UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC.; and NATIONAL WILDLIFE FEDERATION, Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY; et al., Defendants.	Case No. 18-cv-1048 (JPO)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Clean Water Act's purpose is to protect and restore the Nation's waters. 33 U.S.C. § 1251(a). The Environmental Protection Agency and Army Corps of Engineers (the Agencies) are tasked with achieving that goal by applying the Act's protections to the "waters of the United States."

In 2015 the Agencies issued the Clean Water Rule to clarify the scope of the "waters of the United States." *Clean Water Rule: Definition of "Waters of the United States"; Final Rule*, 80 Fed. Reg. 37,054 (June 29, 2015). They explained that the Rule would "ensure protection for the nation's public health and aquatic resources" and increase "predictability and consistency" in applying the Act's protections. *Id.* at 37,054. The Rule was the product of four years of rulemaking effort, *id.* at 37,057, 37,102, and it rested on an extensive scientific record, as well as legal, policy, and economic analyses.

The Trump administration now intends to repeal the Rule. It has not yet done so. Instead, the Agencies have rushed through a two-year suspension of the Rule. *Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule; Final Rule*, 83 Fed. Reg. 5,200 (Feb. 6, 2018) (the Suspension Rule). The Agencies expect that two years will give them enough time to replace the Clean Water Rule with a new definition of "waters of the United States." *Id.* at 5,206.

The Suspension Rule is illegal. While promulgating it, the Agencies refused to consider the single most important issue at stake: whether the Clean Water Rule is better or worse than the tangle of policies the Agencies plan to implement for the next two years instead. Likewise, the Agencies refused to accept public comment on that

fundamental question. The Agencies gave only one reason for suspending the Clean Water Rule: that the suspension will supposedly promote clarity and certainty. But even that rationale is belied by the record. There is no evidence that suspending the Rule will promote clarity or certainty, and ample evidence that it will create confusion.

The Trump administration is entitled to work toward enacting its policy preferences into law, but it must do so within legal bounds. Among other things, that means the Agencies must give rational, record-based explanations for their decisions, and provide meaningful opportunities for public comment. The Agencies violated these and other bedrock requirements of administrative law in the course of suspending the Clean Water Rule. The suspension must be vacated.

FACTUAL BACKGROUND

The Clean Water Act's scope was unclear in the wake of Supreme Court decisions and agency guidance

Congress enacted the Clean Water Act to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act applies a suite of pollution-control measures to "navigable waters," *see id.* § 1251 *et seq.*, which Congress defined as the "waters of the United States," *id.* § 1362(7). In the 1980s, the Agencies adopted substantially similar regulations defining "waters of the United States." Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts (PSUMF) ¶ 3. The regulatory text remained largely unchanged until the Clean Water Rule was enacted.

Between the mid-1970s and early 2000s, courts and the Agencies applied the Act broadly to protect many kinds of water bodies. *See, e.g.*, *United States v. Riverside Bayview*

Homes, Inc., 474 U.S. 121, 123-24, 131-36 (1985). In 2001 and 2006, however, two Supreme Court decisions created uncertainty about what kinds of waters the Act protects. The holding of the first case, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), was narrow: a regulatory interpretation protecting waters used by migratory birds was not authorized when applied to "an abandoned sand and gravel pit." *Id.* at 162, 174. The second case, *Rapanos v. United States*, 547 U.S. 715 (2006), produced no majority opinion. The Court remanded the Corps' application of the Act to wetlands near ditches that drained to traditional navigable waters. *See id.* at 729, 757 (plurality opinion). A four-justice plurality announced one test for determining whether waters are "waters of the United States," *id.* at 739 (plurality opinion), while a four-justice dissent deferred to the Corps' test, *id.* at 788 (Stevens, J., dissenting). Justice Kennedy concurred in the judgment only, and announced a third test: the Act protects waters that have a "significant nexus" to traditional navigable waters. *See id.* at 759 (Kennedy, J., concurring in the judgment).

Although neither *SWANCC* nor *Rapanos* invalidated any regulatory provision, the Agencies retreated from enforcing their regulations as written. They issued guidance documents describing which waters were now covered by the Act.[1] These documents created confusion and inconsistency, and their practical effect was to shrink

[1] *See* EPA & Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008) (*Rapanos* Guidance), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf; *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* 68 Fed. Reg. 1,991 (Jan. 15, 2003) (*SWANCC* Guidance).

the scope of the Act's coverage more than either Court ruling required. For example, the post-*SWANCC* guidance directed field staff to obtain approval from headquarters before applying the Act to any intrastate, non-navigable, "isolated" water. *See SWANCC* Guidance, *supra* note 1, 68 Fed. Reg. at 1,996. In practice, this guidance led the Agencies to abandon protecting such waters. EPA reported in 2011 that after *SWANCC*, "no isolated waters [were] declared jurisdictional by a federal agency." PSUMF ¶ 8.

The post-*Rapanos* guidance, likewise, resulted in unpredictability and under-enforcement of the Act's protections. It unnecessarily limited how the Agencies would consider the aggregate impacts of similarly situated waters when determining whether a stream segment or wetland had a "significant nexus" to waters downstream. *Compare Rapanos* Guidance, *supra* note 1, at 6, 10, *with Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). It also required a case-by-case analysis to demonstrate coverage for many types of waters. *Rapanos* Guidance, *supra* note 1, at 8. This site-specific, resource-intensive process created the potential for inconsistent interpretations and meant that, in practice, many waters that should have been covered by the Act went unprotected. If there were factual questions about a water's "significant nexus," the Justice Department was reluctant to prosecute an enforcement case. *See* PSUMF ¶ 9.

The guidance documents' lack of clarity was compounded by their ostensibly discretionary terms. The documents told field staff that the policies "may not apply to a particular situation" and that third parties could challenge their "appropriateness," *Rapanos* Guidance, *supra* note 1, at 4 n.17; *see also SWANCC* Guidance, *supra* note 1, 68 Fed. Reg. at 1,996 n.1, but did not say when such deviations would be allowed.

The Agencies later conceded that the guidance documents did not ensure timely, consistent, and predictable determinations of the Act's coverage. *Clean Water Rule*, 80 Fed. Reg. at 37,056. Members of Congress, state governments, regulated parties, and environmental groups asked the Agencies to replace the guidance with regulations that would provide clarity. *See Definition of "Waters of the United States" – Recodification of Pre-Existing Rules; Proposed Rule*, 82 Fed. Reg. 34,899, 34,901 (July 27, 2017).

The Agencies promulgated the Clean Water Rule

The Agencies responded by initiating a rulemaking to clarify the scope of the Clean Water Act's coverage. The effort began in 2011 and culminated in the 2015 Clean Water Rule. *Clean Water Rule*, 80 Fed. Reg. at 37,102. In support of the rulemaking, EPA's Office of Research and Development prepared a report that synthesized the published, peer-reviewed scientific literature discussing the connections between streams and wetlands and downstream water bodies. EPA released a draft for public review, obtained a peer review by the agency's Science Advisory Board, and published the final report in January 2015. *See* EPA, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, at xii (Jan. 2015) (excerpts attached as Ex. 5 to Decl. of Jared E. Knicley). The report found that all tributary streams exert a strong influence on downstream waters, that wetlands in a river's floodplain are "integrated" with the rivers, and that even wetlands outside the floodplain provide many benefits to downstream waters. *Id.* at ES-2-3.

In light of this scientific evidence, and using Justice Kennedy's "significant nexus" test from *Rapanos*, the Agencies proposed a rule clarifying that tributaries and

"adjacent" waters, as defined by the rule, categorically have a significant nexus to downstream waters and so are "waters of the United States" covered by the Act. *See Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule*, 79 Fed. Reg. 22,188, 22,188-89 (Apr. 21, 2014). The Agencies also proposed clarifying that certain other waters, such as non-adjacent wetlands, would still be covered upon a case-specific, science-based determination of "significant nexus." *See id.* at 22,189, 22,198. The Agencies solicited comment for over 200 days and received over a million comments. *Clean Water Rule*, 80 Fed. Reg. at 37,057. They also received input through an extensive outreach effort, including over 400 meetings with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and others. *Id.*

The Agencies published the final Clean Water Rule on June 29, 2015.

States, industry groups, and environmental groups challenge the Rule

Many parties, including states, industry groups, and environmental groups (including Plaintiffs here)[2] sued to challenge various aspects of the Clean Water Rule. Most filed in district court as well as in circuit court, due to uncertainty at the time over whether the Clean Water Act's provision for circuit-court review encompassed the Rule. The circuit-court petitions were consolidated in the Sixth Circuit. PSUMF ¶ 14.

EPA Administrator Pruitt, who was then Attorney General of Oklahoma, brought a district-court challenge to the Rule on behalf of the State of Oklahoma in the

[2] Plaintiffs here argued that in narrow respects the Rule was under-protective.

Northern District of Oklahoma. PSUMF ¶ 28. In another case, North Dakota and twelve other states sued in the District of North Dakota. On August 27, 2015, one day before the Clean Water Rule's effective date, the North Dakota court preliminarily enjoined enforcement of the Rule. *N. Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). At the Agencies' urging, that injunction was limited to the 13 plaintiff states. PSUMF ¶ 15.

The Clean Water Rule took effect on August 28, 2015, 80 Fed. Reg. at 37,054, in the remaining 37 states. The Agencies implemented the Rule for six weeks. But on October 9, 2015, the Sixth Circuit stayed the Rule nationwide pending judicial review. *In re EPA & Dep't of Def. Final Rule: "Clean Water Rule: Definition of Waters of the United States,"* 803 F.3d 804 (6th Cir. 2015). Then, in January 2017, the Supreme Court granted certiorari to consider whether the circuit court had jurisdiction over challenges to the Clean Water Rule. In January 2018, the Court held that jurisdiction belonged in federal district courts, not circuit courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). Accordingly, the Sixth Circuit dismissed the case on February 28, 2018. PSUMF ¶ 20.

The Trump administration vilifies the Clean Water Rule

Shortly after taking office, President Trump signed an executive order requiring the Agencies to publish a proposed rule "rescinding or revising" the Clean Water Rule, "as appropriate and consistent with law." Exec. Order No. 13,778, § 2(a) (Feb. 28, 2017), *published at* 82 Fed. Reg. 12,497 (Mar. 3, 2017). On the same day, President Trump spoke publicly about the Rule. He suggested that it had "put[] people out of jobs by the hundreds of thousands," and that "[i]f you want to build a new home, for example, you

have to worry about getting hit with a huge fine if you fill in as much as a puddle—just a puddle—on your lot. I've seen it." PSUMF ¶ 22.[3]

Administrator Pruitt has also pursued a long, public campaign against the Clean Water Rule. Pruitt penned an op-ed opposing the Rule before it was even finalized, PSUMF ¶ 26, and represented the State of Oklahoma in its litigation challenging the Rule, *id.* ¶¶ 28-29. Since becoming Administrator, Pruitt has repeatedly maligned the Rule, *id.* ¶¶ 33, 35, 37, 38, 41, 42, 43, 44, 45, misrepresented the burden it would impose on landowners, *id.* ¶¶ 33, 36, 37, 39, and has said, without qualification, that EPA will repeal it, *id.* ¶¶ 32, 35, 37, 38, 39, 41, 42, 43, 46.

The Agencies suspend the Clean Water Rule

On July 27, 2017, the Agencies proposed repealing the Clean Water Rule and replacing it with the previously existing regulatory text. *Definition of "Waters of the United States" – Recodification of Pre-Existing Rules; Proposed Rule*, 82 Fed. Reg. 34,899, 34,900 (July 27, 2017). The Agencies described this as the first step of a two-step process. Only at the second step—the promulgation of a brand-new definition of "waters of the United States"—would the Agencies conduct any substantive reevaluation. *Id.* at 34,899. The proposed repeal has not been finalized.

The Agencies then proposed, on November 22, 2017, to "add an applicability date" to the Rule of "two years from the date of final action on this proposal." *Definition*

[3] To the contrary, there is no evidence that the Clean Water Rule affected jobs during the six weeks that it was in force, and the Rule expressly exempts "puddles" from regulation. *See* PSUMF ¶¶ 23-24.

of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule; Proposed Rule, 82 Fed. Reg. 55,542, 55,542 (Nov. 22, 2017). Enforcement of the Rule would be suspended during those two years.

The Agencies expressly discouraged the public from commenting on the scope of "waters of the United States" or the merits of the Clean Water Rule. 82 Fed. Reg. at 55,545. The Agencies also severely limited the time for public comment on the suspension. It was published the day before Thanksgiving, and the comment period ended three weeks later, on December 13, 2017. *See id.* The Agencies issued the final rule less than two months after that. *Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule; Final Rule*, 83 Fed. Reg. 5,200 (Feb. 6, 2018). The Suspension Rule amends the Code of Federal Regulations to provide that the Clean Water Rule is not "applicable" until February 6, 2020. *Id.* at 5,208-09. The Agencies received 4,600 comments on the suspension—a small fraction of the 680,000 comments they received on the repeal proposal, which was open to comment for two months. *Compare id.* at 5,203 *with* 82 Fed. Reg. at 55,544 and 82 Fed. Reg. 39,712 (Aug. 22, 2017).

The Agencies' stated purpose for the suspension is to provide "continuity and regulatory certainty" while they "consider . . . revisions" to the Clean Water Rule. 83 Fed. Reg. at 5,200. According to the Agencies, two years will be enough time to "finalize a rule with a new definition of 'waters of the United States.'" *Id.* at 5,206.

STATUTORY BACKGROUND

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). A party may move for summary judgment "at any time" until shortly after the close of discovery. Fed. R. Civ. P. 56(b).

The Administrative Procedure Act (APA) prohibits arbitrary and capricious rulemaking. 5 U.S.C. § 706(2)(A). A rule is arbitrary and capricious if the agency failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). When an agency reverses course it must give good reasons for that reversal, and explain any disregard for facts and circumstances that underlay the prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

The APA also requires agencies to provide the public with notice of a proposed rulemaking, and give interested persons a chance to comment on the proposal. 5 U.S.C. § 553(b), (c). The opportunity for comment must be meaningful. Among other things, there must be sufficient time to submit comments, *see N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 763, 770 (4th Cir. 2012); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011), and the agencies must maintain an open mind toward those comments, *see Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008).

The Due Process Clause of the Constitution also requires that rulemakings be undertaken with an open mind. *See Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1169-70 (D.C. Cir. 1979). Agency actions violate both due process and the APA when there is a clear and convincing showing that the decisionmaker acted with an "unalterably closed mind" on matters critical to the proceeding, and was unwilling to rationally

consider counterarguments. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011); *Nehemiah*, 546 F. Supp. 2d at 847.

ARGUMENT

The Agencies' addition of a February 6, 2020, "applicability date" for the Clean Water Rule suspended the Rule for two years. That is a substantive amendment, and it must comply with the APA. *See* 5 U.S.C. § 551(5) ("rule making" includes amending a rule); *N.C. Growers' Ass'n*, 702 F.3d at 761, 765-66 (suspending a rule for nine months is a rulemaking); *California v. Bureau of Land Mgmt.* (*BLM II*), 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018) (suspending a rule is a rulemaking that is reviewed as rigorously as future revisions to that rule). The Agencies recognized as much by noticing the Suspension Rule for public comment. *See N.C. Growers' Ass'n*, 702 F.3d at 765.

The Suspension Rule violates the APA. It is arbitrary and capricious because the Agencies failed to consider the substantive effect of suspending the Clean Water Rule, and because their sole rationale—"continuity and regulatory certainty"—lacks support and contradicts the record. The Agencies also violated the APA by failing to provide a meaningful opportunity for public comment on the proposal. Finally, the Suspension Rule must be vacated because Administrator Pruitt has demonstrated an unalterably closed mind on the Clean Water Rule, and should not have overseen its suspension.

I. The Suspension Rule is arbitrary and capricious

A. The Agencies ignored the Clean Water Rule's merits

The Agencies suspended the Clean Water Rule for two years, but expressly refused to consider the merits of that Rule. They did not compare the Rule to the

policies that the Agencies say they will enforce for two years instead, and so did not address, for example, whether the Rule is a better interpretation of the Clean Water Act and Supreme Court precedent, is better supported by the relevant science, would better advance the purpose of the Clean Water Act, would have greater economic benefits, or would be easier to apply in practice. The Agencies simply claimed that, because the Suspension Rule did not "repeal or replace" the Clean Water Rule, the suspension did not "implicate the merits of that rule." 83 Fed. Reg. at 5,205.

That is wrong. Even putting aside that the Suspension Rule is effectively the opening stage of a repeal,[4] the Suspension Rule is a rulemaking in its own right, and thus it must be rational. It is not rational to suspend a rule without considering its merits, and doing so violates the APA. *See N.C. Growers' Ass'n*, 702 F.3d at 761, 769-70 (agency "ignored important aspects of the problem" and violated the APA by suspending a rule for nine months in favor of the preexisting regulations while refusing to consider "the substance or merits of either set of regulations"); *BLM II*, 286 F. Supp. 3d at 1058-59, 1072 (agency violated the APA when it "refused to consider comments regarding the substance or merits" of the rule that the agency suspended for one year).

Most significantly, the Agencies refused to consider that the Clean Water Rule would benefit the nation's waterways and thus better fulfill the purpose of the Clean Water Act than the regulatory regime it replaced. As the Agencies explained in the Clean Water Rule's preamble, peer-reviewed science confirms that upstream waters,

[4] The Agencies expressly intend the suspension of the Rule to blend seamlessly into its replacement; the suspension was timed accordingly. *See* 83 Fed. Reg. at 5,206.

including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by, for instance, controlling sediment, filtering pollutants, reducing flooding, and providing habitat for fish and other aquatic wildlife. 80 Fed. Reg. at 37,055; *see also id.* at 37,058 ("The great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters."); *id.* (explaining that the Rule protects adjacent waters, such as wetlands, "that currently available science demonstrates possess the requisite connection to downstream waters and function as a system to protect the . . . integrity of those waters").

Small streams and many wetlands are better protected by the Clean Water Rule because the Rule clarifies that all tributaries and all adjacent wetlands, as defined, qualify for the Clean Water Act's protections. 33 C.F.R. § 328.3(a)(5)-(6); *see also* 80 Fed. Reg. at 37,057 (Rule is "environmentally more protective" than pre-Rule regulatory regime). The pre-Rule regime, by contrast, subjects many streams and wetlands to a resource-intensive and often inconsistent case-by-case analysis of their "significant nexus" to downstream waters. 80 Fed. Reg. at 37,056-57; *see also Rapanos* Guidance, *supra* note 1. As described above, *supra* pp. 3-4, in practice that meant these waters suffered from underenforcement of the Clean Water Act's protections. By clarifying the Act's protections, the Clean Water Rule promotes the integrity of the nation's waters, which is the Act's purpose. *See* 33 U.S.C. § 1251(a); 80 Fed. Reg. at 37,055 ("This final rule interprets the [Act] to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable

waters . . . ."). The Agencies openly disregarded these advantages of the Rule when deciding to discontinue it for two years.

While the Suspension Rule preamble ignored the merits of the Clean Water Rule because it was not being formally "repealed," the Agencies gave a different, but equally illegitimate, explanation for ignoring the Rule's benefits in a memorandum on economic impacts. *See* Knicley Decl. Ex. 17. In that memorandum, the Agencies declared that suspending the Clean Water Rule would result in no forgone benefits because they compared suspending the Rule to a "baseline" condition of the Sixth Circuit's stay of the Rule. *Id.* at 2-5. The Sixth Circuit's stay was, of course, terminated on February 28, 2018—the inevitable outcome of the Supreme Court's January 22, 2018, ruling that the circuit court lacked jurisdiction. Nonetheless, this artificial "baseline" of the Sixth Circuit's stay resulted in the fictional conclusion that the Suspension Rule had no impact at all. A suspension that is compared only to a stay results in no change, no forgone benefits, and no costs.

Choosing this baseline was improper. If the Rule were stayed, there would be no need for the Agencies to suspend it. The sole purpose of the Suspension Rule was to alter the regulatory regime that would have been in place once the Sixth Circuit's stay was dissolved. Without the Suspension Rule, on February 28, 2018, the Clean Water Rule would have become enforceable again in 37 states—those not covered by the North Dakota district court's injunction—absent additional court orders. That is why the Agencies hurried to issue the suspension. *See* 83 Fed. Reg. at 5,205 (justifying the rapid, 21-day comment period in part because the Supreme Court's opinion created an

"urgent need" to "avoid . . . the effects of the Court's ruling"); *id.* at 5,202 ("[W]hen the Sixth Circuit's nationwide stay expires, the 2015 Rule would be enjoined under the District of North Dakota's order in States covering a large geographic area of the country, but the rule would be in effect in the rest of the country pending further judicial action or rulemaking by the agencies."). The Agencies' chosen baseline was self-serving and improper, and they cannot rely on that choice to justify their refusal to consider the merits of the Clean Water Rule while suspending it for two years.

Because the Suspension Rule failed to consider the most important issues at stake, it was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

B. The Agencies' only rationale lacks support and contradicts the record

The Agencies' only rationale for suspending the Clean Water Rule is that doing so will promote "continuity and regulatory certainty." 83 Fed. Reg. at 5,200. According to the Agencies, they had to suspend the Clean Water Rule everywhere in order to prevent it from being judicially enjoined in some states but not others, which would supposedly be "complicated and inefficient." *Id.* at 5,202. This rationale lacks support, and is contrary to the evidence in the record.

There is no evidence that non-nationwide enforcement of the Clean Water Rule would be "complicated and inefficient." When the District of North Dakota enjoined the Clean Water Rule preliminarily in 2015, the federal government requested that the injunction be limited to the 13 state plaintiffs in that case. PSUMF ¶ 15. The district court agreed. *Id.* As a result, the Clean Water Rule went into effect in only 37 states in the fall of 2015, and was enforced non-nationwide for six weeks. The Suspension Rule

gives no evidence that this was "complicated" or "inefficient." In fact, EPA recently argued that if another preliminary injunction of the Clean Water Rule is granted, that too should be limited to the three plaintiff states. Knicley Decl. Ex. 18 at 18-19 ("absolute uniformity is not required by the Clean Water Act"); *see also* 33 U.S.C. § 1370 (preserving state authority to adopt standards more stringent than federal standards).

The claim that the Suspension Rule will create "clarity," 83 Fed. Reg. at 5,202, is also contrary to evidence in the record. As described above, *supra* pp. 3-5, the pre-Clean Water Rule regulatory regime, which the Agencies intend to follow during the suspension, was characterized primarily by a lack of clarity and resulted in inconsistent applications of the Clean Water Act. Many waters were subject to site-specific analyses to determine whether a "significant nexus" existed, which was a time- and resource-intensive process that resulted in inconsistency and ambiguity. *See* 80 Fed. Reg. at 37,056. The Rule addressed this problem by making more waters subject to bright-line tests that either categorically included or categorically excluded them from the Act's coverage. 80 Fed. Reg. at 37,054 ("The rule will . . . increase [Clean Water Act] program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act."); *id.* at 37,055 ("The rule will clarify and simplify implementation of the [Clean Water Act] . . . through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case-specific analysis."). The Agencies have not explained why their earlier position that the Clean Water Rule is clearer and easier to apply than the pre-Rule regime was incorrect. *See Fox*, 556 U.S. at 516 ("[A] reasoned explanation is needed for

disregarding facts and circumstances that underlay . . . the prior policy."); *BLM II*, 286 F. Supp. 3d at 1068 (agency must "provide at least some basis—indeed, a 'detailed justification'—to explain why it is changing course after its three years of study and deliberation resulting in the [rule being suspended]"). In fact, because the Suspension Rule leaves no enforceable regulatory definition of "waters of the United States" in the Code of Federal Regulations for the next two years, it will exacerbate uncertainty in future cases about what waters the law covers.

Furthermore, the Agencies do not grapple with their own role in causing "regulatory uncertainty" by proposing to repeal the Clean Water Rule and replace it, within the next two years, with something new and currently unknown. 83 Fed. Reg. at 5,206. The Agencies have created an inherently uncertain regulatory landscape, and suspending the Clean Water Rule for two years does not address that "uncertainty." The Agencies acknowledge as much, *see* Knicley Decl. Ex. 17 at 4 ("[U]ncertainty about the outcome of the forthcoming substantive re-evaluation of the definition of 'waters of the United States' may persist."), but make no attempt to explain why that does not fatally undercut their rationale for the suspension.

Finally, the rushed and unsupported process by which the Agencies suspended the Clean Water Rule would, if endorsed, cause widespread regulatory uncertainty over the long term. Allowing an agency to nullify, in the span of just a few months and without substantive explanation, a duly promulgated rule that was the product of four years of agency effort, and supported by a vast trove of scientific evidence and legal and economic analysis, would make every regulation vulnerable. The principles of

administrative law are intended to promote stability and continuity even as political actors change, by requiring that agencies provide rational, record-supported explanations for policy changes. The Agencies' approach here, which ignored those principles, would sanction regulatory whiplash. *See California v. Bureau of Land Mgmt.* (*BLM I*), 277 F. Supp. 3d 1106, 1120 (N.D. Cal. 2017) (describing the harmful regulatory uncertainty that arises from a "sudden agency reversal of course").

Because the Agencies' only rationale for the suspension is unsupported and contradicted by the record, the Suspension Rule must be vacated. *See New England Health Care Emps. Union v. NLRB*, 448 F.3d 189, 194 (2d Cir. 2006) (Courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))).

II. The public lacked a meaningful opportunity to comment

The Agencies did not provide a meaningful opportunity to comment on the proposed suspension of the Clean Water Rule. They unreasonably circumscribed the content of the comments, provided an unreasonably short time in which to comment, and masked the true effect of the Suspension Rule, potentially misleading commenters.

As explained above, the Agencies expressly refused to consider, and discouraged the public from commenting on, the merits of the Clean Water Rule and the substantive implications of suspending it for two years. 82 Fed. Reg. at 55,545. That not only made the decision arbitrary and capricious, it also violated the APA's notice-and-comment requirements. When an agency "prevent[s] any discussion of the 'substance or merits' of either [the suspended regulation or the regulations that will replace it], . . . the

opportunity for comment cannot be said to have been 'a meaningful opportunity.'" *N.C. Growers' Ass'n*, 702 F.3d at 770 (quoting *Prometheus Radio Project*, 652 F.3d at 450); *see also BLM II*, 286 F. Supp. 3d at 1072 (where agency refused to consider public comment on matters that were "integral to the proposed agency action," comment opportunity is not "meaningful" and thus violates the APA).

The Agencies also violated the APA's notice-and-comment requirement by allowing just three weeks for comment, including the Thanksgiving holiday. *Supra* p. 9. There were no exigent circumstances warranting such a short comment period. *Cf. N.C. Growers' Ass'n*, 702 F.3d at 770 (citing cases upholding abbreviated comment periods where Congress had mandated quick action, or to avoid widespread disruption of commercial flights). First, the Agencies failed to justify their claim that any harm would result if the Sixth Circuit's stay were lifted. Second, the imminence of that alleged harm was caused solely by the Agencies' own delay in proposing the Suspension Rule. As soon as the Supreme Court granted certiorari in January 2017 to review the Sixth Circuit's exercise of jurisdiction, there was a risk that the stay would be dissolved. Yet the Agencies waited ten months to propose the Suspension Rule, then claimed they needed to rush in order to finalize it before the Supreme Court's January 2018 decision. A crisis of the agency's own making does not justify depriving the public of an adequate time to comment. *Cf. NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) ("We cannot agree . . . that an emergency of [the agency's] own making can constitute good cause [to dispense with notice and comment]."). The paltry number of comments received on the Suspension Rule (4,600), relative to the number received on the

proposed repeal (680,000), for which 60 days were given, evinces the inadequacy of the comment period. *See supra* p. 9; *N.C. Growers' Ass'n*, 702 F.3d at 770.

Finally, the Agencies prevented a meaningful opportunity for comment by masking the true effect of the suspension. They claimed the addition of an "applicability date" was a ministerial action that simply maintained the *status quo*. *See* 82 Fed. Reg. at 55,542 (claiming the suspension "would simply add an applicability date" and "leav[e] in place the current legal *status quo*"). In fact, the *status quo* was that the Clean Water Rule was the law, subject only to judicial stays that could be lifted. Adding the so-called "applicability date" changed the law by suspending the Rule for two years. Without it, the Rule would have gone into effect in most of the country on February 28, 2018.

Because there was no meaningful opportunity to comment, the Suspension Rule violated the APA's notice-and-comment requirements. *See* 5 U.S.C. § 706(2)(D) (court shall set aside agency action that is "without observance of procedure required by law").

III. Administrator Pruitt's mind is closed regarding the Clean Water Rule

Administrator Pruitt made up his mind about the fate of the Clean Water Rule long before signing the rule suspending it. For that reason, too, the Suspension Rule must be vacated.

For the past three years, Administrator Pruitt has exhibited a single-minded determination to upend the Clean Water Rule. In March 2015, as Oklahoma's then-Attorney General, Pruitt wrote an op-ed condemning the proposed Rule as a "radical[] expan[sion] [of] EPA jurisdiction" and an assault on private-property rights. PSUMF

¶ 26.[5] When the Agencies finalized the Rule, Pruitt sued on behalf of Oklahoma, arguing that the Rule was unconstitutional and exceeded the Agencies' statutory authority. *Id.* ¶ 28. Pruitt then quickly moved for a preliminary injunction, claiming that staying application of the Rule would prevent burdening states and landowners with "uncertainty." *Id.* ¶ 29.

Pruitt continued his campaign against the Clean Water Rule as EPA Administrator. Shortly after his confirmation, and on the same day President Trump issued his executive order directing the Agencies to either rescind or revise the Rule, Pruitt reassured a group long opposed to the Rule that "relief is on the way with respect to withdrawing the Waters of the United States Rule. It's already started." PSUMF ¶ 32.

Over the next year, Pruitt escalated his attacks against the Clean Water Rule. He repeatedly misrepresented the Rule's scope, *see* PSUMF ¶¶ 33, 34, 36, 37, 39, maligned the Rule as "bad," "terrible," "deficient," and a "power grab," *id.* ¶¶ 33, 37, 38, 41, 42, 43, criticized the Rule's "significant nexus" approach as "the poorest form of rule-making," *id.* ¶ 35, said the Rule needs to be "rolled back in a very aggressive way," *id.* ¶ 31, and said unconditionally that EPA was repealing the Rule, *id.* ¶¶ 32, 35, 37, 38, 39, 41, 43, 46. On one occasion Pruitt described the Clean Water Rule as "withdrawn," *id.* ¶ 42, further revealing that this outcome, in his mind, is a foregone conclusion. Pruitt also appeared in a video produced by a longtime opponent of the Clean Water Rule, in

[5] This op-ed, like much of the evidence cited in this section, is part of the agency record because it was submitted with comments on the Suspension Rule. The extra-record evidence of Administrator Pruitt's closed mind that is cited in this section is also admissible, however. *See Nehemiah*, 546 F. Supp. 2d at 848.

which he urged ranchers and farmers to submit comments on the proposed repeal. *Id.* ¶ 40. That video linked to a website that had a page telling visitors to "Take Action Now – Tell EPA to Kill WOTUS Today!" *Id.* When asked by a congressperson in December 2017 whether he had "already decided the outcome" of the proposed Clean Water Rule repeal, Pruitt ignored the question and instead continued to criticize the Rule. *Id.* ¶ 45. And, during the comment period for the Suspension Rule, Pruitt told members of a farming group that "the worst thing that could happen is for . . . the [Clean Water Rule to] be enforced across this country and create . . . a lot of uncertainty and confusion. And so we've got steps in place to bar against that." *Id.* ¶ 44.

Although any one of these statements or actions, on its own, might not meet the demanding standard for showing an unalterably closed mind, *see Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 426-27 (D.C. Cir. 1986); *Ass'n of Nat'l. Advertisers*, 627 F.2d at 1170, together they make it unmistakable that Administrator Pruitt has prejudged the question at issue here, *see Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1178 (D.C. Cir. 1980). Pruitt's demonstrated antipathy for the Clean Water Rule goes far beyond a statement about what approach he considers "best," *Consumers Union*, 801 F.2d at 426, or a "mere discussion of policy or advocacy on a legal question," *Ass'n of Nat'l. Advertisers*, 627 F.2d at 1171. His drumbeat against the Clean Water Rule has been relentless, targeted, and extreme. From penning op-eds, to filing lawsuits, to testifying before Congress, to making public statements across the country, Administrator Pruitt has steadfastly derided the Rule and said that it must never—and under his watch, will never – be enforced. This conduct exhibits "the type of single-minded commitment to a particular

position" that makes him "totally incapable of giving fair consideration to the issues that are presented for decision." *Lead Indus. Ass'n*, 647 F.2d at 1179. As a result, Administrator Pruitt's supervision of the suspension of the Rule violated due process protections and is another reason why the Suspension Rule violates the APA. *See Air Transp. Ass'n of Am.*, 663 F.3d at 487; *Nehemiah*, 546 F. Supp. 2d at 847.

IV. Plaintiffs have standing to challenge the Suspension Rule

Plaintiffs bring this action on behalf of their members. Plaintiffs satisfy the test for associational standing because (1) their goal in this lawsuit—to protect our nation's waters from pollution and degradation—is germane to their organizational purposes, *see* Decl. of Gina Trujillo ¶¶ 6-7; Decl. of James S. Lyon ¶¶ 2-4; (2) this suit does not require the participation of Plaintiffs' members, because neither the claims asserted nor the relief sought requires individualized proof; and (3) Plaintiffs' members would have standing to sue on their own because they suffer "injury in fact" traceable to the Suspension Rule and likely to be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

The Suspension Rule injures Plaintiffs' members by increasing the risk that certain types of water bodies will be polluted, degraded, or destroyed. As described above, *supra* pp. 12-14, the Agencies found the Clean Water Rule was "environmentally more protective" than the prior regulatory regime. 80 Fed. Reg. at 37,057. In particular, the Rule would categorically protect, and thus better protect, intermittent and ephemeral tributaries and wetlands defined as "adjacent." *Id.* at 37,068-70. These water bodies, in turn, have significant impacts on water downstream. *Id.*; *supra* pp. 12-13.

Plaintiffs' members have aesthetic, recreational, and health interests in the kinds of water bodies that the Clean Water Rule would better protect. For example, several of Plaintiffs' members enjoy viewing wildlife in and around, boating in, fishing in, and otherwise using wetlands or intermittent or ephemeral streams, or water bodies that receive water from, or are affected by, wetlands or intermittent or ephemeral streams. *See* Decl. of Erik Schomburg ¶¶ 4-5; Decl. of Shawna Creech ¶¶ 5-8, 12; Decl. of Alison Beman ¶¶ 3-6; Decl. of Alexander Kouvel ¶¶ 2, 4-7; Decl. of Manley Fuller ¶¶ 6-8, 10; Decl. of Carol Buie-Jackson ¶¶ 4-8; Decl. of Stacy Woods, Exs. A-I (maps depicting intermittent and ephemeral streams and wetlands in some of the watersheds used by Plaintiffs' members). Plaintiffs' members are concerned about water pollution, and their enjoyment of the water bodies they use is diminished by the Suspension Rule, which makes it more likely that those waters will be polluted or degraded. Schomburg Decl. ¶ 9; Creech Decl. ¶¶ 9-10, 13-14; Beman Decl. ¶ 10; Kouvel Decl. ¶¶ 10, 12-14; Fuller Decl. ¶¶ 12-14; Buie-Jackson Decl. ¶¶ 8, 10-13. This lessening of the aesthetic and recreational values that Plaintiffs' members derive from these waters is a cognizable injury. *See Laidlaw*, 528 U.S. at 183-85.

Additionally, several of Plaintiffs' members receive drinking water from systems that are supplied in part by intermittent or ephemeral streams, or by streams with adjacent wetlands. These members are concerned that, without the Clean Water Rule's protections, there is an increased risk of pollution reaching their drinking water and threatening their health. Schomburg Decl. ¶¶ 8-9; Creech Decl. ¶¶ 4-5, 11; Beman Decl. ¶¶ 3, 9-10; Buie-Jackson Decl. ¶¶ 5, 11, 13; Woods Decl. Exs. D, F, I. The rulemaking

record supports these concerns: the Agencies found that protecting streams and wetlands helps prevent pollution from reaching drinking-water supplies. 80 Fed. Reg. at 37,069; Knicley Decl. Ex. 19 at 311-12. An increased risk of harm is cognizable for standing purposes, particularly where, as here, government statements confirm the threat of harm. *Baur v. Veneman*, 352 F.3d 625, 634, 637 (2d Cir. 2003).

Plaintiffs' members' injuries are directly traceable to the Suspension Rule. A ruling in Plaintiffs' favor is likely to redress Plaintiffs' members' injuries by invalidating the Suspension Rule and allowing the Clean Water Rule to be enforced.

REMEDY

Vacatur is the "usual" remedy under the APA, *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014), and the appropriate remedy here. Remanding without vacatur would give the Agencies a "free pass" to ignore their obligations under the APA, "making a mockery of the statute." *BLM I*, 277 F. Supp. 3d at 1126. The Court should not reward the Agencies' illegal action by allowing the suspension of the Clean Water Rule to continue during remand, and should instead vacate the Suspension Rule.

CONCLUSION

The Suspension Rule is arbitrary and capricious. It ignored every substantive aspect of the Clean Water Rule that it suspended, and rested only on a single, unsupported rationale. The Agencies promulgated the rule without giving a meaningful opportunity for public input. And Administrator Pruitt's participation violated due process and APA principles because he set his mind against the Clean Water Rule years ago. The Suspension Rule should be vacated.

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Respectfully submitted,

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