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December 13, 2017

Via www.regulations.gov

Administrator E. Scott Pruitt
U.S. Environmental Protection Agency
Office of the Administrator
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Acting Assistant Secretary Ryan A. Fisher
Office of the Assistant Secretary of the
Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: *Proposed Suspension of the Clean Water Rule (EPA-HQ-OW-2017-0644)*

Dear Administrator Pruitt and Acting Assistant Secretary Fisher:

For more than five months now, you and your agencies have been struggling to find a means of immediately eliminating the Clean Water Rule’s protections. The effort began in June, when the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers announced a proposed “interim” regulation that would “*rescind the 2015 Clean Water Rule* and replace it with a recodification of the [prior] regulatory text[.]”¹ On November 16—after recognizing that the “more than 680,000 public comments” on the repeal would “require[]

¹ U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Proposed Rule, Definition of “Waters of the United States”—Recodification of Pre-Existing Rules (June 27, 2017) (prepublication version), at 10, 11 (emphasis added), *available at* https://www.epa.gov/sites/production/files/2017-06/documents/wotus_prepublication_version.pdf (last visited Dec. 12, 2017), *and* <https://perma.cc/Y2T9-SMCH> (permanent link). For reasons unknown, the proposed repeal rule did not appear in the Federal Register until July 27, 2017. *See* U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Proposed Rule, Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (“Proposed Repeal Rule”).

sufficient time to process”²—both of you signed a hastily devised proposal to instead “*amend the effective date of the ... Clean Water Rule ... to two years from the date of [the agencies’] final action[.]*”³ When this proposed rule was published only six days later, however, it had been changed without explanation.⁴ Now it seems that you and your agencies are “mov[ing] quickly” to “*add an applicability date to the ... Clean Water Rule*”—one that would suspend the rule’s protections until 2020 or so, “ensur[ing] that there is sufficient time” for the agencies to undertake the “regulatory process for reconsidering the definition of ‘waters of the United States[.]’”⁵

The difficulties you have encountered in your repeated attempts to summarily rescind the Clean Water Rule should not have come as a surprise. Federal law, in short, doesn’t allow such an action—and for good reason. As your agencies recently acknowledged in a “memorandum for the record,” the Clean Water Rule resolved a nationally important issue of significant complexity.⁶ Any effort to suspend the regulation must address this complexity through the regulatory process your agencies have recognized—a process that requires them “to undertake continued outreach efforts, develop supporting documentation, provide for interagency review, undergo public notice on a proposed rule, process and consider those comments, and develop a final rule and supporting documents, including responses to public comments.”⁷ While each of

² Department of the Army and U.S. Environmental Protection Agency, Memorandum for the Record, Rulemaking Process for Proposed Rule: Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule (Nov. 20, 2017) (“Rulemaking Memorandum”), at 4.

³ U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Proposed Rule, Definition of “Waters of the United States”—Amendment of Effective Date of 2015 Clean Water Rule (Nov. 16, 2017) (prepublication version) (“Effective-Date Proposal”) (attached), at 1 (emphasis added).

⁴ U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Proposed Rule, Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542, 55,544 (Nov. 22, 2017) (“Proposed Suspension Rule”).

⁵ News Release, EPA and the Army Propose to Amend the Effective Date of the 2015 Rule Defining “Waters of the United States” (Nov. 16, 2017), *available at* <https://www.epa.gov/newsreleases/epa-and-army-propose-amend-effective-date-2015-rule-defining-waters-united-states> (last visited Dec. 12, 2017), *and* <https://perma.cc/LJ7S-QKR6> (permanent link) (declaring that the agencies “plan to move quickly to take final action in early 2018”); Proposed Suspension Rule, 82 Fed. Reg. at 55,542, 55,544 (emphasis added); *id.* at 55,544 (noting that “[t]he agencies are proposing to establish an applicability date of two years after a final rule and seek comment on whether the time period should be shorter or longer”).

⁶ Rulemaking Memorandum at 1 (“Due to the national importance and complexity of the definition of ‘waters of the United States,’ two years is a reasonable extension to allow the agencies to complete the rulemaking process.”).

⁷ *Id.*

these steps will undoubtedly take time, they are essential to ensuring that any final action is consistent with the Clean Water Act, science, and federal rulemaking requirements.

Because it seeks to bypass both federal law and science, your proposed suspension of the Clean Water Rule is another arbitrary and unlawful effort to eliminate by unilateral fiat the water-quality protections your agencies developed through a four-year process of research and public engagement.⁸ Given that there is no legal or factual basis for staying the regulation, your new proposal would only result in additional litigation and confusion—the very opposite of the “greater regulatory certainty” you claim to seek.⁹ On behalf of a coalition of organizations that share a common commitment to clean water and healthy wetlands, we urge you to withdraw the proposed regulation and prepare your agencies for the Clean Water Rule’s implementation.¹⁰

⁸ See U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Final Rule, Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,102 (June 29, 2015) (“Clean Water Rule”) (noting that agency outreach began “at the onset of rule development in 2011,” four years before the adoption of the Clean Water Rule).

⁹ Proposed Suspension Rule, 82 Fed. Reg. at 55,542. See also *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015), cert. denied sub nom. *Alaska v. Organized Vill. of Kake, Alaska*, 136 S. Ct. 1509 (2016) (holding that a federal agency acted arbitrarily when it “deliberately traded one lawsuit for another” by promulgating a replacement rule).

¹⁰ The Southern Environmental Law Center submits these comments on behalf of the Alabama Rivers Alliance, Altamaha Riverkeeper, American Rivers, Appalachian Voices, Audubon South Carolina, Cahaba River Society, Carolina Wetlands Association, Catawba Riverkeeper Foundation, Center for a Sustainable Coast, Charleston Waterkeeper, Chattahoochee Riverkeeper, Chattooga Conservancy, Chocktawatchee Riverkeeper, Coalition for Smarter Growth, Coastal Conservation League, Congaree Riverkeeper, Coosa River Basin Initiative, Dogwood Alliance, Defenders of Wildlife, Earthkeeper, Flint Riverkeeper, French Broad Riverkeeper, Friends of Accotink Creek, Friends of the Locust Fork, Friends of the Rappahannock, Friends of the Reedy River, Georgia ForestWatch, Green Riverkeeper, Harpeth Conservancy, James River Association, Lynnhaven River NOW, Mountain True, North Carolina Coastal Federation, North Carolina Conservation Network, North Carolina Wildlife Federation, Obed Watershed Community Association, One Hundred Miles, Potomac Riverkeeper Network, Richmond Audubon Society, Rivanna Conservation Alliance, River Guardian Foundation, Roanoke River Basin Association, Satilla Riverkeeper, Savannah Riverkeeper, Save Our Saluda, Sierra Club-Virginia Chapter, South Carolina Native Plant Society, Tennessee Citizens for Wilderness Planning, Tennessee Clean Water Network, The Wilderness Society, Virginia Conservation Network, Virginia League of Conservation Voters, Watauga Riverkeeper, Wetlands Watch, Winyah Rivers Foundation, and WWALS Watershed Coalition.

I. Under the Administrative Procedure Act, the Clean Water Rule Cannot Be Suspended without a Meaningful Opportunity for Public Comment and a Recognition and Reassessment of the Rule’s Protections

Your newest proposal has again betrayed an extraordinary disregard for federal rulemaking requirements and the views of the American public.¹¹ Under the Administrative Procedure Act, an agency that wishes to engage in rulemaking must:

- (1) publish a general notice of proposed rule making in the Federal Register that includes “the terms or substance of the proposed rule or a description of the subjects and issues involved”;
- (2) give “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”; and
- (3) “[a]fter consideration of the relevant matter presented ... incorporate in the rules adopted a concise general statement of their basis and purpose.”¹²

“The important purposes of this notice and comment procedure cannot be overstated.”¹³ Rather than “erect[ing] arbitrary hoops through which federal agencies must jump without reason[,]” the process “improves the quality of agency rulemaking by exposing regulations to diverse public comment,” “ensures fairness to affected parties,” and “provides a well-developed record that enhances the quality of judicial review.”¹⁴ When a proposed regulation is aimed at eliminating protections that were previously adopted by an agency, notice and comment also “ensures that ... [the] agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.”¹⁵ In short, as the D.C. Circuit has summarized, the notice-and-comment process “serve[s] important purposes of agency

¹¹ See Southern Environmental Law Center, Comments on the Proposed “Waters of the United States” Rulemaking (EPA-HQ-2017-0203) (Sep. 27, 2017) (attached) (“SELC Repeal-Rule Comments”), at 5-18 (noting the many ways in which the agencies’ first proposed rule “betray[ed] an extraordinary disregard for the requirements of the Administrative Procedure Act and the views of the American public”).

¹² *N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (quoting 5 U.S.C. §§ 553(b), (c)).

¹³ *Id.*

¹⁴ *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (internal quotations omitted).

¹⁵ *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff’d sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983). See also *N.C. Growers’ Ass’n*, 702 F.3d at 763 (noting that notice and comment helps to ensure that agencies “‘maintain[] a flexible and open-minded attitude towards ... [their] own rules,’ ... because the opportunity to comment ‘must be a meaningful opportunity’” (quoting *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985), and *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011)).

accountability and reasoned decisionmaking”—and it “impose[s] a significant duty on the agency.”¹⁶

Despite the critical importance of public comment and reasoned agency decisionmaking, your new proposal again attempts to circumvent these requirements.¹⁷ Contrary to the repeated assertions of your agencies, the proposed rule is in fact designed to *change* the “legal *status quo*” by “*add[ing] an applicability date* to the ... [Clean Water] Rule such that it is not implemented ... [for] two years[.]”¹⁸ The agencies’ continued refusal to allow substantive comments on the implications of such a change is at odds with the Administrative Procedure Act.¹⁹ Though temporary, the proposed suspension of the Clean Water Rule is, in effect, a repeal that would have “palpable effects” on the nation’s waters and those who depend upon them.²⁰ Indeed, the tributaries and wetlands that could be destroyed as a result of the proposal would be forever lost, causing persistent harm to downstream waters.²¹ Due to the substantive significance of the

¹⁶ *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

¹⁷ See SELC Repeal-Rule Comments at 5-10 (discussing the agencies’ earlier efforts to avoid substantive comments and deliberation).

¹⁸ Proposed Suspension Rule, 82 Fed. Reg. at 55,542, 55,543 (emphasis added). See also, e.g., *California v. U.S. Bureau of Land Mgmt.*, No. 17-CV-03804-EDL, 2017 WL 4416409, at *9 (N.D. Cal. Oct. 4, 2017) (noting that the Bureau of Land Management had “belatedly disrupted” the *status quo*—not “maintain[ed]” it, as claimed—by suspending a rule “[a]fter years of developing ... [it] and working with the public and industry stakeholders”).

¹⁹ See *N.C. Growers’ Ass’n*, 702 F.3d at 769-70; Proposed Suspension Rule, 82 Fed. Reg. at 55,544-45 (declaring that the agencies are not soliciting public comments on “the specific content of th[e] ... regulations” they now seek to revive or on “the scope of the definition of ‘waters of the United States’ that the agencies should ultimately adopt ... , as the agencies will address those issues as appropriate, including those related to the 2015 [Clean Water] Rule, in the notice and comment rulemaking to consider adopting a revised definition of ‘waters of the United States’ in light of the February 28, 2017, Executive Order”).

²⁰ *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) (internal quotations omitted) (holding that an agency order “deferring ... [a] requirement that coal operators supply life-saving equipment to miners” for six months “was a substantive rule” subject to the notice-and-comment provisions of the Administrative Procedure Act “since ... it had “palpable effects” upon the regulated industry and the public in general”). See also, e.g., *Clean Air Council v. Pruitt*, 862 F.3d 1, 5-6 (D.C. Cir. 2017) (holding that the EPA’s decision to “suspend[] implementation of ... [its] methane rule” was “essentially an order delaying the rule’s effective date, and ... such orders are tantamount to amending or revoking a rule”).

²¹ See, e.g., SELC Repeal-Rule Comments at 20-27 (discussing the role of tributaries and wetlands in protecting the integrity of downstream waters); Clean Water Rule, 80 Fed. Reg. at 37,055 (noting that both “[p]eer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and

proposed regulation, you and your agencies must solicit and address comments on the merits of the rule before taking any action.²² And you must ultimately provide a “reasoned explanation” for rejecting the substantial record that your agencies developed in support of the Clean Water Rule.²³

II. Because the Addition of an “Applicability Date” to the Clean Water Rule Would Not Revive the Agencies’ Pre-2015 Regulatory Language, the Proposed Rule Promises to Create a Regulatory Vacuum—and Quite a Bit of Confusion

In addition to retaining the legal flaws of your previous proposal—flaws that we explained at greater length in our previous comment letter, which is attached and incorporated by reference—the proposed rule would give rise to a new set of problems.²⁴ Most notably, perhaps, while your agencies have insisted that adding an “applicability date” to the Clean Water Rule

many other vital chemical, physical, and biological processes”); U.S. EPA Office of Research and Development, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Jan. 2015) (“EPA Connectivity Report”), at ES-2, *available at* http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523020 (last visited Dec. 12, 2017), *and* <https://perma.cc/5KDU-HP4W> (permanent link) (noting, among other things, that “streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters[,]” and “wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality”).

²² See, e.g., *N.C. Growers’ Ass’n*, 702 F.3d at 769-70 (concluding that the Department of Labor had “clearly” violated the Administrative Procedure Act in barring members of the public from commenting on the “substance or merits” of the rules it had suspended or reinstated for a nine-month period); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (holding that the EPA violated the Administrative Procedure Act in adopting an interim rule without notice and comment); *Env’tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (“The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553.”); *Env’tl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) (“[A]n agency action which has the effect of suspending a duly promulgated regulation is normally subject to APA rulemaking requirements.”). See also SELC Repeal-Rule Comments at 5-18 (explaining the agencies’ obligations under the Administrative Procedure Act).

²³ See SELC Repeal-Rule Comments at 13-53 (discussing the record compiled in support of the Clean Water Rule); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (holding that “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy” of an agency).

²⁴ See SELC Repeal-Rule Comments (discussing the proposed repeal’s inconsistency with the Administrative Procedure Act, the Clean Water Act, Executive Order 13,778, and the record underlying the Clean Water Rule, among other things); see also *Action on Smoking and Health v. CAB*, 713 F.2d 795, 798-99 (D.C. Cir. 1983) (noting that “[a]n agency cannot remedy a deficiency in one regulation by promulgating a new rule, equally defective for the same or other reasons”).

would somehow “ensure that the [prior] regulatory definition of ‘waters of the United States’” will “remain in effect[.]” this is incorrect.²⁵ As the Office of the Federal Register explained in its Document Drafting Handbook, “applicability” and “compliance” dates merely establish “the date that the affected classes must comply with ... [a] rule” after it has taken effect.²⁶ They have no bearing on the rule’s effectiveness and placement in the Code of Federal Regulations.²⁷

If your agencies had wanted to prevent the Clean Water Rule from displacing their prior regulatory language, they could have done so by delaying the rule’s “effective date.”²⁸ As you seem to have realized, however, the moment for such an amendment has passed.²⁹ In the words of the Office of the Federal Register, “[y]ou may only [d]elay effective dates that have not yet taken place.”³⁰ And in the words of your agencies, “[t]he effective date of the ... [Clean Water] Rule was August 28, 2015.”³¹

²⁵ Proposed Suspension Rule, 82 Fed. Reg. at 55,542.

²⁶ Office of the Federal Register, Document Drafting Handbook (May 2017) (“Federal Register Handbook”), at 3-9 (noting that “[s]ome rules include a compliance or applicability date in addition to an effective date”), available at <https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf> (last visited Dec. 12, 2017), and <https://perma.cc/FUB5-VPCV> (permanent link).

²⁷ *Id.* at 3-10 (Table 3-3) (noting that a “compliance” or “applicability” date “[a]ddresses the person who must comply[.]” while an “effective” date “[a]ddresses the CFR placement”); *id.* at 3-13 (Table 3-4) (noting that “a compliance date affects the user, not the CFR”). As the Clean Water Rule has only indirect impacts on “user[s]” and “affected classes,” moreover, it is not clear why it would be appropriate to add an “applicability date” to the regulation. *See id.* at 3-9, 3-13 (Table 3-4); Clean Water Rule, 80 Fed. Reg. at 37,101 (noting that “[t]he potential costs and benefits incurred as a result of ... [the Clean Water Rule] are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs”).

²⁸ Federal Register Handbook at 3-8 (noting that “[t]he effective date is the date that ... [the Office of the Federal Register] amend[s] the CFR by following ... [an agency’s] amendatory instructions” and, as a result, “effective dates cannot be retroactive and only rule documents that amend the CFR have effective dates”).

²⁹ *See* Effective-Date Proposal at 1 (quickly abandoned proposal to “amend the effective date of the ... Clean Water Rule ... to two years from the date of final action on th[e] proposal”).

³⁰ Federal Register Handbook at 3-10. *See also, e.g., Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS, *2-3 (D.C. Cir. Jan. 19, 1996) (noting that the Administrative Procedure Act “permits an agency to postpone the effective date of a not yet effective rule, pending judicial review[.]” but “does not permit the agency to suspend without notice and comment a promulgated rule”) (quoted in *Becerra v. U.S. Dep’t of the Interior*, No. 17-CV-02376-EDL, 2017 WL 3891678, at *9 (N.D. Cal. Aug. 30, 2017)).

³¹ Proposed Suspension Rule, 82 Fed. Reg. at 55,542. *See also, e.g., Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1014-15 (9th Cir. 2009) (noting that an agency’s “promulgation of

Given that the Clean Water Rule has already assumed its place in the Code of Federal Regulations, the addition of an “applicability date” would do nothing to revive the regulatory language that appeared in the CFR before the Clean Water Rule displaced it.³² Instead, the proposed rule, if finalized, would leave you and your agencies *without* a regulation to apply, resulting in immediate uncertainty and confusion; Corps districts and the EPA would be left to apply the text of the Clean Water Act directly, making thousands of case-by-case determinations with no regulatory structure to guide them and ensure consistency.³³ This alone is enough to answer the questions your agencies have posed in their limited request for public comment. To summarize, it would not be “desirable and appropriate to add an applicability date to the 2015 Rule[,]” and doing so would not “contribute[] to regulatory certainty.”³⁴ Your proposed regulation—like the repeal rule before it—should accordingly be withdrawn.³⁵

III. The Clean Water Rule Has Been Successfully Implemented by the Army Corps of Engineers—and Has Not Created Regulatory Uncertainty

The agencies’ efforts to effectively repeal the Clean Water Rule in the name of “regulatory certainty” also have no factual or practical basis. In fact, during the six-week period that the rule was in effect, between August 28, 2015 and October 9, 2015, the Corps’ Buffalo, Charleston, Chicago, Fort Worth, Galveston, Jacksonville, Kansas City, Los Angeles, Louisville, Memphis, Mobile, New Orleans, New York, Norfolk, Rock Island, Sacramento, San Francisco, Savannah, Seattle, St. Paul, Tulsa, Vicksburg, and Wilmington districts successfully

... [a replacement] Rule necessarily encompassed the permanent repeal of the ... [original] Rule’s substantive protections”).

³² See, e.g., Federal Register Handbook at 3-11 (noting that an agency can temporarily “restore” an earlier regulation after its replacement has become effective only by “[s]taying ... [the] amendment or revision to [the] CFR text” and “add[ing] the previous text back to the CFR, using a CFR paragraph or section number different from the [s]tayed text”).

³³ The Sixth Circuit’s decision staying the effectiveness of the Clean Water Rule illustrates the agencies’ error here. In the Sixth Circuit litigation, then-Oklahoma Attorney General Pruitt and his co-petitioners asked the court to “restore the status quo as it existed before the Rule went into effect.” *In re: EPA*, 803 F.3d 804, 806 (6th Cir. 2015). The court accepted that request and restored “the pre-Rule regime[.]” *Id.* Adding an applicability date to the Clean Water Rule, in contrast, would merely allow non-compliance with rule’s provisions, which would remain in effect. The proposed rulemaking would not revive “the pre-Rule regime.”

³⁴ Proposed Suspension Rule, 82 Fed. Reg. at 55,544.

³⁵ Notably, your agencies have previously proposed—and apparently abandoned—the only available method of reviving their prior regulation: reinstating it by amending the text of the Code of Federal Regulations. See Proposed Repeal Rule, 82 Fed. Reg. at 34,899. Though the agencies’ July proposal identified the proper procedure for replacing the Clean Water Rule, it violated basic notice-and-comment requirements by failing to evaluate and take comment on the proposed change. See SELC Repeal-Rule Comments at 5-10.

implemented it.³⁶ These districts include all of the South Atlantic Division and nearly 70 percent of the Corps' domestic districts.³⁷ Together, they applied the Clean Water Rule more than 250 times.³⁸ The doomsday scenario imagined in your agencies' latest public notice, in other words, did not come to pass. That is no surprise, given that the Clean Water Rule replaced case-by-case guidance with clearer jurisdictional lines—lines the Corps spent more than four years developing.³⁹ The absence of any difficulty in applying the regulation makes it clear that the purported concerns about “regulatory uncertainty” are unfounded.

IV. Under the Clean Water Act and the Administrative Procedure Act, Your Agencies Lack the Authority to Suspend the Protections of the Clean Water Rule Pending Litigation or Reconsideration

In addition to being a failed attempt at reviving your agencies' prior regulation, the proposed rule cannot lawfully suspend the protections of the Clean Water Rule. According to your recent notice, the suspension proposal is aimed at staying the Clean Water Rule during a lengthy period of “reconsideration” and “judicial review[.]”⁴⁰ Unlike the Clean Air Act, however, the Clean Water Act does not include a provision that authorizes the Environmental Protection Agency to stay the effectiveness of its regulations “during ... reconsideration[.]”⁴¹ And while the Administrative Procedure Act allows your agencies to “postpone the effective date of ... [their regulations] pending judicial review[.]” this authority expired on the Clean Water Rule's effective date—August 28, 2015.⁴² As your agencies “may act only pursuant to

³⁶ See U.S. Army Corps of Engineers, Approved Jurisdictional Determinations (“Corps' Approved Jurisdictional Determinations”) (attached), at http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO::: (last visited Dec. 12, 2017) (isolating jurisdictional determinations for August, September, and October 2015).

³⁷ See U.S. Army Corps of Engineers, Where We Are, at <http://www.usace.army.mil/Locations.aspx> (last visited Dec. 12, 2017).

³⁸ See Corps' Approved Jurisdictional Determinations.

³⁹ See Clean Water Rule, 80 Fed. Reg. at 37,055 (noting that the Clean Water Rule was designed to “clarify and simplify implementation of the CWA consistent with its purposes 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”).

⁴⁰ Proposed Suspension Rule, 82 Fed. Reg. at 55,543, 55,545.

⁴¹ 42 U.S.C. § 7607(d)(7)(B) (providing that “[t]he effectiveness of ... [a] rule may be stayed during ... reconsideration ... by the Administrator or the court for a period not to exceed three months”).

⁴² 5 U.S.C. § 705. See also, e.g., *Safety-Kleen Corp.*, 1996 U.S. App. LEXIS at *2-3 (noting that the Administrative Procedure Act “permits an agency to postpone the effective date of a *not yet effective* rule, pending judicial review” (emphasis added)) (quoted in *Becerra*, 2017 WL 3891678, at *9).

authority delegated to them by Congress[.]" the proposed suspension is unlawful and must be withdrawn.⁴³

V. Under the Endangered Species Act, Your Agencies Must Consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Regarding the Impacts of the Proposed Suspension on Imperiled Species

In your rush to eliminate the Clean Water Rule's protections, you have also disregarded the requirements of the Endangered Species Act. For more than four decades, the Endangered Species Act has "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."⁴⁴ The statute established a vital program for the conservation of both imperiled species and "the ecosystems upon which ... [they] depend[.]"⁴⁵ Central to this program are the consultation requirements of Section 7. Under Section 7(a)(2) of the Act, "[e]ach Federal agency" is required,

in consultation with and with the assistance of the Secretary [of the Interior or the Secretary of Commerce], [to] insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat[.]⁴⁶

This language imposes both substantive and procedural obligations on federal agencies. Substantively, agencies must make certain their actions are "not likely" to leave an imperiled species in jeopardy or adversely modify its critical habitat.⁴⁷ Procedurally, agencies must evaluate the potential impact of their actions "in consultation with" federal wildlife experts.⁴⁸

Before moving forward with the proposed action, your agencies must satisfy these requirements.⁴⁹ If finalized, the suspension rule would strip essential water-quality protections

⁴³ *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014) (internal quotations and alterations omitted).

⁴⁴ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁴⁵ 16 U.S.C. § 1531(b).

⁴⁶ *Id.* § 1536(a)(2). *See also id.* § 1536(a)(1) (requiring federal agencies to "utilize their authorities in furtherance of the purposes of ... [the Endangered Species Act] by carrying out programs for the conservation of endangered species and threatened species listed" under the statute).

⁴⁷ *Id.* § 1536(a)(2).

⁴⁸ *Id.*

⁴⁹ *See, e.g., Cal. ex rel. Lockyer*, 575 F.3d at 1018-19 (holding that consultation was required under the Endangered Species Act before the defendant agency could repeal and replace regulatory protections that had been "in effect without injunction for three months," as the

from wetlands and streams across the United States.⁵⁰ The loss of these protections would also result in significant impacts downstream. As your agencies acknowledged in adopting the Clean Water Rule,

[p]eer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes.⁵¹

In light of the proposed rule’s inevitable impacts on imperiled species and their habitats, your agencies must immediately initiate consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.⁵²

agency had “fail[ed] to cite any support for the proposition that it can ignore a valid rule, codified in the Code of Federal Regulations, simply because the rule was not in effect long enough”).

⁵⁰ See, e.g., U.S. Environmental Protection Agency and Department of the Army, Economic Analysis for the Proposed Definition of “Waters of the United States”—Recodification of Pre-Existing Rules (June 2017), at 2 (acknowledging that eliminating the Clean Water Rule’s protections would “result[] in an overall reduction in positive jurisdictional determinations” under the Clean Water Act), available at https://www.epa.gov/sites/production/files/2017-06/documents/economic_analysis_proposed_step1_rule.pdf (last visited Dec. 12, 2017), and <https://perma.cc/429A-KMUX> (permanent link).

⁵¹ Clean Water Rule, 80 Fed. Reg. at 37,055.

⁵² See 16 U.S.C. § 1536(a)(2). See also, e.g., EPA Connectivity Report at B-4 (noting that Carolina bays, which are granted additional protections under the Clean Water Rule, have been found to support “amphibians [that] are endangered or threatened, including the flatwoods salamander (*Ambystoma cingulatum*) and the gopher frog (*Rana capito*)”); *id.* (noting that “[e]ndangered wood storks (*Mycteria americana*) nest in Carolina bays”); U.S. Environmental Protection Agency Science Advisory Board, SAB Review of the Draft EPA Report “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (Oct. 17, 2014) (attached), at 20 (noting that “[h]abitats that are seasonally dry or even dry for several years in a row can be critical to the biological integrity of downgradient waters because a wide range of species (e.g., fish, amphibians, reptiles, birds, mammals, and invertebrates) use them to complete certain annual or life-cycle stages[,]” and “[w]hen these upstream, lateral, and disconnected aquatic habitats are degraded or destroyed, populations decline and species can become threatened or endangered (or otherwise imperiled), or are extirpated”), available at [https://yosemite.epa.gov/sab/sabproduct.nsf/AF1A28537854F8AB85257D74005003D2/\\$File/EPA-SAB-15-001+unsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf) (last visited Dec. 12, 2017), and <https://perma.cc/CK9V-KDCL> (permanent link); *id.* at 43 (noting that “floodplain wetlands and off-channel waters play an important role as spawning grounds and fish nurseries during high-

VI. Your Agencies' Purported Analysis of the Proposed Rule's Economic Impacts Is Arbitrary and Capricious

Once again, your agencies have attempted to justify eliminating the Clean Water Rule's protections with an economic analysis that is arbitrary, counterfactual, and misleading.⁵³

According to your agencies' three-page "memorandum" on the economic impacts of your proposal, the suspension rule "would not be economically significant" because it wouldn't do anything at all.⁵⁴ In light of the Sixth Circuit's temporary stay, the memorandum argues, "[t]he regulatory regime both with and without th[e] rule are [*sic*] the pre-2015 rule regulatory regime. Therefore," the memo concludes, "there would be no costs, benefits, or other potential impacts" as a result of suspending the Clean Water Rule's protections.⁵⁵ This analysis was arbitrary. In attempting to explain the seemingly urgent need to move forward with the proposed suspension, your agencies have argued that the current "regulatory regime ... depends upon the pendency of the Sixth Circuit's order and *could be altered at any time* by factors beyond the control of the agencies."⁵⁶ Given that this possibility has served as the basis for your rulemaking effort, it must also be used as the baseline of your economic analysis.

Your agencies get no further in arguing that the effects of the suspension can be fairly ignored because "the impact of th[e] proposed rule is limited to a relatively short period of time (i.e., the agencies are proposing two years)."⁵⁷ In their 2015 analysis of the Clean Water Rule, the agencies estimated that more than \$500 million in wetland-mitigation benefits could result from each year of the rule's implementation.⁵⁸ A loss of more than \$1 billion in benefits over two

water seasons for species (including several endangered fishes) that ultimately populate downstream fisheries").

⁵³ Department of the Army and U.S. Environmental Protection Agency, Memorandum for the Record, Consideration of Potential Economic Impacts for the Proposed Rule: Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule (Nov. 20, 2017) ("Economic Memorandum"); SELC Repeal-Rule Comments at 46-52 (discussing the flaws of the agencies' previous economic analysis).

⁵⁴ Economic Memorandum at 3.

⁵⁵ *Id.* at 2.

⁵⁶ Proposed Suspension Rule, 82 Fed. Reg. at 55,543 (emphasis added). *See also id.* at 55,544 (arguing that "a short comment period is reasonable[,] in part, "because a Supreme Court ruling [on the Sixth Circuit's jurisdiction] could come at any time").

⁵⁷ Economic Memorandum at 3.

⁵⁸ U.S. Environmental Protection Agency and U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 20, 2015) (attached), at 49-54, *available at* https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf (last visited Dec. 12, 2017), *and* <https://perma.cc/5LL6-Z4RV> (permanent link).

years is a significant effect by any estimation. Your agencies acted arbitrarily in disregarding these benefits. (And as we noted in our earlier comments, they had no reasonable basis for attempting to remove the same figures from their June 2017 calculations.⁵⁹)

The memorandum's discussion of regulatory uncertainty and its economic implications is similarly flawed. First, as explained above, the proposed rule promises to make the current "regulatory environment" more uncertain—not less.⁶⁰ As a result, there is no merit to your agencies' suggestion that the regulation would result in "avoided costs of the reduced regulatory uncertainty."⁶¹ Second, in declaring that "an uncertain regulatory environment ... can have a chilling effect on investment[.]" the memorandum seems to ignore the conclusions of the only study it cites.⁶² According to Engau and Hoffman (2009), "only a minority of firms actually postpone investment decisions [in response to regulatory uncertainty], contrary to the frequent threats of firms not to invest if governments do not provide predictable investment conditions."⁶³

Your agencies' new economic analysis, in short, is no better than their last one.⁶⁴ It should be abandoned.

VII. Given the "Great National Importance" of the Clean Water Act's Protections, Your Agencies' "Short Comment Period" on the Proposed Suspension Is Not Reasonable

Remarkably, after acknowledging that "[t]he scope of ... [Clean Water Act] jurisdiction is an issue of great national importance[.]" you and your agencies' authorized only a "short comment period" of 21 days and later denied requests for an extension of the comment deadline.⁶⁵ This was arbitrary and unlawful. Before adopting the Clean Water Rule, your agencies "solicited comments for over 200 days."⁶⁶ Ultimately, "over 1 million public comments [were received] on the [agencies'] proposal, the substantial majority of which supported the

⁵⁹ See SELC Repeal-Rule Comments at 46-52.

⁶⁰ Economic Memorandum at 2.

⁶¹ *Id.* at 3.

⁶² *Id.* at 2.

⁶³ Christian Engau and Volker H. Hoffmann, Effects of Regulatory Uncertainty on Corporate Strategy—An Analysis of Firms' Responses to Uncertainty about Post-Kyoto Policy, 12 *Env'tl. Sci. & Policy* 766, 767 (2009). See also *id.* at 774 (noting that "it is not only the number of firms pursuing a postponement response to regulatory uncertainty which seems to be low across all regions and industries, but also the extent to which these firms actually postpone strategic decisions[.]" a fact that "puts the common practice of firms of threatening policy makers with postponing investments during the formulation of a new regulation into perspective").

⁶⁴ See SELC Repeal-Rule Comments at 46-52.

⁶⁵ Proposed Suspension Rule, 82 *Fed. Reg.* at 55,543, 55,545; Letter from M. Shapiro, EPA, to J. Devine, NRDC (Dec. 8, 2017) (attached).

⁶⁶ Clean Water Rule, 80 *Fed. Reg.* at 37,057.

proposed rule[.]”⁶⁷ As demonstrated by your agencies’ previous outreach and engagement, there was no justification for granting the public only three weeks to comment on the proposed suspension of the Clean Water Rule.⁶⁸

VIII. The Proposed Rule Confirms that Administrator Pruitt Must Recuse Himself from Any Effort to Suspend or Repeal the Clean Water Rule

In our previous comment letter, we explained that Administrator Pruitt had betrayed “unalterably closed” views regarding the Clean Water Rule—views that require his recusal from the rulemaking process.⁶⁹ Your agencies’ recent struggles to find a lawful means of immediately suspending the rule’s protections have only confirmed this conclusion.⁷⁰ Because it is clear that Administrator Pruitt is committed to discarding the Clean Water Rule, he must not be allowed to participate in this proceeding.⁷¹

Had there been any doubts regarding Administrator Pruitt’s “unalterably closed mind[.]” they would have been eliminated by his recent remarks to the Kentucky Farm Bureau.⁷² Shortly after taking the podium, Mr. Pruitt announced that the Clean Water Rule “was definitely an overreach” and would be withdrawn.⁷³ He attempted to justify this statement with a favorite falsehood, declaring that the regulation had defined “waters of the United States” in a manner “unrecognizable to those that actually adopted the law—turning a puddle, a dry creek bed, an ephemeral drainage ditch into a water of the United States.”⁷⁴ In the words of Administrator Pruitt:

⁶⁷ *Id.*

⁶⁸ Proposed Suspension Rule, 82 Fed. Reg. at 55,544-45.

⁶⁹ SELC Repeal-Rule Comments at 10-13 (quoting *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979)).

⁷⁰ See Effective-Date Proposal at 1; Proposed Suspension Rule, 82 Fed. Reg. at 55,542.

⁷¹ See SELC Repeal-Rule Comments at 10-13.

⁷² See *id.*; Chris Williams, US EPA Admin. Promises Change to Waters of the US in 2018 (Dec. 1, 2017), available at <http://www.whas11.com/news/politics/us-epa-admin-promises-change-to-waters-of-the-us-in-2018/495899644> (last visited Dec. 12, 2017), and <https://perma.cc/FAL3-TX89> (permanent link).

⁷³ Full Remarks of Administrator Scott Pruitt to the Kentucky Farm Bureau (Nov. 30, 2017) (“Pruitt Remarks”), at 1:36, available at <https://www.facebook.com/chriswnewsfanpage/videos/1540004212755872/> (last visited Dec. 12, 2017), and <https://perma.cc/X4W6-2CQP> (permanent link).

⁷⁴ *Id.* at 2:23. See also SELC Repeal-Rule Comments at 3, 10-13 (discussing the Clean Water Rule’s express puddle exemption and Mr. Pruitt’s prior false statements about puddles); Nat’l Cattlemen’s Beef Ass’n, Press Release, In New NCBA Video, EPA Administrator Pruitt Urges Ranchers to Submit WOTUS Comments (Aug. 16, 2017) (quoting Mr. Pruitt as stating that the Clean Water Rule had “defined a Water of the United States as being a puddle, a dry creek bed,

That's getting fixed. We've got a proposal in place to withdraw that rule; we've got a definition to replace it. ... You should expect a replacement to the waters of the United States rule by mid-time of next year—final rule—and that rule is going to focus on navigability.⁷⁵

Anyone who heard these remarks could fairly assume that there was no point in submitting comments—that Administrator Pruitt has already made up his mind. This is unacceptable.⁷⁶ By all appearances, moreover, the rushed, haphazard approach your agencies have taken in their attempts to eliminate the Clean Water Rule—through repeal, delay, suspension, and replacement—is a result of Mr. Pruitt's insistence that the Clean Water Rule “go away,” as well as his willingness to repeatedly misrepresent the actual content and importance of the rule's protections.⁷⁷ In order to restore public confidence in the integrity of your agencies' rulemaking process, Administrator Pruitt must recuse himself.

IX. Conclusion

In his remarks to the Kentucky Farm Bureau, Administrator Pruitt noted that your agencies “exist to enforce the laws passed by Congress”—“if Congress doesn't give ... [you] authority, ... [you] can't make it up.”⁷⁸ This was correct. Because the proposed rule flouts the limitations imposed on your agencies by the Administrative Procedure Act, the Clean Water Act, and the Endangered Species Act, it must be withdrawn.

Sincerely,



J. Blanding Holman, IV
Managing Attorney

and ephemeral drainage ditches across this country, ... and we are fixing that”), *available at* <https://www.beefusa.org/newsreleases1.aspx?NewsID=6391> (last visited Dec. 12, 2017), *and* <https://perma.cc/ARA6-GVVX> (permanent link).

⁷⁵ Pruitt Remarks at 2:33, 3:32.

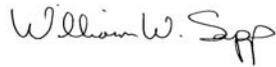
⁷⁶ See SELC Repeal-Rule Comments at 10-13.

⁷⁷ The Times and Democrat, S.C. Waters of the U.S. Roundtable (July 24, 2017), at 1:10, *available at* <https://www.youtube.com/watch?v=1UKABjwd1yg> (last visited Dec. 12, 2017), *and* <https://perma.cc/JXC9-E2VK> (permanent link).

⁷⁸ Pruitt Remarks at 2:09.



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