

**Attorneys General of New York, California, Hawaii, Maine,
Maryland, Massachusetts, Oregon, Rhode Island, Vermont,
Washington, and the District of Columbia**

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By Electronic Transmission

E. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works,
108 Army Pentagon
Washington, D.C. 20310-0108

**Attention: Docket ID No. EPA-HQ-OW-2017-0644
Definition of “Waters of the United States” – Addition of an
Applicability Date to 2015 Clean Water Rule**

Dear Administrator Pruitt and Acting Assistant Secretary Fisher,

We are the Attorneys General of New York, California, Hawaii, Maine, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, Washington and the District of Columbia (the States). We write to comment upon and strongly oppose the recent rule proposed by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, the agencies) that seeks to illegally render ineffective the Clean Water Rule, promulgated in 2015, for a two-year period during which the Clean Water Rule would be superseded by regulations dating back to at least 1980¹ (hereinafter, the Suspension Rule).² See 80 Fed. Reg. 37054 (June 29, 2015); 82 Fed. Reg. 55542 (November 22, 2017). Both the Clean Water Rule and the 1980 regulations define the “waters of the United States” protected by the Clean Water Act. 33 U.S.C. §

¹ These comments are filed by the Attorneys General as *parens patriae* on behalf of the citizens and residents of the States, see *Missouri v. Illinois*, 200 U.S. 496 (1906), and to further the States’ proprietary interests.

² The regulatory definition of “waters of the United States” originated in 1977, and included the basic elements found in later regulations prior to the Clean Water Rule. 42 Fed. Reg. 37122 (July 19, 1977). Since 1980 successive regulations have used the same definition nearly word for word. See 45 Fed. Reg. 85335 (December 24, 1980); 47 Fed. Reg. 31794 (July 22, 1982); 51 Fed. Reg. 41206 (November 13, 1986); 53 Fed. Reg. 20764 (June 6, 1988).

1251 *et seq.* (the CWA or Act). In promulgating the Clean Water Rule the agencies considered an extensive factual record and legal precedent, and applied their experience developed over decades as well as their technical expertise. In contrast, the Suspension Rule completely ignores the agencies' prior findings and the record supporting the Clean Water Rule, and the agencies provide no legal or rational basis for the proposed delay in the implementation of the Clean Water Rule.

As discussed below, the Suspension Rule, if promulgated, would violate the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the APA) and must be set aside because the agencies acted "in excess of statutory jurisdiction, authority . . . [and] short of statutory right," "without observance of procedure required by law," and in a manner that is "arbitrary, capricious [and] not in accordance with law." 5 U.S.C. §§ 706(2)(A),(C),(D). We respectfully urge the agencies to withdraw the proposed rule.

I. BACKGROUND

A. The States' Interests

The undersigned Attorneys General serve ten states and the District of Columbia. The States are situated along the shores of the Atlantic and Pacific Oceans, Chesapeake Bay, and the Great Lakes, and are downstream from, or otherwise hydrologically connected with, many of the Nation's waters.³ As such, the States are recipients of water pollution generated not only within their borders but also from sources outside their borders over which they lack jurisdiction. The States support a protective, clear, practical, and science-based definition of "waters of the United States" under the Act in order to maintain a strong federal foundation for water pollution control that preserves the integrity of their waters.

The Act is the primary mechanism for establishing a federal floor for maintaining water quality and for protecting downstream states from the effects of out-of-state pollution. A protective, science-based definition of the Act's scope is essential for the States to avoid having to impose disproportionate limits on their in-state pollution sources to offset upstream pollution discharges that might otherwise go unregulated. A cramped, unclear, or difficult-to-administer definition of the waters protected by the Act would not only make water quality protection harder for the States, but would put them at an economic disadvantage in competition with other states. This would promote a "race to the bottom" in which states compete with each other by eliminating pollution controls, a situation which the CWA was intended to prevent. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).

³ Hawaii, while not a downstream state in the same sense, supports strong federal water pollution controls to assist in maintaining the quality of its waters, including its wetlands, tributaries, intermittent streams and floodplain waters.

Not only does the definition of “waters of the United States” implicate the water quality and economic interests of the States and their citizens, it also affects the States’ proprietary interests. Should there be inadequate or ineffective federal protection of waters, the States would likely suffer injury to lands, roads, bridges, and other facilities they own or operate, and the administrative burdens in operating State water quality programs would increase.

B. The Clean Water Rule

The Clean Water Rule was promulgated in 2015 in response to widespread and longstanding concerns about the lack of clarity and consistency in the definition of “waters of the United States” under regulations dating back to 1980 as interpreted by the agencies. Indeed, as the agencies previously made clear, “[m]embers of Congress, developers, farmers, state and local governments, environmental organizations, energy companies” and others sought new regulations to replace the 1980 regulations for the purpose of achieving “clarity and certainty on the scope of the waters protected by the CWA.” 82 Fed. Reg. 34899, 34901; *see* 80 Fed. Reg. at 37054. The application of the 1980 regulations, which the Suspension Rule would revive, resulted in many complex case-by-case CWA jurisdictional determinations throughout the country, and led to confusing and inconsistent interpretations by the agencies and the federal courts as to which waters are “waters of the United States,” and therefore within the Act’s protections, and which are not.

In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), the Supreme Court took issue with the assertion by the Corps of jurisdiction over certain waters under the 1980 regulations. In *SWANCC*, the Court introduced the concept of “significant nexus” between non-navigable and navigable waters as the basis for including non-navigable waters within the definition of “waters of the United States.” *SWANCC*, 531 U.S. at 167. The *Rapanos* Court announced two distinct tests for establishing jurisdiction under the Act. Justice Scalia’s plurality test in *Rapanos* defined waters covered by the statute to include relatively permanent, standing or continuously flowing bodies of water connected to traditional navigable waters, as well as wetlands with a continuous surface connection to traditional navigable waters. *Rapanos*, 547 U.S. at 739. Justice Kennedy’s concurring opinion set forth the “significant-nexus” test. Under that test, a “significant nexus” required for protection under the Act “must be assessed in terms of the statute’s goals and purposes . . . ‘to restore and maintain the chemical, physical and biological integrity of the Nation’s waters’” *Id.* at 779-80 (*quoting* 33 U.S.C. § 1251(a)). If a wetland or water significantly affects the integrity of other waters “more readily understood as ‘navigable,’ it possesses that nexus and is protected by the Act. *Id.* at 780.

Since *Rapanos*, the lower federal courts have grappled with how to apply the 1980 regulations in instances of uncertain jurisdiction under the Act. The majority of federal courts have adopted Justice Kennedy’s “significant nexus” test. Other courts have found waters to be protected by the CWA if they satisfy *either* Justice Kennedy’s test *or* Justice Scalia’s plurality test in *Rapanos*, *see, e.g., United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011), an approach endorsed by the four dissenting Justices in *Rapanos*, *see* 547 U.S. at 810 (Stevens, J., dissenting). However *no* court has held, and the agencies have never before taken the position, that only Justice Scalia’s test may be used to determine whether a waterbody is protected by the Act.

To remedy the difficulties with the nearly four-decade-old regulations, the Clean Water Rule defined “waters of the United States” under the Act based on “the goals, objectives and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies’ technical expertise and experience” to establish clear categories of waters within CWA jurisdiction and thereby reduce the need for case-specific jurisdictional determinations. 80 Fed. Reg. at 37056. The Clean Water Rule adopted Justice Kennedy’s “significant-nexus” test to establish these categories. The agencies relied on a large peer-reviewed scientific record to define jurisdictional waters to include those waters that have a “significant nexus” with the integrity of navigable-in-fact waters. *See* 80 Fed. Reg. at 37057. In doing so, the Clean Water Rule clarified and tightened the definition’s “fit” to cover waters with significant effects on the integrity of downstream waters and to exclude others lacking such effects.

The Clean Water Rule became effective on August 28, 2015. 80 Fed. Reg. at 37054. Before and after promulgation of the Clean Water Rule many parties, including industry groups, other states, and environmental groups, challenged it in federal district and circuit courts. The circuit court petitions were consolidated in the U.S. Court of Appeals for the Sixth Circuit, and that court issued a nationwide stay of the Clean Water Rule pending resolution of those petitions.⁴ *Ohio v. United States Army Corps of Eng’rs (In re EPA & DOD Final Rule)*, 803 F.3d 804 (6th Cir. 2015). The Sixth Circuit subsequently determined that it had jurisdiction over the petitions. *Murray Energy Corp. v. United States DOD (In re United States DOD)*, 817 F.3d 261 (6th Cir. 2016). The Supreme Court granted certiorari on that issue, which was fully briefed and argued on October 11, 2017. *Nat’l Ass’n of Mfrs. v. DOD*, 137 S. Ct. 811 (2017). In the meantime, the district court actions challenging the Clean Water Rule have been dismissed or stayed pending resolution of proceedings in the Sixth Circuit and Supreme Court. The Sixth Circuit’s stay of the Clean Water Rule remains in place pending resolution of the Supreme Court proceeding.

⁴ Six of the States intervened in those petitions in support of the Clean Water Rule: New York, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

C. The Repeal Rule

The Suspension Rule was proposed less than two months after the close of the public comment period on the agencies' proposed "Repeal Rule." *See* 82 Fed. Reg. 34899 (July 27, 2017). On September 27, 2017, many of the States filed comments in opposition to that rule. The proposed Repeal Rule sought to repeal the Clean Water Rule and replace it indefinitely with the 1980 regulations.

The agencies characterized the proposed Repeal Rule as a first-step "interim rule." They stated that in a second step at some later unspecified time they intend to engage in notice and comment rulemaking to consider the definition of "waters of the United States." 82 Fed. Reg. at 34901. But nothing in the Repeal Rule required that they do so. The agencies made clear that the proposed Repeal Rule was *not* drafted based on a substantive review by them of the law or the facts relating to the definition of "waters of the United States" and CWA jurisdiction. The agencies would not entertain any substantive public comments concerning the Clean Water Rule or the 1980 regulations they seek to reinstate, even though the science and factual findings underlying those regulations are now nearly four decades old. *See* 82 Fed. Reg. 34899, 34903 (agencies "are not soliciting comment on the specific content of those longstanding regulations").

D. The Suspension Rule

The Suspension Rule would result in the same outcome as the Repeal Rule, rendering ineffective the Clean Water Rule and replacing it with the 1980 regulations—except that the Suspension Rule would apply for two years rather than indefinitely. The Suspension Rule accomplishes this by adding a sentence to the Clean Water Rule stating that the Clean Water Rule is "applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE Federal Register]." 82 Fed. Reg. 55545-47. As with the Repeal Rule, the agencies characterize the Suspension Rule as an "interim" measure to be implemented prior to what they call "Step Two rulemaking" in which they say they will address the substantive issues in defining the "waters of the United States." 82 Fed. Reg. 55542. The agencies assert that the Suspension Rule is intended to "provide continuity and regulatory certainty . . . while the agencies continue to work to consider possible revisions to the 2015 Rule." *Id.* The agencies state that, while proposing the Suspension Rule, the Repeal Rule "remains under active consideration." 82 Fed. Reg. at 55543. The agencies do not explain why they are considering promulgating both proposed interim rules.

In the Suspension Rule, the agencies rely on much of the same rationale as they did for the Repeal Rule. As with the Repeal Rule, they express concern that if the Supreme Court holds that the Sixth Circuit lacks jurisdiction over challenges to the Clean Water Rule, the temporary nationwide stay of that rule "would expire,

leading to possible inconsistencies, uncertainty, and confusion as to the regulatory regime that could be in effect pending substantive rulemaking.” *Compare* Suspension Rule, 82 Fed. Reg. at 55543, *with* Repeal Rule, 82 Fed. Reg. 34899, 34902 (Supreme Court ruling could lead to “inconsistencies, uncertainty, and confusion”). In both rulemakings, they express concern that confusion could result from dissolution of the Sixth Circuit stay because the Clean Water Rule would still not apply in thirteen states pursuant to a preliminary injunction previously issued by the North Dakota District Court, while it would apply in the rest of the nation. Suspension Rule, 82 Fed. Reg. at 55543-44; Repeal Rule, 82 Fed. Reg. at 34902-03. In the Suspension Rule, they express concern that actions in multiple district court actions challenging the Clean Water Rule “could be reactivated,” 82 Fed. Reg. at 55544. Similarly, they stated in the Repeal Rule that such actions “would likely be reactivated.” 82 Fed. Reg. at 34903.

The Suspension Rule relies on other rationales as well. The agencies assert that, if the Sixth Circuit stay is dissolved, *they* should have control over whether the Clean Water Rule is stayed rather than the district courts hearing challenges to the Clean Water Rule. They state that “control over which regulatory definition of ‘waters of the United States’ is in effect while the agencies engage in deliberations on the ultimate regulation *could remain outside of the agencies.*” 82 Fed. Reg. at 55544 (emphasis added). They also apparently believe the Suspension Rule can be finalized more quickly than the Repeal Rule, providing a short 21-day comment period and stating that the Suspension Rule is a “narrowly targeted and focused interim rule” and “the request for comment is on such a narrow topic.” *Id.* at 55544.

As with the Repeal Rule, the agencies did not perform a substantive analysis in the Suspension Rule. Nor do they seek comment on the substance of either the Clean Water Rule or the 1980 regulations which would replace it, deferring any substantive notice and comments until their Step Two rulemaking. 82 Fed. Reg. at 55544-45.

II. THE SUSPENSION RULE VIOLATES THE PROCEDURAL REQUIREMENTS OF NOTICE AND COMMENT RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT.

A. The Agencies’ Refusal to Consider Comments on the Substance of the Clean Water Rule and the 1980 Regulations Violates the APA.

The agencies are in violation of procedures governing notice and comment under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA). The APA is intended to “ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage.” *United States v. Utesch*, 596 F.3d 302, 308 (6th Cir. 2010) (citation omitted). “The process of notice and comment rule-making . . . is to be a process of reasoned decision-making. One particularly

important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules.” *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 528 (D.C. Cir. 1982). Public participation in the notice-and-comment procedure is intended to “educate[] the agency, thereby helping to ensure informed agency decisionmaking.” *Chocolate Mfrs. Ass’n. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985). “[A] chance to comment ... [enables] ‘the agency [to] maintain[] a flexible and open-minded attitude towards its own rules.’” *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (internal citation omitted).

If notice and comment is afforded in the promulgation of a rule, then it is required when an agency proposes to amend or repeal the rule. *Perez v. Mortgage Bankers Association*, — U.S. —, 135 S.Ct. 1199, 1206 (2015) (“[T]he D.C. Circuit correctly read § 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”); *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (an “agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked” and “may not alter [such a rule] without notice and comment.”); 5 U.S.C. § 551(5) (“amending” or “repealing” a rule constitutes a rulemaking under the APA).

The suspension of a rule is “tantamount to amending or revoking” it, requiring notice and comment rulemaking under the APA. *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (unauthorized 90 day suspension of rule’s compliance dates); *accord Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (temporary suspension of rule’s permit requirements held subject to APA notice and comment). Similarly, postponing the effective date of a rule is itself a rule subject to APA notice and comment. *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761-62 (3d Cir. 1982). Failure to comply with the APA’s notice and comment requirements is grounds for vacating an unlawfully promulgated agency rule. *Sprint Corp v. FCC*, 315 F.3d 369, 376-377 (D.C. Cir. 2003).

The courts “must be strict in reviewing an agency’s compliance with procedural rules” for notice and comment. *Chocolate Mfrs. Ass’n*, 755 F.2d at 1103 (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979)). Under the APA an agency cannot refuse to receive comments on relevant and significant issues. *North Carolina Growers Ass’n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012). Where an agency proposes to suspend a rule, reinstate its predecessor regulations, and impose a restriction on public comment “so severe in scope, by preventing any discussion of the ‘substance or merits’ of either set of regulations,” it fails to provide a meaningful opportunity for public comment and violates APA procedural requirements. *North Carolina Growers Ass’n v. UFW*, 702 F.3d at 769-70.

The Suspension Rule is in blatant violation of the APA’s notice and comment procedural requirements. *See North Carolina Growers Ass’n*, 702 F.3d at 769-70. As the agencies correctly point out, “[t]he scope of CWA jurisdiction is an issue of great national importance.” 82 Fed. Reg. at 55543. Yet the agencies seek to suspend and replace the Clean Water Rule for a two-year period without accepting or considering any substantive public comments. *Id.* at 55545 (“[T]his proposed rulemaking does not undertake any substantive reconsideration of the pre-2015 [pre-Clean Water Rule] ‘waters of the United States’ definition nor are the agencies soliciting comment on the specific content of those longstanding regulations . . . For the same reason, the agencies are not at this time soliciting comment on the scope of the definition of ‘waters of the United States’ . . . [and] do not intend to engage in substantive reconsideration of [that] definition . . . until the Step Two rulemaking.”) While the agencies treat the proposed Suspension Rule as a simple housekeeping measure and misleadingly characterize it as an effort to maintain the “legal status quo,” the rule would in fact result in a significant substantive change in the law by rendering the Clean Water Rule ineffective for two years and replacing it with the 1980 regulations. The APA requires the agencies to provide an opportunity for meaningful public comment on these substantive changes. The agencies’ refusal to receive and consider such comments violates the APA. *See North Carolina Growers Ass’n*, 702 F.3d at 769-70.

B. The Suspension Rule’s Extremely Short 21-Day Comment Period Does Not Provide a Meaningful Opportunity for Public Comment and Violates the APA.

The agencies failed to provide the general public a meaningful opportunity to comment by limiting the comment period on the proposed Suspension Rule to 21 days between November 22 and December 13, in the middle of the Thanksgiving/Christmas holiday season. A meaningful opportunity to comment under the APA “means enough time with enough information to comment.” *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 450 (3d Cir. 2011). A short comment period for an “important and complex rule,” such as the Suspension Rule, is insufficient to meet APA mandates. *See Prometheus Radio Project*, 652 F.3d at 453 (comment period of 28 days held insufficient under APA notice and comment provisions).

The agencies acknowledge that the “geographic scope of the Clean Water Act is of great national interest and there were more than 680,000 public comments” on the Repeal Rule submitted during its 60-day comment period. 82 Fed. Reg. at 55544. Yet they offer no plausible explanation why the Suspension Rule should not also be of great public interest, necessitating a sufficient comment period to allow public participation commensurate with the importance of this rulemaking. There is no doubt that the Suspension Rule, just as the Repeal Rule, defines the scope of CWA jurisdiction and is of enormous significance. As with the Repeal Rule, the

Suspension Rule would replace the Clean Water Rule with the 1980 regulations. The Suspension Rule relies on substantially the same flawed rationale as the heavily-commented-upon Repeal Rule. And because the Suspension Rule seeks an illegal, as well as confusing and ambiguous postponement of the Clean Water Rule (*see below*), it raises even more issues than the Repeal Rule and should be expected to elicit even more comments from the public.

The agencies have failed to provide a compelling justification for their truncated 21-day comment period. They claim that the Suspension Rule is a “narrowly targeted and focused interim rule” and the short period is sufficient because it raises “such a narrow topic.” 82 Fed. Reg. at 55544. But the Suspension Rule is substantively no more “narrow” or “focused” than the Repeal Rule, with the only difference between them being the potential length of time during which the Clean Water Rule would be replaced by the 1980 regulations. The agencies are proposing to quickly finalize the Suspension Rule because “a Supreme Court ruling could come at any time.” 82 Fed. Reg. at 55544. But that is not the good cause or exigent circumstances that warrant the exceedingly short duration of the comment period. *See North Carolina Growers Ass’n*, 702 F.3d at 770. Instead, the agencies’ haste to prevent the Clean Water Rule from taking effect only demonstrates they lack the required “flexible and open-minded attitude” necessary for an objective review of public comments. *McLouth Steel Prods. Corp.*, 838 F.2d at 1325. Here, given the important public interests involved, the short and ill-timed comment period is simply inadequate to provide the general public a meaningful opportunity for public comment under the APA. *See North Carolina Growers Ass’n*, 702 F.3d at 770.

In sum, the agencies’ cavalier approach plainly violates the APA’s procedural requirements. *See* 5 U.S.C. § 706(2)(D). The proposed Suspension Rule is contrary to the fundamentals of notice-and-comment rulemaking because it expressly prevents the public from being heard on the very substantive issues that must underlie any regulatory definition of the “waters of the United States,” and given the short comment period amounts to a bureaucratic *fait accompli*. By not taking comments on the substantive issues and providing an unjustifiably short comment period, during the middle of the holidays, the agencies “treat what should be a genuine interchange as mere bureaucratic sport,” and frustrate the proper purpose of a comment period under the APA, “to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.” *Connecticut Light & Power Co.*, 673 F.2d at 530-31.

III. THE SUSPENSION RULE, IF FINALIZED, VIOLATES THE APA BECAUSE IT IS IN EXCESS OF THE AGENCIES' STATUTORY JURISDICTION AND AUTHORITY.

It is “axiomatic that administrative agencies may act only pursuant to authority delegated to them by Congress.” *Clean Air Council v. Pruitt*, 862 F.3d at 9; *see also Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (federal agency is a “creature of statute” and has “only those authorities conferred upon it by Congress”) (internal quotation omitted). An agency acting without authority violates the APA. 5 U.S.C. § 706(2)(C).

The agencies’ proposed Suspension Rule exceeds their authority and impermissibly invades the power of the federal courts. The APA, at 5 U.S.C. § 705, describes the limited context in which administrative agencies can postpone the effective date of a rule pending judicial review, and the more expansive authority of the courts. “When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” *Id.* The courts have the same authority “to postpone the effective date of an agency action,” but unlike agencies, courts may go beyond that authority and “issue all necessary and appropriate process . . . to preserve status and rights pending conclusion of the review proceedings.” *Id.*

An agency lacks statutory authority under 5 U.S.C. § 705 to postpone the effective date of a rule after the effective date has already passed. In that instance, the agency must comply with the APA’s notice and comment requirements. *Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324, *2 (D.C. Cir. Jan. 19, 1996). Here the agencies have not relied on Section 705 nor otherwise established a proper statutory basis for the Suspension Rule. And even if Section 705 applied in such circumstances, an effective date could be postponed under that statute only if the postponement is “pending judicial review,” *see Becerra v. U.S. Department of the Interior*, 2017 WL 3891678, *9 (N.D. Cal. August 30, 2017), and the agency has found that “justice requires” the postponement, *see California v. United States Bureau of Land Management*, 2017 WL 4416409, *10-13 (N.D. Cal. October 4, 2017).

The agencies cannot lawfully invoke Section 705 in the circumstances of the Clean Water Rule to justify the new “applicability date.” By purporting to establish an “applicability date” for the Clean Water Rule, they are seeking to illegally postpone that rule long after its effective date has passed. The agencies made the Clean Water Rule effective on August 28, 2015 (*see* 80 Fed. Reg. at 37054), and on that date it took effect everywhere in the nation except in 13 states covered by a North Dakota District Court preliminary injunction issued on August 27, 2015. Six weeks later, on October 9, 2017, the Sixth Circuit, consistent with its authority under 5 U.S.C. § 705, issued a temporary nationwide stay of the Clean Water Rule.

Now, rather than seek appropriate relief in the federal courts after the Supreme Court resolves the jurisdiction issue, the agencies' Suspension Rule seeks to render the Clean Water Rule ineffective until a new "applicability date," occurring years after the Clean Water Rule's effective date. Notably, the agencies cite no legal authority for their proposal to "add an applicability date" to a rule that became effective more than two years ago. The purported applicability date is merely an illegal attempt to postpone the Clean Water Rule's effective date.

The agencies themselves recognized they were postponing the effective date because their signed November 16, 2017 pre-publication version of the Suspension Rule titled it an "Amendment of Effective Date of 2015 Clean Water Rule," and employed the following language: "Effective date. This [Clean Water] rule is effective [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE Federal Register]." In the six days that followed, the agencies changed their wording by substituting the word "applicability" for "effective" in the version published in the Federal Register. This belated and self-serving change in the Suspension Rule's language does not change its substance which is to postpone the Clean Water Rule's effective date. In other words, what the agencies propose is an unlawful de-facto stay of the Clean Water Rule.

As discussed above, in proposing the Suspension Rule the agencies have failed to comply with notice and comment rulemaking requirements under the APA by failing to consider the substantive change in the applicability of the CWA to waters of the United States that the Suspension Rule would effect. Accordingly, the rule is also in excess of the agencies' statutory authority. *See Safety-Kleen Corp.*, 1996 U.S. App. LEXIS 2324, at *2 (postponement of rule's effective date after that date had passed held illegal because EPA failed to perform APA-required notice and comment rulemaking); *Becerra*, 2017 WL 3891678, at *9 (same).

The Suspension Rule is also not authorized by 5 U.S.C. § 705 because the agencies do not propose postponement of the Clean Water Rule "pending judicial review" of that rule. Rather, the basis for the postponement of the Clean Water Rule is to allow the agencies to complete their own review of the Clean Water Rule. The Suspension Rule's stated purpose is "to maintain the status quo . . . while the *agencies* continue to work to consider possible revisions to the 2015 [Clean Water] Rule." 82 Fed. Reg. 55542 (emphasis added). Tellingly, the agencies state that if the Sixth Circuit lacks jurisdiction, "control over which regulatory definition of 'waters of the United States' is in effect while the agencies engage in deliberations on the ultimate regulation could remain outside of the agencies," *i.e.*, with the courts. *Id.* at 55544. But under Section 705, the agencies have no authority to stay an effective rule pending their own review of the Clean Water Rule. *See Becerra*, 2017 WL 3891678, at *9 (postponement of regulatory compliance dates was outside the agency's authority because it did so pending the rule's repeal by the agency rather than pending judicial review of the rule). In addition, Section 705 provides that an

agency's postponement of a rule's effective date requires that the agency "finds that justice so requires." Here, the agencies have made no such findings. For this reason as well they have acted outside their authority in seeking to postpone the Clean Water Rule's effective date. *See California*, 2017 WL 3891678, at *10-13.

IV. THE SUSPENSION RULE, IF FINALIZED, IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

Agency rulemaking must be "based on a consideration of the relevant factors." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (*State Farm*). 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." *State Farm*, 463 U.S. at 43 (internal quotation and citation omitted). A regulation is arbitrary and capricious "if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* An agency may not promulgate a regulation under the CWA "without supportable facts," *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992), and cannot "ignore the directive given to it by Congress in the Clean Water Act, which is to protect water quality," *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009).

Additional strictures apply where, as here, an agency proposes to take regulatory action to suspend or revoke a rule and replace it in connection with a new administration's different policy choices.

Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, *an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.*

FCC v. Fox TV Stations, Inc., 556 U.S. 502, 537 (2009) (Kennedy, J., concurring) (emphasis added); *see id.*, 556 U.S. at 515 (Scalia, J., for the plurality) (A more detailed justification is needed for an agency's new policy "than what would suffice for a new policy created on a blank slate . . . when its new policy rests upon factual findings that contradict those which underlay its prior policy.").

Here the agencies are in wholesale breach of foundational administrative law principles, and the Suspension Rule, if promulgated, is arbitrary, capricious and not in accordance with law. Specifically, the agencies: (1) failed to consider important aspects of defining “waters of the United States;” (2) disregarded their prior factual findings in the Clean Water Rule; (3) failed to provide a rational basis or reasoned analysis for the Suspension Rule; and (4) improperly allowed EPA Administrator Pruitt’s involvement in the rulemaking. These deficiencies are discussed in detail below.

A. The Agencies Failed to Consider Important Aspects of the Problem of Defining “Waters of the United States.”

In proposing the Suspension Rule, the agencies “entirely failed to consider important aspect[s] of the problem” of defining the scope of waters protected under the Act, in violation of 5 U.S.C. § 706(2)(A). *See State Farm, supra*. In particular, the agencies have failed to consider the well-known ambiguities and inconsistencies in applying the 1980 regulations which they would restore for two years, and the further complications arising from Supreme Court and other federal case law interpreting “waters of the United States”—concerns that were central to the agencies’ promulgation of the Clean Water Rule. 80 Fed. Reg. 37054, 37056. As Chief Justice Roberts observed in *Rapanos*, “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.” *Rapanos*, 547 U.S. at 758. The Chief Justice’s concern was justified. *See, e.g., U.S. v. Cundiff*, 555 F.3d 200, 207-08 (6th Cir. 2009) (“Parsing out any one of *Rapanos*’s lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which – if any – of the . . . main opinions lower courts should look to for guidance.”). Again, this ambiguity, confusion and the unpredictable results in determining CWA jurisdiction were recognized by the agencies as the key reason for the Clean Water Rule. 80 Fed. Reg. 37054, 37056. There is no doubt that reinstating the 1980 regulations will perpetuate the confusion and inconsistencies that have long-plagued CWA jurisdictional determinations, problems that were recognized in and even compounded by the split decision in *Rapanos*. Yet in the Suspension Rule, the agencies have not considered this important aspect of the problem.

The agencies have not explained how the 1980 regulations comport with *Rapanos*. For example, the 1980 regulations included within the “waters of the United States” certain “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, slough, prairie potholes, wet meadows, playa lakes or natural ponds,” 33 C.F.R. § 328.3(a)(3), regardless of whether they have a “significant nexus” with navigable waters under Justice Kennedy’s test, or are relatively permanent/continuous waters under Justice Scalia’s test. Further, those regulations cover waters to the extent they have a nexus with interstate or

foreign commerce, rather than a nexus with navigable waters. *Id.* And while the 1980 regulations do not specifically include seasonal rivers as “waters of the United States,” Justice Scalia’s test specifically refers to seasonal rivers as encompassed within the definition. *Rapanos*, 547 U.S. at 733.

Moreover, in proposing the Suspension Rule, the agencies have entirely failed to consider the Act’s overarching goal to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In fact, the Suspension Rule provides no analysis demonstrating how it would meet this goal. *See Nat’l Cotton Council*, 553 F.3d at 939. Instead, the agencies make clear that they have not undertaken “any substantive reconsideration of the pre-2015 ‘waters of the United States’ definition” and have not addressed issues concerning “those related to the 2015 [Clean Water] Rule.” 82 Fed. Reg. at 55545.

The agencies claim without merit that their failure to address substance in the Suspension Rule is somehow supported by *P&V Enterprises v. U.S. Army Corps of Engineers*, 516 F. 3d 1021 (D.C. Cir. 2008). *See* 82 Fed. Reg. at 55545. But it is not. *P&V Enterprises* concerned an Army Corps Advance Notice of Proposed Rulemaking (ANPRM) requesting from interested parties information on the implications of *SWANCC*, 531 U.S. 159 (2001), for Corps’ jurisdictional determinations under the Act. The court in *P&V Enterprises* stated that the ANPRM “at most indicated that a substantive proposal for review might follow consideration of public input” and did not itself “offer[] a proposed rule,” but instead “was no more than a broadly stated request for information and comment” to help the agency fashion such a proposed rule if it chose to do so. *P&V Enterprises*, 516 F.3d at 1024 (internal quotation omitted). By contrast, here the agencies have not issued a broadly stated request for information to aid them in possibly proposing a rule. Rather they have already proposed a rule that would substantively change the scope of waters protected by the Act. The agencies’ reliance on *P&V Enterprises* to avoid addressing the substantive impacts of the Suspension Rule is unjustified.

In sum, the agencies have violated the APA by failing to consider in the Suspension Rule the important aspects of the problem of defining the scope of waters protected by the Act.

B. The Agencies Disregarded Prior Factual Findings Supporting the Clean Water Rule.

As discussed earlier, suspension of a rule is “tantamount to amending or revoking” it, requiring notice and comment. *Clean Air Council v. Pruitt*, 862 F.3d at 6 (2017). “[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change” and must address the prior factual findings that justify the rule it seeks to rescind. *State Farm*, 463 U.S. at 42, 47-51. In proposing the Suspension Rule, the agencies disregard both their prior factual findings

regarding the science supporting the promulgation of the Clean Water Rule, and the inadequacies they previously identified in regard to the 1980 regulations. The agencies offer no facts contradicting the massive record that formed the basis of the Clean Water Rule. This dramatic about-face by the agencies, in total disregard of their factual findings made just two years earlier, is arbitrary and capricious. See *Fox TV Stations, Inc.*, 556 U.S. at 515, 537.

i. The Agencies Have Disregarded and Failed to Address the Science Supporting the Clean Water Rule.

The Suspension Rule does not discuss the agencies' findings in promulgating the Clean Water Rule that many waters not specifically listed in the 1980 regulations, such as ephemeral and intermittent streams and floodplains, have a significant nexus to downstream waters and must be explicitly included within the definition of "waters of the United States." In making these findings, the agencies relied on a comprehensive report prepared by EPA's Office of Research and Development, which reviewed more than 1200 peer-reviewed publications, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Science Report).⁵ The agencies also relied on EPA's Science Advisory Board that independently reviewed the Science Report. 80 Fed. Reg. at 37057.

In promulgating the Clean Water Rule, the agencies relied on robust science supporting the Act's coverage for waters not specifically identified in the prior regulations. For example, the agencies found strong scientific evidence that wetlands and open waters in floodplains significantly impact the chemical, physical and biological integrity of primary waters. By definition a floodplain becomes "inundated during moderate to high flow events." Science Report at A-4. Because floodplain waters store water during these high flow events, they reduce the frequency of flooding by systematically retaining and more slowly releasing large volumes of stormwater runoff. Technical Support Document (TSD), Docket Id. No. EPA-HQ-OW-2011-0880 at 280, 300, 307. Accordingly, the agencies found that "wetlands and open waters in floodplains of streams and rivers and in riparian areas ... have a strong influence on downstream waters." 79 Fed. Reg. at 22196. "The body of literature documenting connectivity and downstream effects was most abundant for riparian/floodplain wetlands." TSD at 104. Similarly, the 1977 regulations did not provide for explicit inclusion of the category of tributaries, as defined and limited by the Clean Water Rule, within the Act's jurisdiction. The Science Report and the Scientific Advisory Board review confirmed that such tributary streams are connected to and strongly affect the chemical, physical, and

⁵ U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*, EPA/600/R-14/475F (Washington, D.C. 2015), available at <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. 80 Fed. Reg. at 37057.

The Suspension Rule, if finalized, violates the APA because the agencies have completely ignored without explanation their prior science-based findings relating to protection of waters' integrity (such as those discussed above) that are the foundation of the Clean Water Rule. *FCC v. Fox TV Stations, Inc.*, 556 U.S. at 537 (Kennedy, J., concurring) (in changing policy an agency cannot ignore or countermand its prior factual findings without reasoned explanation); *Nat'l Cotton Council*, 553 F.3d at 939 (EPA may not "ignore the directive given to it by Congress in the Clean Water Act, which is to protect water quality."); *United States v. Nixon*, 418 U.S. 683, 696 (1974) ("An Agency may not . . . depart from a prior policy *sub silentio*.").

ii. The Agencies Have Failed to Address the Clean Water Rule's Findings That the 1980 Regulations Are Confusing and Inconsistently Applied.

The agencies also have ignored previous findings regarding the numerous other inadequacies of the 1980 regulations. In promulgating the Clean Water Rule, the agencies determined that in light of the Supreme Court's *SWANCC* and *Rapanos* decisions, they had to make case-specific jurisdictional determinations under those regulations "far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public." 79 Fed. Reg. at 22188. The agencies found that the 1980 regulations (and guidance documents):

did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case specific jurisdictional analysis to determine whether a 'significant' nexus' exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. As a result of the ambiguity that exists under current regulations and practice following these recent decisions, almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination.

80 Fed. Reg. 37054, 37056.

The agencies further found that contributing to the confusion and uncertainty was frequent litigation arising from the case-by-case determinations in

which the federal courts would apply varying standards. 79 Fed. Reg. at 22252. “The purposes of the [Clean Water Rule] are to ensure protection of our nation’s aquatic resources and make the process of identifying ‘waters of the United States’ less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency . . . with increased certainty and less litigation.” *Id.* at 22190.

Yet, in the rulemaking for the Suspension Rule, the agencies have said nothing about their previous findings that the 1980 regulations sow ongoing confusion, inconsistency, uncertainty, administrative inefficiency, and frequent case-specific litigation. They have not explained, nor can they, how their prior findings of dysfunction in the 1980 regulations square with the rationale they have articulated for the restoration of those rules: that they would “avoid the possible inconsistencies, uncertainty, and confusion that could result from a Supreme Court ruling” dissolving the Sixth Circuit’s temporary nationwide stay of the Clean Water Rule. 82 Fed. Reg. at 55544. This disregard of the agencies’ prior factual findings violates the APA.

C. The Agencies Have Failed to Provide a Rational Basis or Reasoned Analysis for the Suspension Rule.

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.” *State Farm*, 463 U.S. at 43 (internal quotation and citation omitted). A regulation is arbitrary and capricious “if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

Here, the agencies’ assertion that the Suspension Rule could avoid “possible inconsistencies, uncertainty, and confusion” has no rational basis. The Suspension Rule would not end confusion and uncertainty associated with determining the scope of the Act’s jurisdiction. As discussed above, by returning to the regulatory regime of the 1980 regulations, the Suspension Rule will restore the well-known systemic problems in making jurisdictional determinations defining “waters of the United States.” In fact the agencies acknowledge that the latest iteration in their convoluted process, the Suspension Rule, will sow further confusion because their other interim proposal, the Repeal Rule, “remains under active consideration” while they also engage in “pre-proposal stakeholder outreach” about their purported “Step Two”. 82 Fed. Reg. at 55543-44. The agencies state the obvious when they observe that “there may be some confusion” with the Suspension Rule. *Id.*

The Suspension Rule will certainly not result in less confusion in the courts. At most it could result in the resolution of one set of court cases challenging the

Clean Water Rule and the commencement of other cases challenging the Suspension Rule. There is no doubt that such lawsuits will be brought given the importance of the definition of “waters of the United States” and the multiplicity of parties already litigating about it. Thus the agencies can have no reasonable expectation that the Suspension Rule will prevent further litigation of this issue, and their deliberate trading of one set of lawsuits for another provides no basis for promulgation of the Suspension Rule. *See Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956, 970 (9th Cir. 2015) (*en banc*).

The agencies’ explanations that ongoing litigation about the Clean Water Rule requires its suspension for two years are contrived and cannot justify the Suspension Rule. Their assertion that repeal of the Clean Water Rule is necessary because the current stay by the Sixth Circuit could expire ignores the fact that by its terms the Sixth Circuit’s stay is temporary. *See Ohio v. United States Army Corps of Eng’rs (In re EPA & DOD Final Rule)*, 803 F.3d at 808 (the stay is temporary “pending judicial review”). The agencies cannot rely on the existence of a temporary court-ordered injunction as a basis for the Suspension Rule. *See California ex rel. Lockyer v. USDA*, 575 F.3d 999, 1013-16 (9th Cir. 2009). In addition, the agencies’ stated concern about potential resumption of the North Dakota District Court’s temporary thirteen-state stay of the Clean Water Rule is belied by the proceedings in that case. The North Dakota District Court limited the geographic scope of its stay out of respect for other courts considering the Clean Water Rule, respect for states supporting the rule (including many of the States), and with the *express support* of the agencies, consistent with their longstanding practice favoring non-uniform geographic application of their rules when a court issues an adverse decision concerning a rule. *See court order in North Dakota v. EPA*, Case 3:15-cv-00059-RRE-ARS, Document No. 79 (D.N.D. Sept. 4, 2015), and Document No. 76 (Federal Defendants’ Brief, dated Sept.1, 2015). The agencies have not provided a reasoned explanation for their about-face on that issue. Nor have they provided a reasoned explanation why they cannot seek appropriate relief in the courts with jurisdiction over challenges to the Clean Water Rule rather than through the illegal proposed Suspension Rule.

The agencies further defy reason by first noting that the Clean Water Rule’s effective date was published in the Federal Register, and then stating that the “Code of Federal Regulations text does not include an applicability date; therefore, the agencies are proposing to amend the text of the Code of Federal Regulations to add a new applicability date.” 82 Fed. Reg. at 55542. This makes no sense. The effective dates of regulations are frequently published in the Federal Register, and most regulations do not have “applicability” dates. The mere absence of an applicability date in a regulation provides no rational basis to add one, especially when the effective date of the rule has long-passed. In addition, the Suspension Rule’s language is ambiguous because it would establish a Clean Water Rule “applicability date” two years into the future without revoking its effective date

from two years ago. Thus, the Suspension Rule is “so vague that it fails to give ordinary people fair notice of the conduct it punishes.” *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-56 (change in regulatory policy held void for vagueness); see *Faith Hospital Ass’n v. United States*, 634 F.2d 526, 536-37 (Ct. Cl. 1980) (internally inconsistent regulation held arbitrary and capricious).⁶

The agencies also claim that “in light of the public interest in these rules and the length of time involved in these rulemakings . . . the agencies are proposing this *more narrowly targeted and focused interim rule* to ensure the consistency of implementation of the definition of ‘waters of the United States’ during this interim period.” 82 Fed. Reg. at 55544 (emphasis added). But this is not a reasoned explanation supporting the proposed Suspension Rule because that rule is no more narrowly targeted and focused than the Repeal Rule. Both rules address the same issue “of great national importance” – the definition of the waters of the United States-- and the agencies rely on a common rationale for both – the purported need to avoid confusion and uncertainty associated with cases pending in the courts. In addition, the Suspension Rule raises even more issues of concern than the Repeal Rule (*e.g.*, the agencies’ lack of authority for the postponement, the added confusion of another proposed interim rule, and the Suspension Rule’s ambiguity). Accordingly, the alleged “narrow focus” of the Suspension Rule is unsupported and does not provide a rational basis for the rule.

Furthermore, the “reasoned analysis” required by *State Farm*, 463 U.S. at 42, for an agency’s reversal of policy should include consideration and discussion of alternatives. *Id.* at 46 (rescission of automobile passive restraint requirements found arbitrary and capricious for agency failure to consider alternative of modifying applicable standard); *Center for Science in the Public Interest v. Department of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (analysis supporting agency reversal of position “should include an explanation for the reversal which is supported by the record and a discussion of what alternatives were considered and why they were rejected,” citing *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 772 F.2d 795, 817-18 (D.C. Cir. 1983)). Here the agencies do not claim to have considered any alternatives. Instead of suspension of the Clean Water Rule and the attempt to resurrect the nearly four-decade-old regulations, modification of the carefully developed Clean Water Rule (by, for example, taking into account the

⁶ The agencies provide no reasoned explanation why the proposed Suspension Rule as signed by Messrs. Pruitt and Fisher on November 16, 2017 differed materially from the version published in the Federal Register six days later on November 22, 2017. They have not explained why the language of the rule changed from amending an “effective date” to adding an “applicability date,” and why the comment period was reduced from 25 to 21 days. They do not explain whether, and if so which, agency officials signed the version published in the Federal Register. In the absence of reasoned explanations and proof that the agencies followed proper procedure, the rule is arbitrary and capricious and not in accordance with law.

substantive issues) is an obvious alternative that the agencies have refused to consider. This failure by the agencies constitutes an “artificial narrowing of options” that “is antithetical to reasoned decision making.” *Int’l Ladies’ Garment Workers’ Union*, 772 F.2d at 817.

D. Administrator Pruitt’s Involvement in the Rulemaking is Illegal.

Administrator Pruitt’s continued participation in this rulemaking is arbitrary, capricious, and contrary to law, thus rendering any final rule invalid.⁷ Administrator Pruitt and EPA acted contrary to law by failing to undergo an ethics review in accordance with procedures set out under 5 C.F.R. § 2635.502, and because his involvement violates due process. Federal ethics regulations set forth a multifactor test for determining whether an agency employee may participate in a particular matter where it would raise a question in the mind of a reasonable person about the employee’s impartiality, but Administrator Pruitt has refused to undergo this ethics review. *Id.* Independent of these procedures, due process requires disqualification of a government official “when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.” *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

As to the Clean Water Rule and its replacement by the 1980 regulations, a reasonable person would conclude that Administrator Pruitt is not impartial; and the evidence compels the conclusion that he has “unalterably closed” his mind on the matter. For two years before becoming EPA Administrator, as Oklahoma Attorney General, he and other state attorneys general challenged the Clean Water Rule on behalf of their states in the U.S. Court of Appeals for the Sixth Circuit and in other federal courts, claiming that it exceeded the agencies’ statutory and constitutional authority. As relief, Mr. Pruitt sought to annul the rule, thereby reinstating the nearly four-decade-old regulations which the Clean Water Rule had superseded. *See* Opening Brief of State Petitioners, *Murray Energy Corp. v. EPA*, Case No. 15-3751, Document No. 128 (6th Circuit, Nov.1, 2016). Thus, this rulemaking involves the very same issues as his legal challenges to the Clean Water Rule and seeks to effect the similar results as that litigation: rendering the Clean Water Rule ineffective and replacing it with the 1980 regulations. *Compare Lead Industries Ass’n. Inc. v. EPA*, 647 F.2d 1130, 1174-78 (D.C. Cir. 1980) (EPA Assistant Administrator had not “prejudged” rulemaking on setting lead air quality

⁷ While in a May 2017 memorandum Mr. Pruitt recused himself from the Clean Water Rule litigation and other cases he previously brought against EPA, he has refused to recuse himself from any rulemakings such as the proposed rule here. My Ethics Obligations, Memorandum from E. Scott Pruitt (May 4, 2017), *available at* <https://foiaonline.regulations.gov/foia/action/public/view/record?objectId=090004d2812efc2b&fromSearch=true>.

levels just because he had previously said, while at his prior job, that lead should be regulated under the Clean Air Act).

Following his resignation as Oklahoma Attorney General, Mr. Pruitt continued his full-throttled advocacy for eliminating the Clean Water Rule. In his official EPA Administrator Twitter account, Mr. Pruitt explained that he sued EPA so many times because “[t]hey deserved it and they deserved it because they exceeded their statutory authority, they exceeded their constitutional authority.”⁸ Significantly, after publication of the proposed Repeal Rule, he met with various groups opposed to the Clean Water Rule to advocate for its repeal. He appeared in a promotional video for the National Cattlemen’s Beef Association, a party that challenged the Clean Water Rule alongside Mr. Pruitt. In the video he stated that “we want farmers and ranchers across the country to submit comments,” after explaining his strong opposition to the Clean Water Rule, which he wrongly stated “defined a water of the United States as being a puddle . . . and ephemeral drainage ditches across this country” -- features that the rule expressly defines as *not* waters of the United States. See 33 C.F.R. § 328.3(b)(3), (4)(vii).⁹ Mr. Pruitt asserted during the Repeal Rule’s comment period that the Clean Water Rule was “an overreach,” as he did in prior litigation on behalf of Oklahoma.¹⁰ And in his August 8, 2017 meeting with the Iowa Farm Bureau he held up a sign advocating to “ditch” the Clean Water Rule.¹¹

In summary, Administrator Pruitt’s involvement in this rulemaking renders a final rule invalid due to his refusal to follow ethics review procedures under 5 C.F.R. § 2635.502 in light of his lack of impartiality, and because the clear and convincing evidence demonstrates his closed mind on the matter in violation of due process. See 5 U.S.C. § 706(2).

⁸ See May 11, 2017, official Twitter statement directing the public to an article on The Daily Caller website, quoting him.

Available at <https://twitter.com/EPAScottPruitt/status/862745467679121408>.

⁹ The video is available at

<http://news.vice.com/story/epa-head-scott-pruitt-is-the-new-star-of-a-big-beef-industry-video>. See “EPA chief in Iowa to talk about recrafting ‘Waters of the U.S.’ rule,” *Radio Iowa*, Aug. 8, 2017 (making same incorrect assertion) at <http://www.radioiowa.com/2017/08/08/epa-chief-in-iowa-to-talk-about-recrafting-waters-of-the-us-rule/>.

¹⁰ See “EPA administrator in Utah to get input on water rule, other regulations,” *Desert News Utah*, July 18, 2017 at <https://www.deseretnews.com/article/865685042/EPA-administrator-in-Utah-to-get-input-on-water-rule-other-regulations.html>.

¹¹ See “Clean Water Rule: Pruitt stars in industry video promoting WOTUS repeal,” *Environment & Energy News*, August 21, 2017 at <https://www.eenews.net/stories/1060058985>.

CONCLUSION

For all of these reasons, the States strongly oppose the Suspension Rule and respectfully request that the agencies not proceed with or finalize it.

Very truly yours,



ERIC T. SCHNEIDERMAN
Attorney General of New York



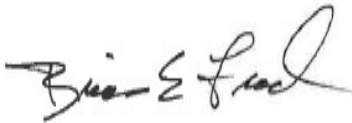
XAVIER BECERRA
Attorney General of California



DOUGLAS S. CHIN
Attorney General of Hawaii



JANET T. MILLS
Attorney General of Maine



BRIAN E. FROSH
Attorney General of Maryland



MAURA HEALEY
Attorney General of Massachusetts



ELLEN F. ROSENBLUM
Attorney General of Oregon



PETER F. KILMARTIN
Attorney General of Rhode Island



T.J. DONOVAN
Attorney General of Vermont



BOB FERGUSON
Attorney General of Washington



KARL A. RACINE
Attorney General of the District of Columbia