue may lead to fewer lawsuits being brought given limited resources.

The second explanation for the unchallenged suspensions is the limited resources of potential litigants. Litigation is an expensive and time-consuming process. For example, in their motion to stay or vacate EPA's three-month suspension of a rule limiting methane emissions, petitioners pulled together motion papers and almost 125 pages of affidavits from scientists, experts, and affected individuals[170] with only a little over a month to do so.[171] In the face of an administration suspending so many different rules, potential litigants, such as nonprofits or Attorneys Generals' Offices, must choose how to prioritize their limited staff and financial resources. Bringing such a time-intensive challenge to an agency action takes away time from other work, making it difficult to bring lawsuits against all of the suspensions, even if all of the

suspensions are blatantly illegal. This reality provides an incentive for agencies to issue as many suspensions as possible so as to overwhelm challengers' resources in the hope that some suspensions will slip by without a lawsuit.

The third factor that affects the number of challenges to suspensions is timing. Even if a challenge is brought, suspensions may not be in effect long enough for a court to reach a decision on the merits, which can have an impact on potential challengers' evaluation of whether to sue.[172] If the suspension only lasts 90 days, it is next to impossible, absent emergency motion practice, to bring a lawsuit in time for a decision before those 90 days pass. In the U.S. Court of Appeals for the D.C. Circuit, where many agency challenges are filed, for example, it typically takes the court about 12 months to resolve a case, unless the parties obtain expedited review from the court.[173] Because of these difficulties, challengers may not want to devote scarce resources to bringing the cases.

2. Whack-a-Mole

In cases where parties have sued, some agencies have nonetheless been able to evade review by replacing their initial suspensions issued without notice and comment, with repeals or suspensions that are issued with notice and comment.[174] This whack-a-mole strategy can be highly effective, but it deprives the public of the ability to submit public comment on the agency's most important decision. Rather than allowing the public to comment on the suspension or repeal of a rule that is in the process of being implemented, all that the agency asks is whether a currently suspended rule should be repealed or further suspended.

For example, the USDA delayed a rule regarding welfare for organic livestock several times, twice without[175] and then once with[176] notice and comment. After a challenge by the Organic Trade Association,[177] USDA repealed the rule[178] and filed a motion to dismiss the lawsuit over the suspension, arguing that the case was moot.[179] The repeal proposal argued that the repeal was justified because of concerns that the rule "could have" unintended consequences in the marketplace.[180] But because of the suspension, the public was deprived of the opportunity to rebut those claims with facts showing implementation and actual market reactions. In addition, the final repeal touted the fact that it would save all of the costs of the original rule, even though that was only possible because the agency had suspended implementation.[181] Had the rule been in effect, the regulated entities would have begun coming into compliance, and in the event of a repeal those costs would be sunk and not able to be counted toward the repeal's cost savings. The parties are now awaiting a decision on the government's argument that the case is moot.[182]

In another case, DOE suspended a rule on test procedures for air conditioners and heat pumps under Section 705 of the APA.[183] Shortly after the suspension was issued, the Natural Resources Defense Council (NRDC) sued DOE arguing that the suspension was illegal.[184] In August 2018, after briefing on NRDC's summary judgment motion was concluded, DOE withdrew the suspension[185] and requested (and obtained) an adjournment of oral argument.[186] The parties have now briefed the question of whether the action is moot.[187] The government's strategy here has helped waste limited advocacy resources.

In *Clean Water Action v. Pruitt*,[188] EPA invoked section 705 to indefinitely suspend[189] the Effluents Rule, a rule setting limits on toxic wastewater discharges from power plants.[190] Eight environmental advocacy organizations promptly sued the agency, arguing that the agency had violated the APA by not seeking public comment, among other deficiencies, and moved quickly for summary judgment.[191] But one day after the motion for summary judgment had been fully briefed, EPA finalized a second suspension, this time with notice and comment, withdrawing the first indefinite suspension.[192] EPA then argued that the original challenge to the first suspension should be dismissed as moot and the court agreed.[193]

Though plaintiffs have a pending appeal, by issuing the first suspension without notice and comment, the agency deprived the public of the opportunity to comment on the suspension of a rule that was in the process of being implemented. And thus far, the timing of EPA's actions has allowed the agency to avoid any declaration that the first indefinite suspension violated the APA.[194]

Even when a court is able to reach a decision before the agency can replace the suspension, advocates may not be able to obtain vacatur. For example, in *Becerra v. DOI*, Interior cited section 705 of the APA to suspend "the effectiveness" of the Valuation Rule, a rule that updated royalty procedures for mining on public lands, without undergoing notice and comment.[195] In April 2017, the states of New Mexico and California sued, arguing that the delay violated the APA. While summary judgment briefing proceeded, the agency sought comment on a repeal and, on August 7, three days after plaintiffs filed their reply brief, the agency released the repeal rule with an effective date of September 6, 2017.[196] The court heard arguments on August 22, 2017, and issued a decision on August 30, 2017, holding that the suspension was illegal and rejecting Interior's argument that the case was "prudentially moot" because of the repeal.[197] Nonetheless, the court did not vacate the suspension as the rule repeal was due to come into effect a few days later.[198]

Even if plaintiffs bring their action quickly, obtaining a decision may still prove difficult, because it requires a court to be willing to hear and decide the case on an expedited basis. For example, in *Becerra*, shortly after the agency finalized the repeal of the Valuation Rule, but before the repeal became effective, Interior had asked for a 30-day extension of the hearing date in order to prepare a motion to dismiss the case as moot based on the not-yet-effective repeal.[199] As the court had already prepared for the hearing, the court denied the request.[200] That speed enabled the court to hear and decide the case before the repeal became effective. In contrast, in *Clean Water Action v. Pruitt*, the government obtained an extension on summary judgment briefing, and was able to finalize a second stay of the rule just shortly after briefing on that first stay was completed.[201] As these cases demonstrate, whether or not an agency succeeds in circumventing the APA's procedural requirements depends on whether plaintiffs can beat the race against the clock, rather than on the established legal principles.

B. Impacts of Suspensions on Rule Repeals

In several cases, suspensions have remained in effect despite obvious illegality and it has been difficult to erase the damage of the suspension. The suspensions allowed agencies to lift regulatory requirements without explaining how the suspension complies with the governing statute and without grappling with the extensive record compiled to support the original rule issued under President Obama. The agencies thus were able to put effective repeals into place without having to do the work.

And when the agencies ultimately do end up proposing repeal, the illegal suspensions help tip the scales in favor of repeal. On repeal, the question should be whether a rule that has been finalized and is in the process of being implemented, should be changed. In other words, the baseline for analysis should include an implemented rule. And the public should be able to comment on whether a world where the public is reaping the benefits of that rule should not include that rule. In addition, implementation takes the impetus for repeal away.[202] But instead of allowing the public to comment on the change from an implemented rule where compliance costs have already been sunk to a world without the rule's benefits, the illegal suspensions have changed the baseline so that it only includes a suspended rule that has not yet been implemented.

For example, in the proposed repeal of the Chemical Disaster Rule, the agency has credited itself with saving all of the compliance costs of the Chemical Disaster Rule, making the repeal look more beneficial than it would have without the illegal suspension.[203] Though petitioners moved quickly to have EPA's suspension of the Chemical Disaster Rule vacated, the D.C. Circuit's decision vacating the suspension was issued less than a week before the comment period on the proposed repeal ended.[204] Thus, at the time the proposed repeal was out for public comment, the rule was still effectively suspended and the agency was able to trumpet cost savings that should have been sunk. Meanwhile, during the entire duration of the suspension, workers have suffered the tangible harm of "[l]iving and working with a higher risk of" accidental chemical releases at their workplaces.[205]

Similarly, in the case of the Valuation Rule, notwithstanding the district court's finding that the suspension was illegal, on repeal, Interior relied on the fact that the rule has not yet been implemented to justify the repeal. For example, Interior claimed that "several unforeseen defects in the 2017 Valuation Rule have the potential to significantly increase the cost and administrative burden of compliance, which *could* create a disincentive to enter [] into . . . leases."[206] Interior also contended that the Valuation Rule's requirement that contracts be written for purposes of royalty valuation is "*potentially* costly" and "*could* increase the cost of production and delay the delivery of mineral resources."[207] But had Interior not illegally delayed the Valuation Rule's implementation, the agency would have had evidence as to whether those "potentially" costly problems were indeed occurring. Meanwhile, states and the federal government have been losing almost $80 million per year in royalties that the Valuation Rule would have provided.[208]

Conclusion

Although the principles enshrined in the APA have proven resilient, the detrimental impact of some suspensions has continued, either because no lawsuit was brought or because the administration managed to win its game of whack-a-mole. Indeed, because of the difficulty of obtaining a judgment, agencies still have an incentive to issue as many illegal suspensions as possible to tie up resources and buy time for repeals. In the process, the administration has created an atmosphere of regulatory uncertainty, which harms both the public and the regulated industry,[209] and imposes significant costs on society, in the form of forgone benefits of those regulations.

Just over a year and a half into the Trump administration, the era of rule suspensions has begun to come to a close, as agencies are pivoting to focus on proposed repeals rather than suspensions. But the current list of proposed repeals is marked by features that are similar to the problems with the administration's suspension rules. For example, agencies have continued to deprive the public of a meaningful chance to provide input on their actions. In a recent proposal to flatline vehicle emissions standards, NHTSA and EPA have drastically limited the public's ability to provide comments on the proposal. The proposal contained more than 2,000 pages of regulatory and economic analysis and relied on modeling from four complex models.[210] Yet the agencies gave the public only 60 days to provide comments on the proposal. The public, industry, and states filed a total of 18 requests for an extension to that public comment period and asked the agencies to provide missing data and information to enable a meaningful comment process.[211] In response, the agencies refused to provide the missing data and information, and granted only a three-day extension, effectively foreclosing the public's ability to conduct an adequate analysis of the proposal.[212]

The agencies are also ignoring their statutory mandate and ignoring the requirement to provide a reasoned explanation for their decisions. For example, in the proposal to flatline vehicle emissions standards, NHTSA and EPA proposed to cause increased fuel consumption and emissions, in direct contravention of the Clean Air Act's requirement to prevent pollution[213] and the Energy Policy and Conservation Act's requirement that NHTSA issue rules to conserve energy.[214] The agencies argue that the increased emissions and fuel consumption are nonetheless justified because of concerns over highway safety.[215] But that safety analysis is fatally flawed. It rests on egregious math errors and it gets basic principles of supply and demand backwards.[216] In addition, the agencies have failed to explain and adequately assess the climate- and pollution- related deaths and illnesses that the rollback will cause.[217] Similarly, in the proposal to replace the Clean Power Plan, EPA has ignored the Clean Air Act's direction to reduce emissions[218] and proposed to instead increase pollution in a way that will impose a net cost on society.[219] Ignoring the statutory mandate and keeping the public out of the decisionmaking process hurt the agencies in their early efforts to roll back rules through suspensions. And those considerations are likely to continue to be relevant as agencies now attempt to finalize repeals.

Endnotes

[1] *See* Reducing Regulation and Controlling Regulatory Costs, Exec. Order. No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Remarks by President Trump on Deregulation (Dec. 14, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-deregulation/; Juliet Eilperin & Damian Paletta, *Trump Administration Cancels Hundreds of Obama-Era Regulations*, Wash. Post (July 20, 2017), https://www.washingtonpost.com/business/economy/trump-administration-cancels-hundreds-of-obama-era-regulations/2017/07/20/55f501cc-6d68-11e7-96ab-5f38140b38cc_story.html?utm_term=.086803c6af0c.

[2] See *infra* Sections I, II, and III.

[3] Connor Raso, Trump's deregulatory efforts keep losing in court—and the losses could make it harder for future administrations to deregulate, *Brookings* (Oct. 25, 2018), https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/.

[4] *See, e.g.*, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018); Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018).

[5] Bethany Davis Noll filed amicus briefs in several of the cases discussed in this Report, including in *California v. U.S. Bureau of Land Management*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017); *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d 95 (2d Cir. 2018); Natural Resources Defense Council Inc. v. EPA, No. 18-1048 (S.D.N.Y.); *Air Alliance Houston v. Environmental Protection Agency*, No. 17-1155, 2018 WL 4000490 (D.C. Cir. Aug. 17, 2018). She did not represent any of the parties.

[6] The administration's suspension efforts have focused on regulations that were not fully implemented yet. *See, e.g.*, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4,594, 4,676 (Jan. 13, 2017) (issuing the Chemical Disaster Rule and setting several compliance deadlines for four years in the future); Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017) (delaying the Chemical Disaster Rule for twenty months in order to consider finalizing a rule "to revise or rescind" the regulation). *See also* Marissa Horn, *24 Environmental Rules Trump is Rolling Back*, Bloomberg (Aug. 23, 2018), https://news.bloombergenvironment.com/environment-and-energy/24-environmental-rules-trump-is-rolling-back-1 (tracking rollback efforts). Rolling back rules that are already fully in effect has been less of a priority. Where industry is already investing in compliance, it has voiced opposition to repeals of rules. For example, a number of companies voiced opposition to the repeal of a rule requiring reductions in mercury and air toxics as they had already invested in compliance. *See* Amena H. Saiyid, *We Already Spent the Money, Keep Air Toxics Rule: AEP, Duke to EPA*, Bloomberg (Jul. 12, 2018), https://www.bna.com/already-spent-money-n73014477383/.

[7] Administrative Procedure Act § 4, 5 U.S.C. § 553; *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) ("Failure to provide the required notice and to invite public comment . . . is a fundamental flaw that normally requires vacatur of the rule." (internal quotations omitted)); *N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) ("the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced"); *see also* Bethany Davis Noll & Denise Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 Energy L.J. 269 (2017).

[8] These actions have taken the form of "suspensions," *see, e.g.*, Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations; Solicitation of Comment, 82 Fed. Reg. 58,439 (Dec. 12, 2017), "postponements," *see, e.g.*, Postponement of Certain Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005 (Apr. 25, 2017), "delays," *see, e.g.*, Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8,499 (Jan. 26, 2017), "stays," Stay of Standards of Performance for Municipal Solid Waste Landfills, 82 Fed. Reg. 24,878 (May 31, 2017), or "revisions," Refuse to Accept Procedures for Premarket Tobacco Product Submissions; Revised Effective Date, 82 Fed. Reg. 8,894 (Feb. 1, 2017). But all these actions have fundamentally the same effect of suspending a regulation and, as a result, this Report uses the term "suspension" to refer to all these actions.

[9] *See, e.g.*, Postponement of Certain Compliance Deadlines for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005 (suspending the Effluents Rule in order to "preserve the regulatory status quo" while "reconsideration is underway"); Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further

Delay of Effective Date, 82 Fed. Reg. 27,133 (delaying rule to allow time for reconsideration).

[10] Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8,499 (Jan. 26, 2017); Chemical Substances When Manufactured or Processed as Nanoscale Materials, 82 Fed. Reg. 22,088 (May 12, 2017); Postponement of Certain Compliance Deadlines for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005; Uniform National Discharge Standards for Vessels of the Armed Forces-Phase II Batch One: Delay of Effective Date, 82 Fed. Reg. 9,682 (Feb. 8, 2017).

[11] Amendments to Regulations Regarding "Intended Uses"; Delayed Effective Date, 82 Fed. Reg. 9,501 (Feb. 7, 2017); Food Labeling; Extension of Compliance Date, 82 Fed. Reg. 20,825 (May 4, 2017); Refuse to Accept Procedures for Premarket Tobacco Product Submissions; Revised Effective Date, 82 Fed. Reg. 8,894 (Feb. 1, 2017); Three-Month Extension of Certain Tobacco Product Compliance Deadlines Related to the Final Deeming Rule, 82 Fed. Reg. 22,338 (May 15, 2017).

[12] Occupational Exposure to Beryllium; Delay of Effective Date, 82 Fed. Reg. 8,901 (Feb. 1, 2017); Definition of the Term "Fiduciary," 82 Fed. Reg. 16,902 (Apr. 7, 2017) ("extension of applicability date").

[13] Civil Penalties, 82 Fed. Reg. 8,694 (Jan. 30, 2017); System Safety Program, 82 Fed. Reg. 10,443 (Feb. 13, 2017); National Performance Management Measures, 82 Fed. Reg. 10,441 (Feb. 13, 2017); Minimum Sound Requirements for Hybrid and Electric Vehicles, 82 Fed. Reg. 9,368 (Feb. 6, 2017).

[14] Confidentiality of Substance Use Disorder Patient Records; Delay of Effective Date, 82 Fed. Reg. 10,863 (Feb. 16, 2017); Medicare Program; Advancing Care Coordination; Delay of Effective Date, 82 Fed. Reg. 14,464 (Mar. 21, 2017); 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties; Delay of Effective Date, 82 Fed. Reg. 12,508 (Mar. 3, 2017).

[15] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 8,985 (Feb. 2, 2017); Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Update, 82 Fed. Reg. 14,427, 14,428 (Mar. 21, 2017); Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8,807 (Jan. 31, 2017); Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 8,806 (Jan. 31, 2017).

[16] Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations, 82 Fed. Reg. 9,974 (Feb. 9, 2017); Waste Prevention Rule; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430; Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823 (Feb. 27, 2017); Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 10,285 (Feb. 10, 2017).

[17] International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31,887 (July 11, 2017).

[18] Borrower Defense Rule, 82 Fed. Reg. 27,621 (Jun. 16, 2017).

[19] National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677 (May 10, 2017); Amendments to the Select Agent and Toxin Regulations; Delay of Effective Date, 82 Fed. Reg. 10,855 (Feb. 16, 2017).

[20] Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437 (Mar. 21, 2017).

[21] Notice for Suspension of Small Area Fair Market Rent (Small Area FMR) Designations; Solicitation of Comment, 82 Fed. Reg. 58,439; Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018).

[22] See *infra* Section I.

[23] See *infra* Section II.

[24] See *infra* Section III.

[25] See *infra* Section I, II, & III.

[26] *See, e.g., Air Alliance Houston v. EPA*, 2018 WL 4000490 (D.C. Cir. 2018) (vacating EPA's suspension of the Chemical Disaster Rule); *Natural Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018) ("NRDC v. NHTSA") (vacating NTHSA's suspension of penalties); *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (vacating EPA's suspension of a methane regulation issued under the Clean Air Act); *S.C. Coastal Conservation League, et al. v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062 (N.D. Cal. 2018) ("PCUN v. Pruitt") (vacating delay of pesticide rule); *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018) (enjoining Interior's delay of a rule restricting leaks of natural gas from mining facilities on public lands); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050 (N.D. Cal. 2018) (vacating delay in Formaldehyde standards); *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017) (enjoining suspension of rule designed to increase housing for low-income tenants); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5 (D.D.C. 2017) (vacating delay of Entrepreneur Rule); *California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) ("*California v. BLM*") (vacating Interior's delay of a rule restricting leaks of natural gas from mining facilities on public lands); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (declaring illegal Interior's delay of a rule updating royalty payment procedures).

[27] Alana Semuels, *Do Regulations Really Kill Jobs?*, The Atlantic (Jan. 19, 2017) (summarizing research on whether regulations hurt jobs), https://www.theatlantic.com/business/archive/2017/01/regulations-jobs/513563/; Bouree Lam, *Trump's 'Two-for-One' Regulation Executive Order*, The Atlantic (Jan. 30, 2017), https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007/; Heather Timmons, *Trump is dismantling rules and laws protecting millions of Americans. Here are the most important*, Quartz (Sept. 22, 2017) (summarizing the most critical rules being repealed), https://qz.com/1072054/dismantling-the-rules-that-protect-americans-a-guide-to-the-trump-administrations-destruction-from-within/.

[28] Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines for Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494 (Sep. 18, 2017) (replacing Postponement of Certain Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005 (Apr. 25, 2017)); Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (replacing Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823); Off-Label Intended Use Rule; Partial Delay of Effective Date, 83 Fed. Reg. 11,639 (Mar. 16, 2018) (replacing Off-Label Intended Use Rule; Delayed Effective Date, 82 Fed. Reg. 9,501 (Feb. 7, 2017)); Medicare Program; Cancellation of Advancing Care Coordination; 82 Fed. Reg. 57,066 (Dec. 1, 2017) (replacing Medicare Program; Advancing Care Coordination; Delay of Effective Date, 82 Fed. Reg. 14,464).

[29] *See, e.g.*, *Clean Water Action v. Pruitt*, 315 F. Supp. 3d 72, 86 (D.D.C. 2018), appeal docketed (D.C. Cir. No. 18-5149) (dismissing challenge to EPA's stay of the effluents rule after EPA withdrew the stay and replaced it with a new stay issued with notice and comment); *see also Bauer v. DeVos*, 325 F. Supp. 3d 74, 91-93 (D.D.C. 2018) (holding that challenged to suspension that had ended was not moot because of the suspension's "continuing consequences"); Mem. of Law in Supp. of Def.'s Mot. to Dismiss the Am. Compl. as Moot, *Natural Res. Def. Council v. Dept. of Energy*, No. 17-06989 (S.D.N.Y. Aug. 23, 2018).

[30] *See, e.g.*, *Becerra*, 276 F. Supp. 3d at 953.

[31] Jack M. Beermann, *Presidential Power in Transitions*, 83 B. U. L. Rev. 947, 993 (2003); *see also* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471, 530 (2011) ("In the worst case (thinking from the perspective of an incoming administration), an agency can also 'unfreeze' the suspension of an effective date in the face of a judicial challenge, making any challenge to the suspension moot and thus unreviewable in court.").

[32] *See, e.g.*, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. at 36,938 (emphasis added).

[33] For example, EPA estimated that a 2-year delay of the Effluent Rule cost between $26.6 million and $36.8 million. Postponement of Certain Compliance Dates for ELGs for Steam Electric Power Generating Point Source Category, 82 Fed. Reg. at 43,498. When delaying the Fiduciary Rule, the Department of Labor estimated a reduction in benefits of $147 million in the first year and $890 million over 10 years using a three percent discount rate. Definition of the Term "Fiduciary," 82 Fed. Reg. at 12,319.

[34] The Truck Trailer Manufacturers Association has filed suit against EPA for the length of the suspension on greenhouse gas limits, stating that "[t]he continuing uncertainty … is untenable" for the association's members." *See* Abby Smith, *Trailer Makers Seek Action on Idled EPA Climate Rule Review*, Bloomberg Environment (Aug. 7, 2018), https://news.bloombergenvironment.com/environment-and-energy/trailer-makers-seek-action-on-idled-epa-climate-rule-review.

[35] *See* Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. Pol. Econ. 473 (1977) (explaining that changing a policy may not work if it also changes expectations about future policy).

[36] *Price v. Stedoring Servs. of America*, 697 F.3d 820, 830 (9th Cir. 2012); *see also Becerra*, 276 F. Supp. 3d at 964; *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156-57 (2012) (agencies should provide "fair warning of the conduct [a regulation] prohibits or requires" (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)); *Long Island Care at Home v. Coke*, 551 U.S. 158, 170-171 (2007) (agencies should not inflict an "unfair surprise" on parties).

[37] *See* Saiyid, *supra* note 6 (describing industry opposition to changes in mercury air emission rules); David Reid, *Here's Why Automakers Won't Want Trump's Plan to Freeze Efficiency Rules*, CNBC (May 11, 2018), https://www.cnbc.com/2018/05/11/auto-makers-dont-want-trumps-plan-to-freeze-fuel-efficiency-rules.html (reporting that industry researchers believed that a decision to freeze fuel economy standards would mean that automakers who had invested already had wasted investment and would put those automakers at a competitive disadvantage with global firms).

[38] *See* Alfred A. Marcus & Allen M. Kaufman, *Why It Is Difficult to Implement Industrial Policies: Lessons from the Synfuels Experience*, 28 Cal. Mgmt. Rev. 98, 102-103 (1986); B. Yang, N.D. Burns & C.J. Backhouse, *Management of Uncertainty Through Postponement*, 42 Int'l J. of Prod. Research 1049 (2004); Ben. S. Bernanke, *Irreversibility, Uncertainty and Cyclical Investment*, 98 Q. J. Econ. 85 (1983); Robert S. Pindyck, *Irreversibility, Uncertainty, and Investment*, 29 J. Econ. Lit. 1110 (1991).

[39] *See* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 Vand. L. Rev. 1021 (2007); Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 90, 123 (2018).

[40] *See* Nielson, *supra* note 39, at 131 (If Trump "wishes for his regulatory initiatives to have staying power (and so to encourage robust participation by regulated parties), he would be well served by going through the full rulemaking process. Otherwise, fewer will be willing to invest the capital necessary to, say, open a new coal facility.").

[41] *Envtl. Def. Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983).

[42] *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982).

[43] *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) (internal quotations omitted).

[44] *NRDC v. EPA*, 683 F.2d at 762; *see also California v. BLM*, 277 F. Supp. 3d at 1118; *Becerra*, 276 F. Supp. 3d at 964.

[45] *See Natural Res. Def. Council,* 894 F.3d at 115 (2d. Cir. 2018) (vacating suspension of increased penalties for violations of fuel economy standards); *Sierra Club*, 293 F. Supp. 3d at 1061(vacating delay of Formaldehyde Rule); *Open Cmtys. All.*, 286 F. Supp. 3d at 179 (enjoining suspension of rule designed to increase housing for low-income tenants); *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 21 (vacating delay of the International Entrepreneur Rule); *California*, 277 F. Supp. 3d at 1127 (vacating Interior's delay of a rule restricting leaks of natural gas from mining facilities on public lands); *Becerra*, 276 F. Supp. 3d at 967 (declaring illegal Interior's delay of a rule updating royalty payment procedures); *PCUN*, 293 F. Supp. 3d at 1067 (vacating delay of Pesticide Rule).

[46] Memorandum from Susan P. Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, EPA to Bill Wehrum, Assistant Administrator, Office of Air and Radiation, EPA (July 6, 2018), *available at* https://www.epa.gov/sites/production/files/2018-07/documents/memo_re_withdrawal_of_conditional_naa_regarding_small_manufacturers_of_glider_vehicles_07-26-2018.pdf.

[47] Emergency Mot. for Stay or Summ. Disposition and Req. for Admin. Stay, *Envtl. Def. Fund et al. v. EPA*, No. 18-1190 (D.C. Cir. July 17, 2018); Emergency Mot. for Summ. Vacatur, or in the Alt., for Stay Pending Judicial Review, *California v. EPA*, No. 18-1192 (D.C. Cir. July 19, 2018).

[48] Memorandum from Andrew R. Wheeler, Acting Administrator, EPA to Susan P. Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, EPA (July 26, 2018), *available at* https://www.epa.gov/sites/production/files/2018-07/documents/memo_re_withdrawal_of_conditional_naa_regarding_small_manufacturers_of_glider_vehicles_07-26-2018.pdf.

[49] Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 10,285.

[50] Compl. for Injunctive and Declaratory Relief, *Natural Res. Def. Council v. Interior*, No. 17-01130 (Feb. 15, 2017 S.D.N.Y.), ECF No. 10.

[51] *Rusty Patched Bumble Bee (Bombus affinis)*, U.S. Fish & Wildlife Service, https://www.fws.gov/midwest/endangered/insects/rpbb/index.html; *see also* Michael Greshko, First U.S. Bumblebee Officially Listed as Endangered, Nat'l Geographic (Mar. 22 2017), https://news.nationalgeographic.com/2017/03/bumblebees-endangered-extinction-united-states/ (explaining that the rusty patched bumble bee was listed as endangered after NRDC filed suit).

[52] National Performance Management Measures, 82 Fed. Reg. 10,441; 82 Fed. Reg. 14,438 (Mar. 21, 2017); 82 Fed. Reg. 22,879 (May 19, 2017).

[53] Compl. for Declaratory and Injunctive Relief, *Clean Air Carolina v. Dep't of Transportation*, No. 17-05779 (S.D.N.Y. July 21, 2017), ECF No. 1.

[54] National Performance Management Measures, 82 Fed. Reg. 45,179 (Sept. 28, 2017). The Greenhouse Gas Emission measure was subsequently repealed. *See* National Performance Management Measures, 83 Fed. Reg. 24,920 (May 31, 2018).

[55] Administrative Procedure Act § 4, 5 U.S.C. § 553(b)(3)(B).

[56] *Action on Smoking and Health v. C.A.B.*, 713 F.2d 795, 800-01 (D.C. Cir. 1983).

[57] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012); *see also Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

[58] *Mack Trucks*, 682 F.3d at 93; *NRDC v. NHTSA*, 894 F.3d at 114.

[59] *NRDC v. NHTSA*, 894 F.3d at 115.

[60] *Mack Trucks*, 682 F.3d at 94; *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001).

[61] *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006).

[62] *U.S. Steel v. EPA*, 595 F.2d 207, 213 (5th Cir. 1979); *Am. Fed'n of Gov't Emps., AFLCIO v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981); *Donovan,* 653 F.2d at 581; *Natural Res. Def. Council v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003); *Chamber of Commerce v. SEC*, 443 F.3d at 908; *see also* Lisa Heinzerling, *Unreasonable Delays*, 12 Harv. L. & Pol'y Rev. 13, 34-36 (2018).

[63] *Donovan*, 653 F.2d at 581; *see also NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004).

[64] Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8,499.

[65] Off-Label Intended Use Rule; Delayed Effective Date, 82 Fed. Reg. at 9,502; Off-Label Intended Use Rule; Further Delayed Effective Date, 82 Fed. Reg. 14,319, 14,320 (Mar. 20, 2017).

[66] Occupational Exposure to Beryllium; Delay of Effective Date, 82 Fed. Reg. 8,901.

[67] Civil Penalties, 82 Fed. Reg. 8,694; 82 Fed. Reg. 15,302 (March 28, 2017); Civil Penalties, 82 Fed. Reg. 32,139 (Jul. 12, 2017).

[68] Chemical Substances When Manufactured or Processed as Nanoscale Materials, 82 Fed. Reg. 22,088.

[69] Food Labeling; Extension of Compliance Date, 82 Fed. Reg. 20,825.

[70] Confidentiality of Substance Use Disorder Patient Records; Delay of Effective Date, 82 Fed. Reg. 10,863.

[71] Refuse to Accept Procedures for Premarket Tobacco Product Submissions; Revised Effective Date, 82 Fed. Reg. 8,894.

[72] Minimum Sound Requirements for Hybrid and Electric Vehicles, 82 Fed. Reg. 14,477 (Mar. 21, 2017).

[73] Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. at 8500 ("The temporary delay in effective dates… is necessary to give Agency officials the opportunity for further review and consideration of new regulations.").

[74] Medicare Program; Advancing Care Coordination; Delay of Effective Date, 82 Fed. Reg. 14,464.

[75] National Performance Management Measures, 82 Fed. Reg. at 10,441-42.

[76] Memorandum for Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8,346, 8,346 (Jan. 24, 2017).

[77] Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 8,985, 8,985.

[78] *Id.*

[79] Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 10,285.

[80] Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations, 82 Fed. Reg. 9,974.

[81] Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Update, 82 Fed. Reg. at 14,428.

[82] Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8,807.

[83] Medicare Program; Advancing Care Coordination; Delay of Effective Date, 82 Fed. Reg. 10,961 (Feb. 17, 2017).

[84] Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 8,806; Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 14,427 (March 21, 2017). The agency later allowed the rules to come into effect without change: Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 23,723 (May 24, 2017).

[85] Amendments to the Select Agent and Toxin Regulations; Delay of Effective Date, 82 Fed. Reg. 10,855.

[86] Uniform National Discharge Standards for Vessels of the Armed Forces-Phase II Batch One: Delay of Effective Date, 82 Fed. Reg. 9,682; Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. at 8,499.

[87] *NRDC v. NHTSA*, 894 F.3d at 114.

[88] *PCUN v. Pruitt*, 293 F. Supp. 3d 1062.

[89] *Id.* at 1067.

[90] *Id.*

[91] International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. at 31,888.

[92] *PCUN*, 293 F. Supp. 3d at 1067, n.5.

[93] *Duke*, 291 F. Supp. 3d at 20.

[94] *Id.*

[95] *Id.* at 17-18.

[96] *Bauer*, 325 F. Supp. 3d at 97.

[97] 5 U.S.C. § 705.

[98] *Id.*; *see also Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996) (per curiam). In *State Farm*, the Court noted in dicta that "it would have been permissible for the agency to temporarily suspend the passive restraint requirement or to delay its implementation date while an airbag mandate was studied." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, n.15 (1983). But the agency would have needed to put any such suspension in place before the effective date. In fact, before the rescission at issue in State Farm, the agency had delayed the rule's effective date, but those suspensions were issued before the effective date actually passed. *see also* 40 Fed. Reg. 16,217 (Apr. 10, 1975); 42 Fed. Reg. 34,289, 34,290 (July 5, 1977) (listing effective date as September 1, 1981), 46 Fed. Reg. 21,172 (Apr. 9, 1981). In addition, any such suspension would have needed to comply with the D.C. Circuit's then-developing caselaw requiring agencies to go through notice-and-comment procedures prior to effectively revoking a regulation through delay.

[99] *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012).

[100] *Id.* at 30; *Jeffrey v. Office of Pers. Mgmt.*, 28 M.S.P.R. 434, 435–36 (Merit Systems Protection Board 1985).

[101] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430.

[102] Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823.

[103] Postponement of Certain Compliance Deadlines for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005.

[104] Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 32,227.

[105] *California*, 277 F. Supp. 3d at 1106.

[106] *Id.* at 1118.

[107] *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28, 31 (3d Cir. 1995); *see also California*, 277 F. Supp. 3d at 1118; *Becerra*, 276 F. Supp. 3d at 963-64.

[108] National Archives and Records Administration, Document Drafting Handbook 3-9 (2018), https://www.archives.gov/federal-register/write/handbook.

[109] *Id.* at 3-8.

[110] *See Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1057–58 (D.C. Cir. 2014) (citing 42 U.S.C. § 7412); *see also Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143 (9th Cir. 2009) (citing Energy Policy and Conservation Act).

[111] *California*, 277 F. Supp. 3d at 1118-20.

[112] Borrower Defense Rule, 82 Fed. Reg. 27,621.

[113] *See* Compl., *Massachusetts v. Dep't of Education*, No. 17-01331 (D.D.C. 2017). The Department of Education has now issued a proposed replacement for the Borrower Defense Rule. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 83 Fed. Reg. 37,242 (Jul. 31, 2018).

[114] *Bauer*, 325 F. Supp. 3d at 108.

[115] *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014).

[116] *See, e.g., NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004); *NRDC v. EPA*, 683 F.2d at 761-62.

[117] Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 16,146 (Apr. 3, 2017).

[118] National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677.

[119] 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties; Delay of Effective Date, 82 Fed. Reg. 12,508.

[120] Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437.

[121] Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 10,285.

[122] 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 83 Fed. Reg. 25,943 (Jun. 5, 2018).

[123] *See Baggage*, www.transportation.gov (Jan. 10, 2018) (rule on mishandling baggage and wheelchairs); Greshko, *supra* note 51.

[124] Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25,730 (June 5, 2017).

[125] 42 U.S.C. § 7607(d)(7)(B).

[126] *Clean Air Council*, 862 F.3d at 1.

[127] *Air Alliance Houston*, 2018 WL 4000490, at *11.

[128] *See id.* at *1.

[129] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 82 Fed. Reg. 4594.

[130] *Air Alliance Houston*, 2018 WL 4000490, at *11.

[131] *Id.* at *38.

[132] *Sierra Club*, 293 F. Supp. 3d at 1056 (describing series of delays issued by EPA).

[133] *Id.* at 1059-1060.

[134] Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. at 29,246 (June 28, 2017).

[135] *American Lung Assoc'n v. EPA*, No. 17-1172 (D.C. Cir.).

[136] Withdrawal of Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards, 82 Fed. Reg. 37,318 (Aug. 10, 2017).

[137] Petitioners' Initial Opening Brief, *Natural Res. Def. Council v. EPA*, No. 17-1157 (D.C. Cir. Nov. 20, 2017).

[138] The agency has not proposed a new suspension. 83 Fed. Reg. 54,527 (Oct. 30, 2018).

[139] Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 14,427; Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 8,806.

[140] Press Release, Attorney General Schneiderman Announces Lawsuit And Other Legal Action Against Trump Administration For Illegally Blocking Cost-Saving, Pollution-Cutting Energy Efficiency Standards (Apr. 3, 2017), https://ag.ny.gov/press-release/attorney-general-schneiderman-announces-lawsuit-and-other-legal-action-against-trump.

[141] Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 23,723.

[142] *See, e.g., Pub. Citizen v. Steed*, 733 F.2d 93, 105 (D.C. Cir 1984) (finding an indefinite suspension to be arbitrary and capricious).

[143] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also State Farm*, 463 U.S. at 43 (describing the "arbitrary and capricious" review applied to agency regulations).

[144] *State Farm*, 463 U.S. at 43.

[145] *Id. See also Fox*, 556 U.S. at 552.

[146] *See State Farm*, 463 U.S. at 43 (explaining that agencies must base their decisions on the relevant factors); *Air Alliance Houston*, 2018 WL 4000490, at *13 (holding that EPA failed to explain how the harms that the Chemical Disaster Rule would have prevented during the suspension were now only "speculative").

[147] *See Fox*, 556 U.S. at 515 (explaining agency obligations when changing regulations).

[148] *See Id.* at 515-16 (The agency has to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *State Farm*, 463 U.S. at 39 (explaining that the agencies' claims on repeal cannot run "counter to the evidence before the agency"); *see also 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).

[149] *Pub. Citizen*, 733 F.2d at 102 ("Without showing that the old policy is unreasonable, for NHTSA 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.").

[150] *See, e.g.*, Civil Penalties, 82 Fed. Reg. at 8,694; Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings' Baseline Standards Update, 82 Fed. Reg. at 14,428; Medicare Program; Advancing Care Coordination; Delay of Effective Date, 82 Fed. Reg. at 14,465; Food Labeling; Extension of Compliance Date, 82 Fed. Reg. at 20,825–26; Civil Penalties, 82 Fed. Reg. at 32,139.

[151] *See, e.g.*, Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. at 8,499; Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. at 8,807; Refuse to Accept Procedures for Premarket Tobacco Product Submissions; Revised Effective Date, 82 Fed. Reg. at 8,894; Occupational Exposure to Beryllium; Delay of Effective Date, 82 Fed. Reg. at 8,901; Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. at 8,985; Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases, 82 Fed. Reg. at 9,974; Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. at 10,285; Amendments to the Select Agent and Toxin Regulations; Delay of Effective Date, 82 Fed. Reg. at 10,855.

[152] *See, e.g.* Postponement of Certain Compliance Deadlines for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005; Food Labeling; Extension of Compliance Date, 82 Fed. Reg. 20,825; Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430.

[153] *Air Alliance Houston*, 2018 WL 4000490, at *12.

[154] *Id.*

[155] *Id.* at *13.

[156] *California*, 277 F. Supp. 3d at 1122-23.

[157] *Id.* at 1123.

[158] *California*, 286 F. Supp. 3d at 1054.

[159] *Id.* at 1064.

[160] *Id.* at 1065.

[161] Compl., *New York v. Pruitt*, No. 18-04739 (S.D.N.Y. May 30, 2018), ECF No. 1.

[162] *See* Pesticides; Agricultural Worker Protection Standard; Notification of Availability, 83 Fed. Reg. 29,013 (June 22, 2018).

[163] Department of Labor delayed the beryllium rule without notice and comment, then delayed it again after notice and comment, then allowed it to come into force, then announced it would not enforce certain provisions of the rule while undergoing notice and comment to further delay compliance dates. *See* Occupational Exposure to Beryllium; Further Delay of Effective Date, 82 Fed. Reg. 14,439 (Mar. 21, 2017); Carla J. Gunnin, Jackson Lewis P.C., *OSHA Beryllium Rule Lowering Exposure Limits Takes Effect, But It Faces Uncertain Future* (May 30, 2017), https://www.jacksonlewis.com/publication/osha-beryllium-rule-lowering-exposure-limits-takes-effect-it-faces-uncertain-future; Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, 82 Fed. Reg. 29,182 (Jun. 27, 2017); Limited Extension of Select Compliance Dates for Occupational Exposure to Beryllium in General Industry, 83 Fed. Reg. 25,536 (Jun. 1, 2018).

[164] Definition of the Term "Fiduciary," 82 Fed. Reg. 12,319 (Mar. 17, 2017); Definition of the Term "Fiduciary" 82 Fed. Reg 16,902.

[165] System Safety Program, 82 Fed. Reg. 10,443 (Feb. 13, 2017).

[166] *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim nor the relief requested requires the participation of individual members in the lawsuit."); *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (States have "special solicitude in our standing analysis.").

[167] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[168] *See, e.g.*, *National Fair Housing Alliance v. Carson*, No. 18-1076, 2018 WL 3962930 (D.D.C. Aug. 17, 2018) (holding that housing advocates did not have standing to challenge HUD's actions suspending a tool needed to enforce a housing-rights rule, because plaintiffs had a "continuing opportunities" to participate in the agencies' re-write of the rule).

[169] *See, e.g.*, *NRDC v. NHTSA*, 894 F.3d at 104 (holding that states and environmental petitioners had standing to challenge NHTSA's suspension of penalties for violation of fuel-economy standards, because the suspension could lead to increased air emissions); *Air Alliance Houston*, 2018 WL 4000490, at *5 (holding that workers suffered tangible harm during the time that the Chemical Disaster Rule was delayed); *see also NRDC v. EPA*, 683 F.2d at 763 n.23 (observing that indefinite stays are "tantamount to a revocation").

[170] *See* Emergency Mot. for a Stay or in the Alt., Summ. Vacatur, *Clean Air Council v. Pruitt*, No. 17-1145 (June 5, 2017), ECF No. 1678141 (D.C. Cir.).

[171] On April 18, 2017, EPA Administrator Pruitt announced that he planned to exercise his authority to issue the suspension, and on June 5, 2017, Pruitt issued the suspension. *See* Letter from E. Scott Pruitt, Administrator, U.S. EPA, to Howard J. Feldman, API, et al. (Apr. 18, 2017), attached to Emergency Mot. for a Stay or in the Alt., Summ. Vacatur, *Clean Air Council v. Pruitt*, No. 17-1145 (June 5, 2017), ECF No. 1678141 (D.C. Cir.).

[172] Many of the rule suspensions have been thirty days or sixty days in length. *See, e.g.*, Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499.

[173] *See* Administrative Office of the United States Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary-12-Month Period Ending March 31, 2018*. An electronic copy of the Summary is *available at* http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0331.2018.pdf.

[174] *See, e.g.*, Off-Label Intended Use Rule; Partial Delay of Effective Date, 83 Fed. Reg. 11,639 (indefinite suspension indefinitely suspending rule following previous delays and providing that knowledge of off-label uses of tobacco products could make those uses "intended uses" of the products); Medicare Program; Cancellation of Advancing Care Coordination, 82 Fed. Reg. 57,066 (rescinding the rule bundling payments for cardiac care and joint replacement following early delays issued without notice and comment); *Clean Water Action*, 315 F. Supp. 3d at 86.

[175] National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 9,967 (Feb. 9, 2017); National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677.

[176] National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 52,643 (Nov. 14, 2017).

[177] Compl., *Organic Trade Assoc. v. U.S. Dep't of Agric.*, No. 17-01875 (D.D.C. Sep. 13, 2017).

[178] National Organic Program; Organic Livestock and Poultry Practices, 83 Fed. Reg. 10,775 (Mar. 13, 2018).

[179] Defs.' Mot. to Dismiss Second Am. Compl., *Organic Trade Assoc. v. U.S. Dep't of Agric.*, No. 17-01875 (D.D.C. May 2, 2018).

[180] National Organic Program (NOP); Organic Livestock and Poultry Practices—Withdrawal, Proposed Rule, 82 Fed. Reg. 59,988, 59,990 (Dec. 18, 2017).

[181] National Organic Program (NOP); Organic Livestock and Poultry Practices, 83 Fed. Reg. 10,775, 10,781 (Mar. 13, 2018).

[182] *See* Docket, *Organic Trade Assoc. v. U.S. Dep't of Agric.*, No. 17-01875 (D.D.C.).

[183] Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 32,227 (July 13, 2017).

[184] Compl., *NRDC v. DOE*, No. 17-06989 (S.D.N.Y. Sep. 14, 2017), ECF No. 1.

[185] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 83 Fed. Reg. 39873, 3987439,873 at 39,874 (Aug. 13, 2018).

[186] *See NRDC v. DOE*, No. 17-06989 (S.D.N.Y Aug. 7, 2018) (order granting motion to adjourn conference), ECF No. 53.

[187] *See* Docket, *NRDC v. DOE*, No. 17-06989 (S.D.N.Y.).

[188] *Clean Water Action*, 315 F. Supp. 3d at 72.

[189] Postponement of Certain Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. 19,006.

[190] Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838 (Nov. 3, 2015).

[191] *Clean Water Action*, 315 F. Supp. 3d at 78.

[192] Postponement of Certain Compliance Dates for ELGs for Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494 (Sep. 18, 2017).

[193] *Clean Water Action*, 315 F. Supp. 3d at 86. *See also* O'Connell, *Agency Rulemaking and Political Transitions*, *supra* note 31, at 530 (suggesting that incoming Presidents can suspend regulations and simply unfreeze the suspension to make legal challenges moot); Beermann, *supra* note 31 at 992-994 (suggesting that legal questions around suspensions are unlikely to be resolved because agencies can revoke or amend those suspensions if they are challenged).

[194] *Clean Water Action*, 315 F. Supp. 3d at 86.

[195] Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823 (Feb. 27, 2017).

[196] Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934.

[197] *Becerra*, 276 F. Supp. 3d at 960-61.

[198] *Id.* at 967.

[199] *Id.* at 957-58.

[200] *Id.* at 957-58.

[201] *Clean Water Action*, 315 F. Supp. 3d at 86.

[202] Raso, *supra* note 3 (explaining that when regulated parties invest in compliance they may lose their "appetite . . . to eliminate the rule").

[203] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 83 Fed. Reg. 24,850 (May 30, 2018).

[204] *See* Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, Proposal, 82 Fed. Reg. 27,133 (June 14, 2017) (explaining agency's plan to reconsider the rule).

[205] *Air Alliance Houston*, 2018 WL 4000490, at *6.

[206] Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. at 36,939 (emphasis added).

[207] *Id.* at 36,937 (emphasis added).

[208] Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 81 Fed. Reg. 43,337, 43,360 (July 1, 2016).

[209] *See, e.g.*, Abby Smith, Landfill Methane Rule Delay Was Floated in EPA Power Plan, *Bloomberg* (Sept. 5, 2018), https://news.bloombergenvironment.com/environment-and-energy/landfill-methane-rule-delay-was-floated-in-epa-power-plan (reporting on industry's desire for clarity from the agency).

[210] The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 42,986 (Aug. 24, 2018).

[211] *See* Extension of Comment Period, 83 Fed. Reg. 48,578 (Sept. 26, 2018).

[212] *Id.*

[213] 42 U.S.C. § 7401(c).

[214] 83 Fed. Reg. at 42,995, 43,015, 43,205 (conceding that EPCA ultimately requires NHTSA to set standards to conserve energy).

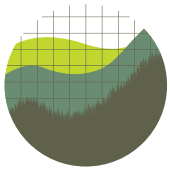
[215] 83 Fed. Reg. at 42,995-96, 43,067, 43,230.

[216] *See* Robinson Meyer, The Trump Administration Flunked Its Math Homework, *The Atlantic* (Oct. 31, 2018), https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errors-clouding-its-legal-future/574249/.

[217] 83 Fed. Reg. at 42,996-97 (claiming that the rule will have a "minimal" impact on climate).

[218] *See Sierra Club v. Costle*, 657 F.2d 298, 325-26 (D.C. Cir. 1981) (explaining that an "essential purpose" of Section 111 standards is to "reduc[e] emissions as much as practicable").

[219] *See* Letter from Jack Lienke& Richard Revesz to EPA regarding proposal to revise Clean Power Plan (Oct. 31, 2018), https://policyintegrity.org/documents/PolicyIntegrityACEComments2_2018.10.31.pdf.



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Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

Institute for Policy Integrity
New York University School of Law
Wilf Hall, 139 MacDougal Street, New York, New York 10012
policyintegrity.org