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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE, SIERRA CLUB, and IDAHO CONSERVATION LEAGUE,

Plaintiffs,

v.

ANDREW WHEELER,<sup>1</sup> in his official capacity as Acting Administrator of the United States Environmental Protection Agency, and R.D. JAMES,<sup>2</sup> in his official capacity as Secretary of the Army for Civil Works,

Defendants.

Case No. 2:15-cv-01342-JCC

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTIONS CALENDAR:  
FRIDAY, OCTOBER 19, 2018<sup>3</sup>

ORAL ARGUMENT REQUESTED

<sup>1</sup> Please note that pursuant to Fed. R. Civ. P. 25(d)(1), Andrew Wheeler, Acting Administrator of the U.S. Environmental Protection Agency, is substituted as a defendant for Scott Pruitt, who was substituted for Gina McCarthy.

<sup>2</sup> Please note that pursuant to Fed. R. Civ. P. 25(d)(1), R.D. James, Secretary of the Army for Civil Works, is substituted as a defendant for Jo-Ellen Darcy.

<sup>3</sup> Pursuant to the Court's June 12, 2018 scheduling Minute Order (Dkt. No. 35), both Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment are noted for October 19, 2018. No hearing has been scheduled on the motions.

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## INTRODUCTION

This case challenges a decision by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively “Agencies”) to stay the final, effective Clean Water Rule defining the term “waters of the United States” in the Clean Water Act (“CWA”). More than two years after the Clean Water Rule went into effect, the Agencies inserted a new “applicability date” of February 6, 2020, even though there was no applicability date, compliance date, or any other form of later implementation date in the rule. “Definition of ‘Waters of the United States’—Addition of an Applicability Date to 2015 Clean Water Rule,” 83 Fed. Reg. 5,200 (Feb. 6, 2018) (AR Dkt. No. EPA-HQ-OW-2017-0644-0708) (“Final Applicability Date Rule”). The “Applicability Date Rule” is an unlawful exceedance of agency authority that also ignores fundamental rulemaking requirements under the Administrative Procedure Act (“APA”). The Agencies’ attempt to unring the bell of effectiveness with a *post hoc* applicability date fails to comply with the law, and the rule must be vacated.

## BACKGROUND

## I. LEGAL BACKGROUND

The CWA is one of our nation’s most important environmental laws. Congress’ stated purpose and intent was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Consistent with this objective, Congress established “the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” *Id.* § 1251(a)(1).

The cornerstone of the CWA is its prohibition against “the discharge of any pollutant by any person” except in compliance with the CWA’s permitting requirements and other pollution prevention programs. *Id.* § 1311(a) (incorporating *id.* §§ 1312, 1316, 1317, 1328, 1342, and

1 1344). These programs include the National Pollutant Discharge Elimination System, *id.* § 1342;  
2 the CWA section 404 permitting program for discharges of dredged or fill material, *id.* § 1344;  
3 and the CWA section 311 oil spill prevention and response programs, *id.* § 1321. The jurisdiction  
4 of the CWA extends to “navigable waters,” and the CWA defines that term as “the waters of the  
5 United States, including the territorial seas.” *See id.* §§ 1251, 1321, 1342, 1344; *id.* § 1362(7).  
6 Thus, the Agencies’ interpretation and application of the statutory definition of “waters of the  
7 United States” affects which waters the Agencies choose to protect under CWA programs.

8       Until 2015, the core provisions of the regulatory definition of waters of the United States  
9 had remained largely unchanged since 1979. *See* “National Pollutant Discharge Elimination  
10 System; Revision of Regulations,” 44 Fed. Reg. 32,854, 32,901 (June 7, 1979). However, these  
11 regulatory provisions are informed by court opinions, and a series of Supreme Court decisions  
12 over the last few decades introduced a new test for determining which waters are waters of the  
13 United States, called the “significant nexus” test. *See United States v. Riverside Bayview Homes,*  
14 *Inc.*, 474 U.S. 121 (1985) (“*Riverside Bayview*”); *Solid Waste Agency of Northern Cook County*  
15 *v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”); *Rapanos v. United States*,  
16 547 U.S. 715 (2006) (“*Rapanos*”). Although the approach of looking for an ecological  
17 connection between wetlands and nearby “navigable waters” was introduced in *Riverside*  
18 *Bayview* (*Riverside Bayview*, 474 U.S. at 134-35, n.9), and the term “significant nexus” was first  
19 used in *SWANCC* (*SWANCC*, 531 U.S. at 167), it was the case of *Rapanos* that solidified the  
20 significant nexus test.

21       The Supreme Court’s 2006 decision in *Rapanos* involved disputes over whether certain  
22 wetlands fall within the jurisdiction of the CWA. While a plurality of the justices agreed in the  
23 result – a remand to address whether the Corps’ assertion of jurisdiction was supported by facts  
24



1 in the record – all three of the opinions directly disagreed with some aspects of one another,  
2 resulting in no controlling decision or precedent. A majority of five justices interpreted the CWA  
3 as protecting waters, including wetlands, that “possess a ‘significant nexus’ to waters that are or  
4 were navigable in fact or that could reasonably be so made,” including Justice Kennedy and the  
5 four dissenting justices. *Rapanos*, 547 U.S. at 759 (J. Kennedy, concurring in judgment); *id.* at  
6 810 (J. Stevens, dissenting). However, because the Court failed to produce a majority opinion,  
7 the decision left the Agencies with mixed messages from the Supreme Court. Although the  
8 Agencies issued guidance documents after both the *SWANCC* and *Rapanos* decisions in 2003  
9 and 2008, respectively, those documents lead to a significant number of time-consuming, case-  
10 by-case jurisdictional determinations and rampant inconsistencies and unpredictability regarding  
11 which waters are waters of the United States. *See* “Clean Water Rule: Definition of ‘Waters of  
12 the United States,’” 80 Fed. Reg. 37,054, 37,056 (June 29, 2015).

13         With a stated purpose of resolving the uncertainties around the meaning of “waters of the  
14 United States,” on April 21, 2014, the Agencies published their proposed Clean Water Rule.  
15 “Definition of ‘Waters of the United States’ Under the Clean Water Act,” 79 Fed. Reg. 22,188  
16 (proposed Apr. 21, 2014). The Agencies concurrently published a “synthesis of published peer-  
17 reviewed scientific literature discussing the nature of connectivity and effects of streams and  
18 wetlands on downstream waters,” prepared by EPA’s Office of Research and Development. *Id.*  
19 at 22,189.

20         In the final Clean Water Rule published on June 29, 2015, the Agencies define several  
21 categories of waters as jurisdictional-by-rule, meaning these waters are categorically “waters of  
22 the United States” and no further case-specific analysis is required. In particular, the Agencies  
23 define the following waters as jurisdictional-by-rule: (1) traditional navigable waters, (2)  
24

1 interstate waters, (3) the territorial seas, (4) impoundments of jurisdictional waters, (5)  
2 tributaries, as defined, and (6) adjacent waters, as defined. 80 Fed. Reg. at 37,058. The rule  
3 defines “tributaries” to mean “waters that are characterized by the presence of physical indicators  
4 of flow – bed and banks and ordinary high water mark – and that contribute flow directly or  
5 indirectly to a traditional navigable water, an interstate water, or the territorial seas.” *Id.* The rule  
6 defines “adjacent waters” to include “wetlands, ponds, lakes, oxbows, impoundments, and  
7 similar water features” that are within 100 feet of a jurisdictional water, in a 100-year floodplain  
8 and within 1,500 feet of a jurisdictional water, or within 1,500 feet of the high tide line of a  
9 tidally influenced jurisdictional water or the Great Lakes. *Id.* The Clean Water Rule also  
10 provides that other waters will be jurisdictional if they are determined to have a “significant  
11 nexus” to jurisdictional waters after the Corps conducts an individualized case-specific analysis,  
12 utilizing the test in Justice Kennedy’s *Rapanos* opinion. This case-specific category includes all  
13 adjacent waters that do not meet the geographical limits of the categorical definition of adjacent  
14 waters, as well as “Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools  
15 in California, and Texas coastal prairie wetlands.” *Id.* at 37,059. The Clean Water Rule’s  
16 effective date was August 28, 2015. As a result, the new definitions were published in the Code  
17 of Federal Regulations on that date, where they remain today. *See* 33 C.F.R. Part 328; 40 C.F.R.  
18 Parts 110, 112, 116, *et al.* There are no later implementation dates, compliance dates, or other  
19 later deadlines associated with the Clean Water Rule.

## 20 II. FACTUAL BACKGROUND

21 When the Clean Water Rule went into effect on August 28, 2015, the effectiveness was  
22 not merely theoretical; Corps districts immediately began making jurisdictional determinations  
23 under the new rule. Plaintiffs filed a Complaint in this case a few days before the effective date,  
24 on August 20, 2015, bringing claims under the CWA and the APA against only specific

1 defective portions of the Clean Water Rule. *See* Pls. Compl. (Dkt. No. 1); 33 C.F.R. part 328; 40  
2 C.F.R. parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. In the U.S. District Court for  
3 the District of North Dakota, several states brought claims against the whole Clean Water Rule,  
4 and that court granted a preliminary injunction against the entire rule in thirteen states on August  
5 27, 2015. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D. N.D. 2015). Plaintiff Sierra  
6 Club is a defendant-intervenor in the North Dakota litigation, defending the Clean Water Rule  
7 against claims that the Agencies went too far in finding that waters with a “significant nexus” to  
8 downstream navigable waters fall under the protection of the CWA.

9       Petitions for review of the Clean Water Rule were also brought in courts of appeals,  
10 including a petition for review by Plaintiff Sierra Club and Plaintiff Puget Soundkeeper Alliance  
11 arguing for the preservation of the majority of the Clean Water Rule and challenging only the  
12 specific faulty portions of the Clean Water Rule related to improper exclusions. The petitions for  
13 review of the Clean Water Rule in the courts of appeals were consolidated in the Sixth Circuit,  
14 and on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay  
15 of the Clean Water Rule. *In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015), *vacated sub nom. In re*  
16 *United States Dep't of Def.*, 713 F. App'x 489 (6th Cir. 2018). On February 22, 2016, the Sixth  
17 Circuit Court of Appeals decided that it, rather than the district courts, had jurisdiction over the  
18 petitions for review, and the U.S. Supreme Court granted *certiorari* on January 13, 2017. *In re*  
19 *U.S. Dep't of Def., EPA*, 817 F.3d 261, 263 (6th Cir. 2016), *cert. granted sub nom. Nat'l Ass'n of*  
20 *Mfrs. v. Dep't of Def.*, 137 S. Ct. 811 (2017), *rev'd and remanded sub nom. Nat'l Ass'n of Mfrs. v.*  
21 *Dep't of Def.*, 138 S. Ct. 617 (2018).

1 While waiting for the U.S. Supreme Court’s decision on the proper jurisdiction of the  
2 court challenges, the Agencies undertook three new administrative actions regarding the Clean  
3 Water Rule. First, on March 6, 2017, the Agencies announced their future intent to review,  
4 rescind, and revise the Clean Water Rule in a notice published in the Federal Register, citing a  
5 February 28, 2017 Executive Order suggesting these actions. *See* “Intention to Review and  
6 Rescind or Revise the Clean Water Rule,” 82 Fed. Reg. 12,532 (March 6, 2017). Second, on  
7 June 27, 2017, the Agencies proposed to repeal the Clean Water Rule and recodify the previous  
8 regulatory definition of waters of the United States. *See* “Definition of ‘Waters of the United  
9 States’ – Recodification of Pre-existing Rules,” 82 Fed. Reg. 34,899 (June 27, 2017) (“proposed  
10 Repeal Rule”); Defs. Notice of Proposed Rule (Dkt. No. 24). The Agencies have not finalized  
11 that proposed Repeal Rule. Finally, on November 22, 2017, Defendants proposed to add an  
12 “applicability date” to the Clean Water Rule, to delay the “applicability” of the Clean Water Rule  
13 for two years after the date of the final adoption of the “applicability date.” *See* “Definition of  
14 ‘Waters of the United States’—Addition of an Applicability Date to 2015 Clean Water Rule,” 82  
15 Fed. Reg. 55,542 (proposed Nov. 22, 2017) (AR Dkt. No. EPA-HQ-OW-2017-0644-0001)  
16 (“Proposed Applicability Date Rule”). The Agencies’ stated purpose was to avoid applying the  
17 Clean Water Rule in the event the Sixth Circuit lifted its nationwide stay of that rule. *Id.* at  
18 55,544. The Agencies held only a 21-day comment period on the proposed Applicability Date  
19 Rule, in spite of receiving requests for an extension of the comment period. *See* Final  
20 Applicability Date Rule, 83 Fed. Reg. at 5,205. Plaintiffs submitted timely comments opposing  
21 the publication of the Applicability Date Rule. *See* Comment submitted by Cook Inletkeeper et  
22 al. (AR Dkt. No. EPA-HQ-OW-2017-0644-0376) (attached Ex. 1).<sup>4</sup>

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24 <sup>4</sup> Plaintiffs’ public comment letter is attached as Exhibit 1 to this Motion, as an administrative record document that  
is not already part of this docket or published elsewhere. Pursuant to Defendants’ Notice of Filing of Certified Index

1 On January 22, 2018, the U.S. Supreme Court ruled that federal district courts, not the  
 2 courts of appeals, have jurisdiction over challenges to the Clean Water Rule. *Nat'l Ass'n of Mfrs.*  
 3 *v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018). On February 6, 2018, the Agencies finalized the  
 4 Applicability Date Rule, which added a new “applicability date” of February 6, 2020 to the  
 5 Clean Water Rule. Final Applicability Date Rule, 83 Fed. Reg. 5,200. The Sixth Circuit vacated  
 6 its nationwide stay of the Clean Water Rule only a few weeks later, on February 28, 2016. *In re*  
 7 *United States Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018). Plaintiffs subsequently filed a  
 8 First Amended and Supplemental Complaint adding claims against the Applicability Date Rule,  
 9 and it is these claims that are ripe for summary judgment. *See* Stip. and Prop. Order Reopening  
 10 Case and Staying Claims (Dkt. No. 31). On July 12, 2018, the Agencies published a  
 11 supplemental notice to the July 2017 proposal to repeal the Clean Water Rule and recodify the  
 12 pre-2015 definition of “waters of the United States.” “Definition of ‘Waters of the United  
 13 States’—Recodification of Preexisting Rule,” 83 Fed. Reg. 32,227 (July 12, 2018).

#### 14 STANDARD OF REVIEW

15 Summary judgment is appropriate if there is no genuine issue of material fact and the  
 16 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v.*  
 17 *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In the context of a record review case, resolution  
 18 of the plaintiffs’ claims, however, does not require traditional fact finding by the court but rather  
 19 court review of the administrative record. *Nw. Motorcycle Ass’n v. U.S. Dep’t. of Agric.*, 18 F.3d  
 20 1468, 1471-72 (9th Cir. 1994) (citations omitted). Because this case involves review of final

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 24 to the Administrative Record (Dkt. No. 36), the Agencies did not file the administrative record documents in this  
 docket, and instead filed only the Index to the Administrative Record (Dkt. No. 36-2).

1 agency action and an administrative record, it does not present any genuine issues of material  
2 fact, and resolution of the case on a motion for summary judgment is appropriate.

3 Under the APA, courts are charged with determining whether an agency's decision is  
4 "arbitrary, capricious, . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2).  
5 Plaintiffs' challenge to the Applicability Date Rule implicates each of these elements. First,  
6 agencies may not take any actions that are not authorized by statute. "[A]n agency literally has  
7 no power to act, . . . unless and until Congress confers power upon it." *Louisiana Public Service*  
8 *Comm. v. FCC*, 476 U.S. 355, 374 (1986). An agency's action "cannot stand" without statutory  
9 authorization for the action. *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 1995).

10 Moreover, the APA standard of review requires the reviewing court to determine whether  
11 the agency correctly interpreted the law, and agencies must "examine the relevant data and  
12 articulate a satisfactory explanation for [their] action." *FCC v. Fox Television Stations*, 556 U.S.  
13 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463  
14 U.S. 29, 43 (1983)); *see also Pacific Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d  
15 1028, 1034 (9<sup>th</sup> Cir. 2001) (stating that a court must ask whether an agency "considered the  
16 relevant factors and articulated a rational connection between the facts found and the choice  
17 made"). An agency decision is arbitrary and capricious when it "failed to consider an important  
18 aspect of the problem." *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1525 (9<sup>th</sup> Cir.  
19 1995) (citations omitted); *see also Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43 (same).  
20 Additionally, agencies must provide "a more detailed justification" when they adopt a new  
21 policy that "rests upon factual findings that contradict those which underlay its prior policy...."  
22 *Fox Television Stations*, 556 U.S. at 515. An agency cannot depart from prior findings or  
23 positions without "supply[ing] a reasoned analysis for that change." *Lynch v. Dawson*, 820 F.2d  
24

1 1014, 1021 (9<sup>th</sup> Cir. 1987). In applying these standards, the Court must perform a “thorough,  
 2 probing, in-depth review.” *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 481-82 (W.D.  
 3 Wash. 1988).

#### 4 ARGUMENT

##### 5 I. THE APPLICABILITY DATE RULE IS *ULTRA VIRES*

6 Agencies are “creature[s] of statute.” *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8  
 7 (D.C. Cir. 2002). The Supreme Court has consistently recognized that “an agency literally has no  
 8 power to act, . . . unless and until Congress confers power upon it.” *Louisiana Public Service*  
 9 *Comm. v. FCC*, 476 U.S. 355, 374 (1986). Therefore, for every action an agency takes, the  
 10 agency must be able to point to a statutory provision that authorizes that specific type of action.  
 11 No matter the language used, the Agencies’ decision in this case to stay, delay, suspend, or  
 12 otherwise fail to enforce or apply the final, effective Clean Water Rule for two years utterly lacks  
 13 any statutory authority and is accordingly *ultra vires*.

14 In the final Applicability Date Rule, the Agencies stated that the CWA in its entirety,  
 15 “including sections 301, 304, 311, 401, 402, 404, 501,” provides statutory authority for the rule.  
 16 *See* Final Applicability Date Rule, 83 Fed. Reg. at 5,202. In assessing whether a particular statute  
 17 provides authority for agency action, courts should review the plain language of the statute and  
 18 the “core purposes” of the statute. *See Nat. Res. Def. Council v. Nat’l Highway Traffic Safety*  
 19 *Admin.*, 2018 WL 3189321, at \*7 (2d Cir. June 29, 2018) (citing *FERC v. Elec. Power Supply*  
 20 *Ass’n*, 136 S. Ct. 760, 764 (2016), *as revised* (Jan. 28, 2016)). Here, the plain terms of the CWA  
 21 do not provide authorization for the action taken, and authorization would interfere with the core  
 22 purposes of the statute. The seven specific CWA statutory provisions cited by the Agencies  
 23 provide the Agencies with substantive authorities to regulate areas including effluent limitation  
 24 guidelines, water quality criteria, oil spill prevention, state water quality certifications, pollution

1 discharges, and discharges of dredged or fill material, as well as a generic rulemaking power to  
2 “prescribe such regulations as are necessary to carry out his functions under the Act,” 33 U.S.C.  
3 § 1361. Not one of these provisions authorize the addition of an applicability date to an effective  
4 rule, or any other kind of delay or stay of an effective rule.<sup>5</sup> Undoubtedly, the Agencies have the  
5 power to issue regulations under the CWA. 33 U.S.C. § 1361. However, such a general  
6 rulemaking power cannot be construed to authorize *any* type of specific agency rulemaking  
7 action, or else the meaning of Congress’ check on agency authority would become meaningless.

8 The Agencies also cannot rely on a “discretionary authority to define ‘waters of the  
9 United States,’” as they incorrectly claim in their response to comments in the final rule notice.  
10 Final Applicability Date Rule, 83 Fed. Reg. at 5,203. The Agencies’ authority to conduct the  
11 underlying substantive rulemaking is distinct from their purported authority to stay the  
12 underlying rulemaking after it has gone into effect. The Agencies had an obligation to identify a  
13 specific statutory provision that authorizes a *stay* of final rules under the CWA, but they have  
14 failed to do so, instead attempting to rely on a provision that authorizes the promulgation of rules  
15 under the CWA in the first place.

16 Similarly, the agencies cannot rely on an “inherent authority” to stay or otherwise delay  
17 final rules during reconsideration. Courts have repeatedly held that agencies have no inherent  
18 authority to stay or delay final rules while they reconsider them. *See, e.g., Clean Air Council v.*  
19 *Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety*

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21 <sup>5</sup> In a different statute, the APA, Congress specified that agencies may only postpone effective dates “pending  
22 judicial review.” 5 U.S.C. § 705. The Agencies do not cite this APA provision as a source of statutory authority for  
23 their promulgation of the Applicability Date Rule. Even if they had, the provision plainly does not apply here, where  
24 the effective date had already passed. Courts have consistently rejected attempts by agencies to “postpone” rules that  
have already gone into effect, even in cases where the agencies were reconsidering or planning to later repeal the  
rules. *See, e.g., Becerra v. U.S. Dep’t of Int.*, 276 F. Supp. 3d 953 (N.D. Cal. 2017); *State v. U.S. Bur. Of Land Mgt.*,  
277 F. Supp. 3d 1106 (N.D. Cal. 2017).



1 *Admin.*, 2018 WL 3189321, at \*11-12 (2d Cir. June 29, 2018); *Nat. Res. Def. Council v.*  
 2 *Abraham*, 355 F.3d 170, 202-03 (2d Cir. 2004). Just last year, the U.S. Court of Appeals for the  
 3 D.C. Circuit reviewed the legality of EPA’s decision to “stay” the “implementation” of portions  
 4 of a final rule regarding fugitive emissions of methane and other greenhouse gases by the oil and  
 5 gas industries, after the rule had already gone into effect. *Clean Air Council*, 862 F.3d at 1. The  
 6 court rejected EPA’s argument that it has “inherent authority” to temporarily stay or otherwise  
 7 not enforce an already promulgated and effective rule while it reconsiders it. *Id.* at 9. The court  
 8 reiterated “it is ‘axiomatic’ that ‘administrative agencies may act only pursuant to authority  
 9 delegated to them by Congress . . . .’” *id.* (internal citations omitted), and concluded that “EPA  
 10 must point to something in either the Clean Air Act or the APA that gives it authority to stay the  
 11 methane rule, and . . . the only provision it cites—CAA section 307(d)(7)(B)—confers no such  
 12 authority.” *Id.* Even more recently, the U.S. Court of Appeals for the Second Circuit rejected an  
 13 argument by the National Highway Traffic Safety Administration that it had inherent authority to  
 14 delay the effective date of a final, effective rule, pending reconsideration of that rule. *Nat. Res.*  
 15 *Def. Council*, 2018 WL 3189321, at \*11-12.

16 The Agencies have no statutory authority to simply fail to enforce a final effective rule  
 17 under the CWA for two years, and as a result, the Applicability Date Rule must be vacated.

## 18 II. THE APPLICABILITY DATE RULE IS ARBITRARY AND CAPRICIOUS

19 Even if the Agencies had statutory authority to suspend the Clean Water Rule for two  
 20 years, which they do not, the Applicability Date Rule should still be vacated because it was an  
 21 arbitrary and capricious agency action that violated bedrock requirements of the APA. The  
 22 Agencies conducted a notice and comment rulemaking for the Applicability Date Rule, albeit  
 23 with an abbreviated 21-day public comment period. *See* Final Applicability Date Rule, 83 Fed.  
 24 Reg. at 5,205. The Agencies must have, then, recognized that this rulemaking is a substantive

1 rulemaking requiring notice and comment under APA § 553. 5 U.S.C. § 553. “Notice and  
 2 comment are not mere formalities,” and the process requires a “forum for the robust debate of  
 3 competing and frequently complicated policy considerations having far-reaching implications.”  
 4 *Nat. Res. Def. Council*, 2018 WL 3189321, at \*14. However, the Agencies instead treated the  
 5 applicability date rulemaking as a rushed paperwork exercise, violating several basic tenets of  
 6 notice and comment rulemaking along the way.

7 A. The Agencies failed to address the substance or merits of the rules or provide a  
 8 rational explanation for their policy reversal.

9 Because of the Applicability Date Rule, the Agencies will not implement the current  
 10 definitional regulation of “waters of the United States” in the Code of Federal Regulations for  
 11 the next two years. This failure to apply and enforce a valid and final rule unequivocally changes  
 12 the standards used by Corps districts to make decisions about the application of the CWA to  
 13 water bodies. Were it not for the Applicability Date Rule, the Clean Water Rule would have gone  
 14 back into effect in more than half of the states in the country when the Sixth Circuit lifted its stay  
 15 on February 28, 2018. The Applicability Date Rule decision is, accordingly, a meaningful policy  
 16 reversal with on-the-ground consequences for waters.

17 1. *The Agencies did not address the findings of the Clean Water Rule.*

18 In order to lawfully complete a rulemaking, the agencies must “examine the relevant data  
 19 and articulate a satisfactory explanation for [their] action.” *FCC v. Fox Television Stations*, 556  
 20 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automobile Ins.*  
 21 *Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). The “relevant data” must necessarily include the  
 22 substance of the rules. For example, in the seminal case of *State Farm*, the National Highway  
 23 Traffic Safety Administration could not simply rescind a requirement for passive restraints,  
 24 adopted by the previous administration, without considering alternatives that would achieve the

1 Motor Vehicle Safety Act’s goal of greater traffic safety. *State Farm*, 463 U.S. at 48. By the  
2 same token, the Agencies here may not simply rescind, stay, or otherwise void the Clean Water  
3 Rule’s protections without considering the effects on the CWA’s goal of cleaner water. The  
4 Applicability Date Rule does not address that basic goal at all, nor does it address any factors  
5 relevant to the jurisdictional reach of the CWA.

6 Moreover, the Agencies must provide “a more detailed justification” when the “new  
7 policy rests upon factual findings that contradict those which underlay its prior policy . . . .” *Fox*  
8 *Television Stations*, 556 U.S. at 515; *see also id.* (“the requirement that an agency provide  
9 reasoned explanation for its action would ordinarily demand that it display awareness that it is  
10 changing position. An agency may not . . . depart from a prior policy *sub silentio* or simply  
11 disregard rules that are still on the books.”). The Agencies failed to even address the factual  
12 findings of the Clean Water Rule, much less reverse them, *see* 83 Fed. Reg. 5,200; therefore, the  
13 Applicability Date Rule fails to satisfy this most fundamental requirement of rulemaking.

14 In a similar case regarding the Bureau of Land Management’s recent suspension of the  
15 methane “Waste Prevention Rule,” the U.S. District Court for the Northern District of California  
16 explained the type of “detailed justification” that is necessary to support a delay or suspension  
17 rule. The court explained that the agency

18 must provide some basis – indeed, a “detailed justification:” – to explain why it is  
19 changing course after its three years of study and deliberation resulting in the  
20 Waste Prevention Rule. New facts or evidence coming to light, considerations  
21 that BLM left out in its previous analysis, or some other concrete basis supported  
22 in the record – these are the types of “good reasons” that the law seeks. Instead, it  
23 appears that BLM is simply “casually ignoring” all of its previous findings and  
24 arbitrarily changing course.

25 *Sierra Club v. Zinke*, 286 F. Supp. 3d 1054, 1068 (N.D. Cal. 2018) (“*Zinke*”) (internal citation  
26 omitted). Here, the Agencies similarly “casually ignor[ed]” their previous science-based findings

1 and four years of study and deliberation that led to the passage of the Clean Water Rule. The  
2 Agencies pointed to no new facts, no mistakes, and no considerations the Agencies neglected to  
3 include in their previous analysis. Therefore, as in *Zinke*, the Agencies failed to provide any  
4 concrete support in the record that would justify their policy reversal.

5           2.       *The Agencies' sole justification for the Applicability Date Rule is*  
6                   *irrational and unsupported by the record.*

7           Instead of addressing any substantive facts or failures of the Clean Water Rule, the  
8 Agencies repeatedly pointed to just one justification for the Applicability Date Rule: “regulatory  
9 certainty.” Final Applicability Date Rule, 83 Fed. Reg. at 5,205. After the Supreme Court ruled  
10 that jurisdiction for any challenges to the Clean Water Rule lies with the district courts, the  
11 Agencies oddly claimed that this created some kind of new “uncertainty” and that the  
12 Applicability Date Rule was necessary to “maintain[] the legal *status quo* and thus provide[]  
13 continuity and certainty for regulated entities.” *Id.* at 5,200. The Agencies’ explanation is  
14 fundamentally unsound and contrary to reality because the Applicability Date Rule reverses the  
15 *status quo* and increases regulatory uncertainty.

16           After a rule’s effective date passes and the rule is published in the Code of Federal  
17 Regulations, the regulatory *status quo* is the new regulation, until it is lawfully repealed. By  
18 attempting to delay, stay, or otherwise suspend the application or implementation of a final and  
19 effective rule, an agency is inherently upsetting the *status quo*. This is true even if there are  
20 pending judicial cases challenging the merits of the final rule. The Agencies could and should  
21 have chosen to apply the Clean Water Rule in the majority of states where it would have gone  
22 back into effect after the removal of the Sixth Circuit stay, and they could defend the rule in  
23 court in order to maintain the regulatory *status quo* in place since finalization of the rule in 2015.

1 The Agencies' decision to instead reverse course and abandon the Clean Water Rule is a  
2 purposeful dislodging of the *status quo*.

3 In addition, the promulgation of the Applicability Date Rule increases regulatory  
4 uncertainty. Instead of allowing the regulation in the Code of Federal Regulations to go back into  
5 effect after the Sixth Circuit's stay was lifted, the Agencies decided to instruct Corps districts to  
6 ignore the current law and apply an uncodified, rescinded regulatory scheme for the next two  
7 years. The pace at which the Agencies have changed course regarding the definition of "waters  
8 of the United States" is dizzying. Since 2015, the Agencies have finalized the Clean Water Rule,  
9 announced an intent to repeal and replace the Clean Water Rule, proposed to repeal the Clean  
10 Water Rule outright and recodify the pre-2015 regulations, proposed and finalized the  
11 Applicability Date Rule instead of a repeal, and most recently filed a supplemental proposal for  
12 the earlier proposed repeal. With each new announcement, the Agencies foster further  
13 uncertainty regarding the current regulatory status. Indeed, the Agencies admitted they are  
14 sowing confusion by publishing the Applicability Date Rule. In the proposed rule, they stated  
15 they "recognize that there may be some confusion because there is an existing proposal to  
16 rescind the 2015 Rule and replace it with the previous definition of 'waters of the United States,'  
17 as well as ongoing pre-proposal stakeholder outreach and engagement about the scope of the  
18 Step Two rulemaking . . . ." Proposed Applicability Date Rule, 82 Fed. Reg. at 55,544. In the  
19 final rule, the Agencies similarly acknowledged "this action may be confused with the Step One  
20 and Step Two rulemaking efforts." Final Applicability Date Rule, 83 Fed. Reg. at 5,202.

21 The Applicability Date Rule also introduced uncertainty and confusion by stating an  
22 intent to return to the pre-2015 regime, *id.* at 5,200, without actually re-codifying the pre-2015  
23 regulatory definitions. Unlike in the proposed Repeal Rule, the agencies did not remove the 2015  
24

1 regulatory definitions and replace them with the prior ones. Leaving a fully promulgated  
2 regulation on the books, but failing to enforce it for a period of two years, raises far more  
3 questions than it answers. It can only cause confusion for the state and federal agencies that  
4 apply the CWA, and for the regulated industry and affected public that must live with the  
5 consequences.

6 In addition, even if the Agencies had recodified the pre-2015 regime in the Applicability  
7 Date Rule, that regime would itself continue the regulatory confusion the 2015 Rule was  
8 intended to resolve. It is well-known that the pre-2015 regime engendered uncertainty due to the  
9 change that the *SWANCC* and *Rapanos* decisions wrought on decades of broad application of the  
10 CWA. In fact, the Agencies’ desire to reduce that confusion was perhaps the most prominent  
11 theme in the preamble for and discussion of the Clean Water Rule. In that rule, the Agencies  
12 noted that the accumulated interpretations of the pre-existing regulations embodied in case law  
13 and agency practice had led to a situation where “[m]any waters are currently subject to case-  
14 specific jurisdictional analysis to determine whether a ‘significant nexus’ exists, a time and  
15 resource intensive process can result in inconsistent interpretation of [Clean Water Act]  
16 jurisdiction and perpetuate ambiguity over where the [Act] applies.” 80 Fed. Reg. at 37,056. The  
17 Agencies similarly found that pre-existing jurisdiction determinations “often depend[ed] on  
18 individual, time-consuming, and inconsistent analyses of the relationship between a particular  
19 stream, wetland, lake, or other water with downstream waters.” *Id.* at 37,057. They also found  
20 that the pre-existing regime fostered “confusion and inconsistency regarding the regulation of  
21 ditches.” *Id.* at 37,058. And they found a “lack of clarity and inconsistent field practices across  
22 the nation” due to the lack of definition for the term “neighboring,” as well as pre-existing  
23 “inconsistency by clarifying the meaning of the term “similarly situated.” *Id.* at 37,082, 37,095.

1 The Agencies specifically noted that the 2003 and 2008 guidance memoranda “did not provide  
2 the public or agency staff with the kind of information needed to ensure timely, consistent, and  
3 predictable jurisdictional determinations.” *Id.* at 37,056. To counter the confusion and  
4 inconsistencies, the Agencies developed a rule that, according to their contemporaneous findings,  
5 “makes the process of identifying waters protected under the CWA easier to understand, more  
6 predictable, and consistent with the law and peer-reviewed science.” *Id.* at 37,055. Yet, the  
7 Agencies now state a desire to return to the pre-2015 state of confusion, on the grounds that they  
8 need to avoid “inconsistencies, uncertainty, and confusion.” Final Applicability Date Rule, 83  
9 Fed. Reg. at 5,202.

10 The public notices for the Applicability Date Rule fail to address the Agencies’ Clean  
11 Water Rule findings regarding confusion and inconsistency under the pre-existing regime, either  
12 to confirm those findings or to disclose that the Agencies now seek to abandon them. The public  
13 notices further fail to explain how those 2015 findings are eclipsed by the Agencies’ present  
14 concern that some confusion might arise if they were to apply the Clean Water Rule in the states  
15 where it is not under an injunction. The Agencies simply have not explained why it would  
16 increase uncertainty to allow Corps districts to begin enforcing the Clean Water Rule again in the  
17 districts where it is not enjoined. The fully promulgated 2015 Rule is unburdened by the  
18 numerous uncertainties the Agencies identified in the pre-2015 regime. It is therefore irrational  
19 to suggest that re-imposing that regime will avoid “inconsistencies, uncertainty, and confusion.”  
20 *Id.* at 5,202.

21 Finally, the Agencies also failed to consider the likelihood that their Applicability Date  
22 Rule would prompt new litigation and all of its associated uncertainties. Indeed, multiple  
23 challenges to the Applicability Date Rule, including the one in the above-captioned case, were  
24

1 filed in response to this agency action. The Ninth Circuit held that an agency action violated the  
2 APA in a similar case involving a challenge to an agency move to exempt the entire Tongass  
3 National Forest in Alaska from the “Roadless Rule.” *Organized Vill. of Kake v. U.S. Dep't of*  
4 *Agric.*, 795 F.3d 956, 970 (9th Cir. 2015), *cert. denied sub nom. Alaska v. Organized Vill. of*  
5 *Kake, Alaska*, 136 S. Ct. 1509 (2016). In promulgating the “Tongass exemption,” the U.S.  
6 Department of Agriculture claimed that its rule would “reduce[] the potential for conflicts  
7 regardless of the disposition of the various lawsuits” over the Roadless Rule. *Id.* But this claim  
8 was easily belied by the subsequent turn of events: the Tongass exemption itself “predictably led  
9 to [another] lawsuit, and did not even prevent a separate attack by Alaska on the Roadless Rule  
10 itself.” *Id.* “At most,” the Ninth Circuit found, “the Department deliberately traded one lawsuit  
11 for another.” *Id.*

12 The Agencies’ purported goal of reducing uncertainty appears to be a pretext for simply  
13 suspending the Clean Water Rule during their reconsideration process without providing a  
14 substantive justification for that decision. As such, it cannot provide the requisite reasonable and  
15 detailed justification for the Agencies’ rulemaking.

16 B. The Agencies are not otherwise excused from the requirement to address the  
17 substance and merits of the rules.

18 The Agencies cannot excuse their failure to comply with the APA’s rulemaking  
19 requirements by claiming the procedural machinations of this rulemaking somehow vitiate the  
20 duty to fully address and explain the merits of the rulemaking.

21 1. *The interim nature of the Applicability Date Rule does not eliminate the*  
*obligation to address the substance and merits of the rules.*

22 The fact that the Agencies described this rule as an “interim” measure, 83 Fed. Reg. at  
23 5,200, did not excuse the Agencies from soliciting comments on and explaining the substance  
24 and merits of the legal regime. Courts have previously addressed situations where agencies in a



1 new administration have sought to reverse the recently-adopted policies of their predecessors  
2 through a “temporary” suspension or repeal pending a new rulemaking, just as Agencies did  
3 here. The courts have been consistent and clear that, to do so, the agency must fully justify the  
4 substance and merits of even the “temporary” measure, just as they would be required to do in  
5 any rulemaking.

6 For example, in *Public Citizen v. Steed*, 733 F.2d 93 (D.C. Cir. 1984), the National  
7 Highway Traffic Safety Administration in the Reagan administration adopted a final rule  
8 temporarily suspending, pending further study, tire treadwear standards adopted at the end of the  
9 Carter administration. *Id.* at 95-97, 99. The agency argued that its action should be reviewed  
10 under a less stringent standard because it was only temporary. *Id.* at 98. The court summarily  
11 rejected this argument, holding that the agency’s “action should be treated as a revocation,  
12 subject to the standard of review set forth in *State Farm.*” *Id.* The court proceeded to consider the  
13 merits of the revocation and held it arbitrary for failure to consider various alternatives relating  
14 to the substance of the rule. *Id.* at 99-100; *see also N.C. Growers’ Ass’n v. United Farm*  
15 *Workers*, 702 F.3d 755, 759-60, 771 (4th Cir. 2012) (holding arbitrary, for failure to address the  
16 substance and merits through APA notice-and-comment rulemaking, a rule adopted for nine  
17 months) (“*North Carolina Growers’ Association*”); *Organized Village of Kake v. USDA*, 795  
18 F.3d 956, 962, 967-70 (9th Cir. 2015) (en banc) (holding arbitrary, for failure to justify  
19 substantive changes, a rule “temporarily” exempting one national forest from a nationwide rule).

20 2. *The proposed return to a prior regulatory regime did not eliminate the*  
21 *obligation to address the substance and merits of the rules.*

22 The fact that the Agencies instructed the Corps to “revert” to the legal regime in place  
23 before 2015 did not excuse the Agencies from fully considering the substance and merits of the  
24 two respective regimes, or from soliciting and addressing public comments on them. If the Clean

1 Water Rule was necessary in the first instance (as demonstrated by the extensive resources,  
2 research, and careful justification that went into it), then “reverting” back is an action that belies  
3 that record and returns the country to a regime that the Agencies had already found to be  
4 inadequate, contrary to facts, and contrary to law.

5 The Department of Labor faced the same situation in *North Carolina Growers’*  
6 *Association*. There, the Department of Labor in the newly-elected Obama administration  
7 attempted to suspend regulations adopted in 2008—the last year of the Bush administration—  
8 governing wages for agricultural workers. *N.C. Growers’ Ass’n*, 702 F.3d at 759-60. The  
9 suspension was to last nine months, pending review and reconsideration, during which time the  
10 pre-existing 1987 regulations would be reinstated. *Id.* at 760. In the notice of the proposed  
11 suspension, the agency stated that it would consider comments only on the temporary suspension  
12 and not on the substance of either the 1987 regulations or the 2008 regulations. *Id.* at 761.  
13 Despite the fact that the agency was reinstating a rule previously in force, the court held that the  
14 reinstatement of the old regulations was subject to the rulemaking requirements of the APA. *Id.*  
15 at 764-66. The court rejected the agency’s attempt to reinstate the pre-existing rule without  
16 considering the merits: “because the Department . . . did not solicit or receive relevant comments  
17 regarding the substance or merits of either set of regulations, we have no difficulty in concluding  
18 that the Department ‘ignored important aspects of the problem.’” *Id.* at 770 (quoting *Ohio River*  
19 *Valley Env’tl Coal. v. Kempthorne*, 473 F.3d 94, 103 (4th Cir. 2006)). Accordingly, the court  
20 held the action was arbitrary. *Id.*

21 In the Applicability Date Rule, the Agencies made the same error as the agency in *North*  
22 *Carolina Growers’ Association*. Namely, they suspended a new rule and reinstated an old one  
23 without considering the merits of either. The public notice for the proposed Applicability Date  
24

1 Rule states that “this proposed rulemaking does not undertake any substantive reconsideration of  
 2 the pre-2015 ‘waters of the United States’ definition nor are the agencies soliciting comment on  
 3 the specific content of those longstanding regulations.” Proposed Applicability Date Rule, 82  
 4 Fed. Reg. at 55,545. As recognized in *North Carolina Growers’ Association*, the Agencies did  
 5 not have that option. They were required to provide a rational explanation for their decision that  
 6 considered all the relevant factors concerning the Clean Water Rule and the legal regime that  
 7 preceded it, and they had a duty to solicit public comments on those substantive choices. The  
 8 Agencies’ unequivocal failure to take this step deprived the public of a meaningful opportunity  
 9 to comment and violated the requirements of the APA.

10 3. *The judicial stay and injunction of the Clean Water Rule did not eliminate*  
 11 *the obligation to address the substance and merits of the rules.*

12 Similarly, the fact that at the time of the promulgation of the Applicability Date Rule the  
 13 U.S. Court of Appeals for the Sixth Circuit had stayed the Clean Water Rule nationwide, and the  
 14 U.S. District Court for the District of North Dakota had enjoined the rule in thirteen states, did  
 15 not excuse the Agencies from fully considering the substance and merits of the Clean Water  
 16 Rule.<sup>6</sup> In the Applicability Date Rule, the Agencies expressed a concern that the Sixth Circuit’s  
 17 stay was about to expire and the North Dakota court’s injunction only applied to thirteen states,  
 18 meaning the Clean Water Rule was about to go back into effect in most of the country. *See* Final  
 19 Applicability Date Rule, 83 Fed. Reg. at 5,202. Due to the “uncertainty” this would cause, the  
 20 Agencies stated an intent to “ensure[] that, during an interim period, the scope of CWA  
 21 jurisdiction will be administered nationwide exactly as it is now being administered by the

22 \_\_\_\_\_  
 23 <sup>6</sup> Well after the finalization of the Applicability Date Rule, on June 8, 2018, the U.S. District Court for the Southern  
 24 District of Georgia preliminarily enjoined the Clean Water Rule in the eleven states involved in that lawsuit.  
 Therefore, the Clean Water Rule is now enjoined in a total of twenty-four states. Notice of Order in Related Case  
 (Dkt. No. 37).

1 agencies.” *Id.* However, the Agencies cannot choose to extend temporary court injunctions  
 2 without considering the substance of the decision, under the pretext that they must do so to  
 3 maintain the *status quo*.

4 The U.S. Forest Service made the same mistake in *California ex rel. Lockyer v. USDA*,  
 5 575 F.3d 999 (9th Cir. 2009) (“*Lockyer*”). There, the Forest Service had adopted the “Roadless  
 6 Rule” governing un-roaded areas of the national forests. Like the Clean Water Rule at issue here,  
 7 the Roadless Rule was enjoined. *Id.* at 1007. While the injunction and its appeal were pending,  
 8 the Forest Service repealed the Roadless Rule and replaced it with the “State Petitions Rule.” *Id.*  
 9 at 1007-08. The Forest Service argued that neither the National Environmental Policy Act nor  
 10 the Endangered Species Act applied, because the injunction against the Roadless Rule rendered  
 11 its repeal merely a procedural, administrative matter, or a “paper exercise.” *Id.* at 1015. The court  
 12 rejected this argument, noting that “[t]he most obvious problem” was that the injunction was  
 13 under appeal with an outcome that could change. *Id.* The court noted its agreement with the  
 14 district court’s observation that “this type of self-serving argument ‘leaves too much to the  
 15 vicissitudes of the timing of litigation.’” *Id.* at 1016 (quoting district court). The court wrote:

16 The promulgation of the State Petitions Rule had the effect of  
 17 permanently repealing uniform, nationwide, substantive protections  
 18 that were afforded to inventoried roadless areas, and replacing them  
 19 with a regime of the type the agency had rejected as inadequate a  
 few years earlier. Such a substantial regulatory change is neither  
 routine nor merely procedural.

20 *Id.* at 1021. By the same token, the Applicability Date Rule nullifies the uniform, nationwide,  
 21 substantive jurisdictional definition of “waters of the United States” in the Clean Water Rule and  
 22 replaces it with the very regime the agencies deemed inadequate just a few years ago.<sup>7</sup> As with

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23  
 24 <sup>7</sup> Although the public notices state that the Agencies intend to follow the pre-2015 regime, the Agencies did not  
 recodify the pre-2015 regulatory definitions. Therefore, it is not clear that the pre-2015 regulatory definitions would

1 the parallel circumstances in *Lockyer*, “[s]uch a substantial regulatory change is neither routine  
 2 nor merely procedural.” *Id.* Therefore, the Agencies had a duty to address the substance and  
 3 merits of their suspension of the Clean Water Rule, notwithstanding the temporary injunctions of  
 4 the rule in some states.

### 5 III. PLAINTIFFS HAVE STANDING TO CHALLENGE THE APPLICABILITY DATE 6 RULE

7 Plaintiffs have associational standing to challenge the Applicability Date Rule. “An  
 8 association has standing to bring suit on behalf of its members when its members would  
 9 otherwise have standing to sue in their own right, the interests at stake are germane to the  
 10 organization's purpose, and neither the claim asserted nor the relief requested requires the  
 11 participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Envtl.*  
 12 *Servs.*, 528 U.S. 167, 181 (2000) (internal citation omitted). Plaintiffs satisfy this standard  
 13 because their members have suffered injuries-in-fact that are redressable by a favorable court  
 14 decision, the water protection interests at stake are germane to these conservation organizations’  
 15 purposes, and the lawsuit does not require the participation of individual members.

16 Members of the plaintiff organizations have submitted declarations demonstrating their  
 17 recreational and aesthetic interests in specific wetlands, tributaries, and similar water bodies  
 18 throughout the country, which are at risk of various forms of pollution that would be regulated  
 19 under the CWA. Decl. of Katherine Melmoth ¶¶ 6-18; Decl. of Katherine Slama ¶¶ 5, 7-10; Decl.  
 20 of Steven Ring ¶¶ 8, 11-15, 21-22; Decl. of Peter Haase ¶¶ 6-8, 14-16; Decl. of Richard Finch ¶¶  
 21 5-8, 11; Decl. of James DeWitt ¶¶ 3, 7-11, 13-15. The Clean Water Rule, among other things,  
 22 increased protections for tributaries and so-called “adjacent” waters like wetlands, because it

23  
 24 fill the regulatory void created by the Applicability Date Rule.

1 provided clear categorical definitions that broadly encompassed most of these waters. Without  
2 these definitions, the “smaller” waters are more susceptible to unregulated or unpermitted  
3 pollution, harming the members who care about these specific waters. Due to the Applicability  
4 Date Rule’s suspension of the protections of the Clean Water Rule for the next two years, the  
5 member declarants are harmed by the increased risk of unregulated or unpermitted pollution that  
6 their cherished water bodies now face. Decl. of Katherine Melmoth ¶¶ 19-25; Decl. of Katherine  
7 Slama ¶¶ 11-12; Decl. of Steven Ring ¶¶ 21-26, 29; Decl. of Peter Haase ¶¶ 18-22; Decl. of  
8 Richard Finch ¶¶ 11-12; Decl. of James DeWitt ¶¶ 16-18.

9 In addition, Plaintiffs have organizational standing in their own right, as the Applicability  
10 Date Rule conflicts with their organizational missions and they have had to expend additional  
11 resources to combat its effects. Decl. of Austin Hopkins ¶¶ 12-17; Decl. of Dalal Aboulhosn ¶¶  
12 8-12; Decl. of Chris Wilke ¶¶ 15-17; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379  
13 (1982).

#### 14 CONCLUSION

15 By rendering the Clean Water Rule “inapplicable” for a period of two years, the Agencies  
16 have substantially altered the manner in which they assess CWA jurisdiction. The Agencies had  
17 no statutory authority to take this action. In addition, the Agencies provided no rational  
18 justification for this meaningful policy reversal, as required by the APA. As a result, Plaintiffs  
19 respectfully request that the Court grant their Motion for Summary Judgment, declare the  
20 Applicability Date Rule unlawful, and vacate the rule.

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Respectfully submitted this 27<sup>th</sup> day of July, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 27, 2018, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants:

- Plaintiffs’ Motion for Summary Judgment
- Exhibit 1 to Plaintiffs’ Motion for Summary Judgment
- Declaration of Dalal Aboulhosn
- Declaration of James D. DeWitt
- Declaration of Richard C. Finch
- Declaration of Peter C. Haase
- Declaration of Austin Hopkins
- Declaration of Katherine Melmoth
- Declaration of Steven J. Ring
- Declaration of Katherine M. Slama
- Declaration of Chris Wilke
- Proposed Order

*/s/ Janette K. Brimmer*  
\_\_\_\_\_  
Janette K. Brimmer