UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, MARYLAND, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON; COMMONWEALTH OF MASSACHUSETTS; and the DISTRICT OF COLUMBIA,

Plaintiffs,

v.

E. SCOTT PRUITT, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; R.D. JAMES, as Assistant Secretary of the Army for Civil Works; and UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants.

18-cv-1030 (JPO)

Brief of the Society of Wetland Scientists as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment

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Interests of the Amicus Curiae[1]

The Society of Wetland Scientists (SWS) is a leading professional association of wetland and aquatic scientists around the world, including the United States. Established in 1980, SWS advances scientific and educational objectives related to wetland science and encourages professional standards in all activities related to wetland science. SWS has over 3,000 members and publishes a peer-reviewed quarterly journal, *Wetlands*, concerned with all aspects of wetland biology, ecology, hydrology, water chemistry, soil, and sediment characteristics. Amicus supports the use of the best available scientific information in making decisions on the use and management of wetland and aquatic resources.

Introduction

In June 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) promulgated the Clean Water Rule, which defined the term "waters of the United States" (WOTUS) under the Clean Water Act (CWA). Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) [hereinafter Clean Water Rule]. The Clean Water Rule was based on sound science, including a report that analyzed over 1,200 peer-reviewed publications. In February 2018, the EPA and Corps issued a subsequent rule that suspended the Clean Water Rule for two years. Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018)

[1] This brief was not authored in whole or in part by any party's counsel, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amicus curiae or its counsel—contributed money that was intended to fund preparing or submitting this brief.

[hereinafter Suspension Rule]. When doing so, the agencies expressly refused to consider the scientific basis of the Clean Water Rule.

Summary of Argument

An agency must provide a reasoned explanation when promulgating or amending a rule. An agency's implausible explanation or its failure to consider relevant and significant aspects of a problem renders a rulemaking arbitrary and capricious. Because the EPA and Corps refused to consider the scientific basis of the Clean Water Rule, including the most current scientific understanding of how streams and wetlands contribute to the chemical, physical, and biological integrity of downstream waters, the Suspension Rule is arbitrary and capricious.

More broadly, all major EPA policy decisions since the agency's inception have required the use of science. Science is critically important to furthering the goals of the CWA, and this Court should hold the EPA and Corps accountable for failing to consider science in their decisions. The agencies cannot so blithely disregard science related to the chemical, physical, and biological integrity of the Nation's aquatic resources.

Argument

I. The Suspension Rule is arbitrary and capricious because it fails to consider the scientific basis of the Clean Water Rule.

Courts uniformly recognize that agencies must provide a reasoned explanation when promulgating or amending a rule. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency's implausible explanation or its failure to consider relevant and significant aspects of a problem renders a rulemaking arbitrary and capricious. *Id.* The Clean Water Rule was based on, inter alia, an analysis of over

1,200 peer-reviewed publications, entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. EPA Office of Research & Dev., EPA/600/R-14/475F (2015) [hereinafter *Connectivity Report*]. The EPA and Corps amended the Clean Water Rule by adding an "applicability date," which effectively suspended it for two years. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (explaining that an order delaying a rule's effective date is "tantamount to amending or revoking a rule"). When issuing the Suspension Rule, however, the EPA and Corps expressly refused to consider the scientific basis of the Clean Water Rule and provided an implausible explanation for this choice. The Suspension Rule is therefore arbitrary and capricious.

A. The EPA's *Connectivity Report*, which informed the development of the Clean Water Rule, represents the state of the science on how streams and wetlands contribute to the chemical, physical, and biological integrity of downstream waters.

Jurisdiction under the CWA has both legal and scientific components. The U.S. Supreme Court has accepted that traditional navigable waters, interstate waters, and the territorial seas (hereinafter collectively referred to as "primary waters") are "waters of the United States" entitled to CWA protection. *See generally Rapanos v. United States*, 547 U.S. 715 (2006). For other waters, such as streams and wetlands, scientific research plays a critical role in determining how they affect the chemical, physical, and biological integrity of primary waters, and thus their qualifications for CWA protection.

The *Connectivity Report* is the key document that provides scientific support for the Clean Water Rule by establishing how streams and wetlands are connected to primary waters. This report reviewed and synthesized more than 1,200 peer-reviewed scientific publications and was developed over the course of several years. *Connectivity Report*,

supra, at ES-2. It summarized the current scientific understanding of the contribution of streams and wetlands to the chemical, physical, and biological integrity of primary waters. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, 80 Fed. Reg. 2100 (Jan. 15, 2015) (stating that "[t]his report informs development" of the Clean Water Rule).

The *Connectivity Report* was one of the most thorough analyses, procedurally, ever conducted by the EPA and Corps. The *Connectivity Report* itself was subjected to multiple rounds of independent peer review, as well as public comment, and included only studies that were peer reviewed or otherwise verified for quality assurance. *See* EPA & U.S. Dep't of Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* 158–63 (2015) (describing the extensive process of peer review of the *Connectivity Report* itself, including the use of a panel of 27 technical experts from an array of relevant fields, as well as other public processes). The focus on high standards and verification through peer review ensured that the *Connectivity Report* used the best available science to inform the development of the Clean Water Rule. *See* Clean Water Rule, 80 Fed. Reg. at 37,055; *see also, e.g.*, P.J. Sullivan et al., *Report: Best Science Committee, Defining and Implementing Best Available Science for Fisheries and Environmental Science, Policy, and Management*, 31 Fisheries 460, 462 (2006) (describing assurance of data quality and use of rigorous peer review as aspects of best available science).

The *Connectivity Report* meticulously explains the numerous ways in which streams and wetlands influence the chemical, physical, and biological integrity of downstream waters (including primary waters), and the central role that streams and

wetlands play "in maintaining the structure and function of downstream waters." *Connectivity Report*, *supra*, at ES-6. Streams and wetlands "influence the timing, quantity, and quality of resources available to downstream waters" by serving as sources, sinks, and refuges of materials and by providing functions related to the transformation and lag of materials. *Id.*[2]

The functions provided by, and the effects of, an individual stream or wetland on downstream waters are cumulative and should be considered over time and in the context of other streams and wetlands in the watershed. *Id.* at ES-5, 6-7. For example, an individual ephemeral stream may contribute only a small amount of water, organisms, and/or materials to downstream waters in a given year, but the aggregate contribution from that stream over time or from all of the ephemeral streams in that watershed can be substantial. *Id.* at ES-5, ES-14, 6-11. Similarly, one stream may provide many functions, such as water transport, nutrient removal and transformation, flood mitigation, and

[2] Streams and wetlands act as sources by assisting with "the net export of materials, such as water and food resources." *Connectivity Report*, *supra*, at ES-6. Streams are the main water source for most rivers, and streams "transport sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers." *Id.* at ES-2, 3-5, 3-13, 3-17, 6-1. Streams and wetlands also serve as "sinks" and are integral to "the net removal or storage of materials." *Id.* at ES-6, ES-9. For example, wetlands retain and store sediments, contaminants (such as nitrogen and phosphorus), and stormwater, preventing these materials from negatively impacting downstream waters. *Id.* at ES-3, ES-10, 4-8, 6-2 to 6-3. Further, streams and wetlands act as refuges and provide protection and habitat for materials and organisms, such as plants, invertebrates, birds, fish, reptiles, and amphibians, which use the waters for breeding, spawning, feeding, migration, and other activities. *Id.* at ES-3, ES-8, ES-9 to ES-10, 3-38 to 3-39, 3-40 to 3-43, 4-15, 4-19, 4-32 to 4-35, 4-36 to 4-37 tbl. 4-2, 6-3.

In addition to their functions as sources, sinks, and refuges, streams and wetlands provide important transformation and lag functions. Streams and wetlands transform "materials, especially nutrients and chemical contaminants, into different physical or chemical forms." *Id.* at ES-3, ES-6. Streams and wetlands can, for example, remove nitrate through the process of denitrification, *id.* at ES-10 to ES-11, 3-28, 4-11, 4-29, 6-6, and streams may convert coarse particulate matter into a finer form. *Id.* at 2-25 tbl. 2-1, 3-39. Streams and wetlands also perform important lag functions by "delay[ing] or regulat[ing] [the] release of materials, such as stormwater." *Id.* at ES-6. Wetlands may reduce or delay floods by capturing and storing water, and over time, the water can move back to a stream as baseflow. *Id.* at 4-5 tbl. 4-1, 4-7, 4-24, 6-2. Streams also may delay the arrival of water, nutrients, sediments, and contaminants to downstream waters. *Id.* at 3-47.

habitat, and these functions should be considered cumulatively when evaluating the overall effect of that stream on downstream waters. *Id.* at ES-5, 1-10, 1-11.

Wetlands and their functions also should be considered in the aggregate, as the cumulative influence of many wetlands in a watershed can exert a strong impact on "the spatial scale, magnitude, frequency, and duration of hydrologic, biological and chemical fluxes or transfers of water and materials to downstream waters." *Id.* at ES-11, 4-44. For example, multiple wetlands may reduce flooding due to their cumulative storage of larger amounts of water. *Id.* at ES-14. Negative effects also can be cumulative—a single discharge of a pollutant may have a negligible effect, but multiple discharges could have a cumulative negative impact, degrading downstream waters. *Id.* at 6-12.

Human activities can affect the functions provided by streams and wetlands, which, in some instances, can harm downstream waters.[3] Damage to stream and wetland systems can affect society in a number of ways, including: harming human welfare and property via flooding, impairing human health via water pollution, destroying recreational opportunities, and threatening species, including commercial species harvested in fisheries, via water pollution and a loss of connectivity. Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Wetlands and Water Synthesis* 1–3 (José Sarukhán et al. eds., 2005); *see also* Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *IPBES (2018): Summary for Policymakers of the Regional Assessment Report on Biodiversity and Ecosystem Services*

[3] For example, culverts, channelization, and water withdrawals can negatively affect the connectivity between headwater streams and downstream waters, as well as the functions provided by streams and wetlands. *Connectivity Report*, *supra*, at ES-9, ES-13, 1-11, 2-44, 6-10. Dams may impair wetland functions and block migrating fish and organisms from moving upstream, and levees and urban stormwater drainage may eliminate or impair the habitats provided by streams and wetlands. *Id.* at 1-11, 2-45. Wetland drainage for agricultural and other activities leads to lost connectivity and functions, such as decreased water storage and increased pollutant delivery to downstream waters. *Id.* at 2-45 to 2-47.

for the Americas of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services 17 (Jake Rice et al. eds., unedited advance version Mar. 28, 2018); Restore America's Estuaries, *The Economic and Market Value of Coasts and Estuaries: What's at Stake?* 17 (Linwood H. Pendleton ed., 2008).

These potential negative impacts demonstrate that we must protect hydrologically connected streams and wetlands to minimize adverse effects from human activities. The Clean Water Rule was designed to do this by identifying as jurisdictional those waters—including streams and wetlands—that support the objective of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). The *Connectivity Report* describes the myriad ways in which streams and wetlands are connected to, and influence the chemical, physical, and biological integrity of, downstream waters, including primary waters, and the agencies relied on the *Connectivity Report* in developing the definition of WOTUS in the Clean Water Rule. As such, the *Connectivity Report* represents a fundamental part of the scientific basis for the Clean Water Rule, and the EPA and Corps must consider the *Connectivity Report* and the rest of the scientific basis for the Clean Water Rule before amending or suspending it.

B. The EPA and Corps expressly refused to consider the *Connectivity Report* when suspending the Clean Water Rule.

SWS and other scientific societies submitted comments and otherwise participated at every stage of the WOTUS rulemaking.[4] In its comments, SWS repeatedly

[4] See, for example, the comments submitted by the Society of Wetland Scientists and 11 other scientific organizations regarding the proposed rule. Comment Letter from Society of Wetland Scientists et al. to Scott Pruitt, Administrator, EPA, Re: Docket ID No. EPA-HQ-OW-2017-0203; FRL-9962-34-OW; Definition of "Waters of the United States" – Recodification of Pre-existing Rules (Sept. 21, 2017),

urged the EPA and Corps to make decisions regarding the definition of WOTUS based on peer-reviewed publications that are comparable in depth, breadth, and accuracy to the literature (including the *Connectivity Report*) that supported the Clean Water Rule. In response to the agencies' request for comments on the proposed Suspension Rule, SWS and other scientific societies reminded the EPA and Corps that "any agency action concerning 'Waters of the United States' (WOTUS)—including the effective suspension of the Clean Water Rule—must be supported by peer-reviewed science." SWS and others further observed that "[t]he proposed rule to add an 'applicability date' to the Clean Water Rule currently lacks any such support."[5]

Despite such comments, the EPA and Corps expressly refused to consider the scientific basis of the Clean Water Rule when the agencies suspended it for two years. Specifically, in response to comments that the agencies failed to consider the scientific record, the EPA and Corps claimed that "the agencies are under ***no obligation*** to address the merits of the 2015 [Clean Water] Rule because the addition of an applicability date to the 2015 [Clean Water] Rule does not implicate the merits of that rule." Suspension Rule,

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https://sws.org/images/sws_documents/WOTUS-CWR-Repeal-Cmt-Ltr-FINAL.pdf ("strongly oppos[ing] the proposed rule to rescind the definition of 'Waters of the United States'" as promulgated in the Clean Water Rule); Comment Letter from Society of Wetland Scientists et al. to Scott Pruitt, Administrator, EPA, Re: Docket ID No. EPA-HQ-OW-2017-0203; FRL-9962-34-OW; Definition of "Waters of the United States" – Recodification of Pre-existing Rules (Sept. 26, 2017), https://sws.org/images/sws_documents/SWS_WOTUS_2015CWR_Repeal_Comment_LtrFINAL.pdf (also opposing proposed rule to rescind the Clean Water Rule's WOTUS definition); Comment Letter from Society of Wetland Scientists et al. to Scott Pruitt, Administrator, EPA, Re: Docket ID No. EPA-HQ-OW-2017-0480; Proposed Rule: Definition of "Waters of the United States: Pre-proposal Outreach Comments" (Nov. 20, 2017), https://sws.org/images/sws_documents/WOTUSCWR-Step2-Cmt-Ltr-FINAL.pdf ("oppos[ing] the repeal of the 2015 CWR rule and vehemently object[ing] to a definition of WOTUS based on Justice Antonin Scalia's plurality opinion in *Rapanos v. United States*").

[5] *See* Comment Letter from Society of Wetland Scientists et al. to Scott Pruitt, Administrator, EPA, Re: Docket ID No. EPA-HQ-OW-2017-644; FRL-9970-57-OW; Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule (Dec. 12, 2017), https://sws.org/images/sws_documents/WOTUSCWR-Effective-Date-Cmt-Ltr-FINAL.pdf.

83 Fed. Reg. at 5204–05 (emphasis added). That is an implausible explanation. The agencies suspended the Clean Water Rule precisely because the current Administration disagrees with its content. *See* Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

The Suspension Rule undoubtably affects the merits of the Clean Water Rule. The Suspension Rule effectively repealed the Clean Water Rule for two years. Delaying the implementation of the Clean Water Rule does nothing to further the CWA's goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. The agencies have an obligation to explain why they have rejected the merits of the Clean Water Rule.

Yet the final Suspension Rule is completely devoid of any consideration of the relevant scientific record supporting the Clean Water Rule. The agencies' express refusal to consider the scientific basis (including the *Connectivity Report*) of the Clean Water Rule establishes that the agencies "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, thereby rendering the Suspension Rule arbitrary and capricious. As such, the Court should hold unlawful and set aside the Suspension Rule because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (2012).

II. Agency consideration of science is necessary to achieve the goals of the Clean Water Act.

The CWA requires the EPA, which has the primary authority to define WOTUS,[6] to consider science when promulgating rules under the Act. Scientific thinking has underpinned all major EPA policy decisions since the agency's inception. As the EPA itself stated one week ago: "***The best available science must serve as the foundation of EPA's regulatory actions***." Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768, 18,769 (proposed Apr. 30, 2018) [hereinafter Proposed Transparency Rule] (emphasis added) (quoting Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) ("Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science."). Science is critically important to furthering the goals of the CWA, and this Court should hold the EPA (and the Corps) accountable for arbitrarily and capriciously failing to consider science in a WOTUS rulemaking.

A. Science is critical to EPA decision-making.

The EPA's mandate to protect the environment inherently requires the consideration of science. "Science is the backbone of the EPA's decision-making." EPA, *Scientific Integrity Policy* 1 (2012), https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf [hereinafter *Scientific Integrity Policy*]. The EPA's "ability to pursue its mission to protect human health and the

[6] Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 49 Op. Att'y Gen. 197 (1979) (explaining that the EPA Administrator, rather than the Secretary of the Army, has the ultimate authority to interpret CWA jurisdictional terms).

environment depends upon the integrity of the science on which it relies. The environmental policies, decisions, guidance, and regulations that impact the lives of all Americans every day must be grounded, at a most fundamental level, in sound, high quality science." *Id.*

It has long been known that scientific knowledge is the foundation of effective environmental protection. *See generally, e.g.*, William H. Rodgers, Jr., *Giving Voice to Rachel Carson: Putting Science into Environmental Law*, 28 J. Land Use & Envtl. L. 61 (2012). Its prominence began with the Environmental Defense Fund's 1967 "advancement of science" campaign against the agency that would become the EPA. William H. Rodgers, Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 Vt. J. Envtl. L. 1, 17–18 (2010). It is now unassailable that "[s]ound science is an integral component of sustainable and legitimate environmental programming." Shimson Balanson, *Holding Nature Responsible: The Natural Conditions Exception to Water Quality Standards of the Clean Water Act,* 56 Clev. St. L. Rev. 1057, 1080 (2008).

"[S]cience plays a prominent role as a predictor of the environmental consequences of a certain activity." Ora Fred Harris, Jr., *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 Sw. L.J. 909, 924 (1986). This role is preventative in nature, and one reason it is considered "vital" is "because the cost of preventing an environmental disaster is generally much less than the cost of cleaning up one." *Id.* at 926. Simply put, "science is the driving force" behind environmental laws. Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law*, 69 Chi.-Kent L. Rev. 847, 847 (1994).[7]

[7] "Environmental law is a joint product of economics, ethics and science, but science is the driving force. Science—primarily ecology and toxicology—gives content to ethics and economics. Ecology is a well-

The EPA's most recently articulated mission statement declares that it will "work[] to ensure that . . . [n]ational efforts to reduce environmental risks are ***based on the best available scientific information***." EPA, *About EPA: Our Mission and What We Do*, EPA.gov, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last updated Feb. 7, 2018) (emphasis added).[8] The agency's mission and its rulemaking are inextricably intertwined. "Rules . . . are a critical cornerstone of the Environmental Protection Agency's (EPA's) mission. By statute and executive order, they are to be based on the best reasonably obtainable scientific, technical, economic, and other information." EPA Office of Inspector Gen., *Science to Support Rulemaking Pilot Study*, at i (Nov. 15, 2002), https://www.epa.gov/sites/production/files/2015-12/documents/ssrulemaking.pdf; *see also Scientific Integrity Policy*, *supra*, at 5 ("Scientific research and analysis comprise the foundation of all major EPA policy decisions."). On April 30, 2018, the EPA reiterated that "[t]he best available science must serve as the foundation of EPA's regulatory actions." Proposed Transparency Rule, 83 Fed. Reg. at 18,769. The EPA's refusal to consider science when suspending the Clean Water Rule defies logic, conflicts with the agency's core values, and is arbitrary and capricious.

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recognized branch of biological science that deals with the interrelationship between living things and their environment. One of ecology's primary contributions to modern environmental law has been to show how an action that impacted one species of plant or animal might indirectly impact many other species . . . ." *Id.*

[8] The EPA has long emphasized its use of the best available science to accomplish its mission. *See* EPA Office of Inspector Gen., *Science to Support Rulemaking Pilot Study*, at i (Nov. 15, 2002), https://www.epa.gov/sites/production/files/2015-12/documents/ssrulemaking.pdf (ability of EPA to "accomplish our mission and continue to have a meaningful impact on the quality of life for all Americans to a large extent is based on our ability to more fully integrate science into our programs, policies and decisions") (quoting Christine Todd Whitman, EPA Administrator, *Strengthening Science at the Environmental Protection Agency* (May 24, 2002), https://archive.epa.gov/osa/pdfs/web/pdf/saduties.pdf).

B. Implementation of the Clean Water Act requires consideration of science.

The CWA's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The ***only*** way to make sound determinations regarding the restoration and maintenance of waters' "chemical, physical, and biological integrity" is through science because otherwise, no empirical determinations can be made about the chemical, physical, and biological integrity of our waters. The U.S. Supreme Court noted that the CWA's "objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word "integrity" . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.'" *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 132 (1985) (citing H.R. Rep. No. 92–911, at 76 (1972)). The ***only*** way to assess "water quality" or the "natural structure" or "function" of "ecosystems" is through science, again, because otherwise, there is no way of empirically assessing water quality or the function of ecosystems.

Every aspect of the CWA's implementation requires the use of science. For example, the Corps, the agency vested with responsibility to issue CWA section 404 permits, relies on scientific manuals in making those CWA site determinations. *See, e.g.*, *Tin Cup LLC v. U.S. Army Corps of Eng'rs*, No. 4:16-cv-00016-TMB, 2017 WL 6550635, at *8 (D. Alaska Sept. 26, 2017) (discussing the scientific basis of CWA jurisdictional determinations and noting that the Corps' supplemental manual for Alaska "reflect[s] the benefit of nearly two decades [of] advancement in wetlands research and science"). The Corps' CWA determinations themselves have been labeled as "scientific decision[s]." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 906 (5th Cir.

1983). Indeed, the U.S. Supreme Court recently underscored, in a reference to the Clean Water Rule, the agencies' reliance on science. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1812 n.1 (2016) ("In 2015, the Corps adopted a new rule modifying the definition of the scope of waters covered by the Clean Water Act in light of scientific research and decisions of this Court interpreting the Act.").

The traditional deference that courts afford to EPA and Corps decisions is based on the agencies' actual use of science. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989). Not surprisingly, the Corps' CWA determinations are routinely upheld when based upon rigorous scientific literature or studies. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 464 F. Supp. 2d 1171, 1225 (M.D. Fla. 2006) (court upheld Corps' CWA mitigation plan where "scientifically supported"), *aff'd*, 508 F.3d 1332, 1337 (11th Cir. 2007); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 984 F. Supp. 2d 538, 545, 560, 561–62 (E.D. Va. 2013) (Corps' CWA findings upheld as "sufficient evidence" where they included scientific literature showing that the wetlands "support[ed] the water integrity of the [river] by removing nitrates and phosphorous, storing water, and slowing flow" and had an important "biological and ecological impact" on the river); *Nw. Envtl. Def. Ctr. v. Wood*, 947 F. Supp. 1371, 1384 (D. Or. 1996) (Corps' decision must be upheld so long as it was "carefully considered [and] based on evidence from scientific studies" (citation omitted)).

Defendant Pruitt himself, as recently as March 14, 2018, discussed the importance of science to EPA rulemaking. In a Bloomberg interview, while discussing the EPA's rulemaking and its reliance on science, Pruitt noted the importance of the agency's "leaning in to being very robust in our scientific review, getting the best scientists in the

country to work with us and for us in air and water and the rest" and "making sure there is robust analysis in these conclusions that are being drawn by multiple folks across the country . . . across all the rulemaking that we do." *EPA's Pruitt Challenges California on Emission Rules* (Bloomberg Podcast Mar. 14, 2018), https://www.bloomberg.com/news/audio/2018-03-14/epa-s-pruitt-challenges-california-on-emissions-rules.

In short, science permeates all aspects of the CWA, and, indeed, must do so for the EPA and Corps to fulfill their mandates. Under the arbitrary and capricious standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm,* 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The EPA recognizes that "[t]he best available science must serve as the foundation of EPA's regulatory actions," yet it entirely ignored all science.[9] When the agencies disregard science, their judgments deserve no deference, and when they admittedly fail to examine the relevant data, their actions are arbitrary and capricious.

Conclusion

The U.S. Supreme Court has held that agencies must provide a reasoned explanation when amending a rule and that an implausible explanation or failure to consider relevant and significant aspects of a problem renders a rulemaking arbitrary and capricious. In promulgating the Suspension Rule to add an "applicability date" that

[9] The agencies' claim that they "are under no obligation to address the merits of the 2015 [Clean Water] Rule because the addition of an applicability date to the 2015 [Clean Water] Rule does not implicate the merits of that rule," Suspension Rule, 83 Fed. Reg. at 5205, defies logic. When an agency wishes to deviate from a prior rule, it must still examine the relevant data, provide a "reasoned explanation" and "show that there are good reasons" for the change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see also California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018) ("Any suggestion . . . that the [BLM] Suspension Rule should be reviewed with less rigor than any future revision has no merit.").

suspended the 2015 Clean Water Rule for two years, the EPA and Corps expressly refused to consider the scientific basis of the Clean Water Rule and provided an implausible explanation for doing so. Accordingly, SWS supports the Plaintiffs' Motion for Summary Judgment and respectfully requests that this Court hold unlawful and set aside the Suspension Rule because it is arbitrary and capricious.

Date: May 7, 2018

Respectfully submitted,

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*** Affiliations of counsel are provided for identification purposes only.

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I electronically filed a true and correct copy of the foregoing Brief of the Society of Wetland Scientists as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment with the Clerk of the Court for the United States District Court for the Southern District of New York using the Court's CM/ECF system, which will send notification of this filing to the attorneys of record.

Date: May 7, 2018

/s/ Kathleen Gardner
Kathleen Gardner