IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASSACHUSETTS RIVERS ALLIANCE, *et al.*, Plaintiffs, v. E. SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *et al.*, Defendants.	Civil Action No. 17-cv-11825-GAO **REQUEST FOR ORAL ARGUMENT**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Fed. R. Civ. P. 56, plaintiffs[1] respectfully submit this memorandum in support of the Court's entry of summary judgment on their claims under Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, challenging EPA's[2] action staying the effective date of the General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts ("MS4 Permit"). EPA signed the MS4 Permit on April 4, 2016, under the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* ("CWA" or "Clean Water Act"), and it provided permittees with 15 months—until July 1, 2017—to prepare for implementation. The MS4 Permit represented the culmination of eight years of review, negotiation, analysis, and notice-and-comment rulemaking involving hundreds of stakeholders. Upon issuance, EPA announced that the permit satisfied CWA requirements, including by ensuring that pollutant discharges from small MS4s are reduced to the "Maximum Extent Practicable." Yet, on June 29, 2017, just two days before the permit's effective date, EPA abruptly stayed implementation of the MS4 Permit without authority or rational basis ("Stay Notice").[3] On its face and as a matter of law, the Stay Notice fails to satisfy Section 705 of the APA, which authorizes stays of agency actions only when judicial review is pending and "justice so requires." 5 U.S.C. § 705.

First, in the Stay Notice, EPA did not address the relevant factors or make the required findings necessary to support a determination that "justice so requires" an administrative

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[1] The term "plaintiffs" refers to Massachusetts Rivers Alliance, Neponset River Watershed Association, Connecticut River Watershed Council, Inc. d/b/a Connecticut River Conservancy, Merrimack River Watershed Council, Taunton River Watershed Alliance, OARS, Inc., Ipswich River Watershed Association, Mystic River Watershed Association, Jones River Watershed Association, and North and South Rivers Watershed Association.

[2] The term "EPA" collectively refers to defendants U.S. Environmental Protection Agency and E. Scott Pruitt, in his official capacity as Administrator of EPA.

[3] The Stay Notice is attached as Exhibit 1 to the Motion for Summary Judgment.

postponement of the MS4 Permit. While EPA has acknowledged that Section 705 is an equitable rule, the Stay Notice only considered the potential cost to municipalities of implementing the Permit—costs that EPA had given municipalities 15 months to prepare for due to the already-delayed implementation date—and completely ignored the Permit's benefits to public health and the environment. As such, EPA "entirely failed to consider an important aspect of the problem," and the Stay Notice violates a core principle of the APA.

Second, Section 705 stays must meet a four-part test that courts and agencies, including EPA in prior cases, apply when determining whether delaying agency action pending judicial review is appropriate. In the Stay Notice, EPA made no attempt to address or consider *any* of the necessary four factors, namely: (1) whether the legal challenges to the agency action are likely to succeed on the merits; (2) whether there will be irreparable harm absent a stay; (3) whether a stay causes harm to other interested parties; and (4) whether the public interest is served by a stay. The Stay Notice therefore is unlawful under the APA.

Third, Section 705 of the APA only authorizes a postponement "pending judicial review." It does not authorize stays for the purpose of agency reconsideration. On its face, the Stay Notice reflects that EPA postponed implementation of the MS4 Permit so that it could reconsider the permit under the guise of alternative dispute resolution, not to preserve the status quo "pending judicial review." Indeed, just three weeks after EPA issued the Stay Notice, the agency asked the D.C. Court of Appeals to hold judicial review of the petitions in abeyance. Regardless of the context, reconsideration is not an authorized ground for a Section 705 stay. For these and other reasons discussed below, the Stay Notice should be vacated immediately.

II. BACKGROUND

A. Stormwater Pollution In Massachusetts

Stormwater runoff is one of the greatest threats to clean water in Massachusetts and a public health concern. Plaintiffs' Fact Statement filed herewith ("FS") ¶¶ 1, 6. It is generated from rain and snowmelt that flows over impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground. FS ¶ 2. The runoff typically is a mix of bacteria, chemicals, metals, nutrients, hydrocarbons, and other pollutants that flows down storm drains into the waterways the public relies on for drinking water and recreation. FS ¶ 3. Common pollutants in stormwater runoff include antifreeze, detergents, fertilizers, gasoline, household chemicals, oil and grease, paints, pesticides, fecal matter from pets, farm animals, and wildlife, road salt, trash such as plastics and cigarette butts, sediments, ammonia, and solvents. FS ¶ 4. According to EPA, stormwater discharges are causing or contributing to at least 55% of the water quality impairments in all Massachusetts' assessed waters. FS ¶ 5.

B. The Clean Water Act And NPDES

The Clean Water Act is the principal federal statute enacted to protect water quality in the United States, including Massachusetts. The CWA's goals are "to restore and maintain the chemical, physical, and biological integrity of," and to "eliminate[]" "the discharge of pollutants into" the waters of the United States. 33 U.S.C. §§ 1251(a), (a)(1). The National Pollutant Discharge Elimination System ("NPDES") permitting program under the CWA is the primary federal vehicle to protect the quality of the nation's waterbodies. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101–02 (1992). To protect public water resources, the CWA requires municipalities to use stormwater controls and best management practices to filter out pathogens and pollutants and/or to prevent pollution by controlling it at its source. *See* 33 U.S.C. § 1342(p).

The NPDES stormwater program uses permits to regulate stormwater discharges from, among other sources, municipal separate storm sewer systems (MS4s). *See Los Angeles Cty. Flood Control Dist. v. NRDC*, 568 U.S. 78, 80–81 (2013) ("Because storm water is often heavily polluted, the CWA . . . require[s] the operator of an MS4 . . . to obtain a NPDES permit before discharging storm water into navigable waters.") (internal citations omitted). MS4 permits include requirements "to effectively prohibit non-stormwater discharges into the storm sewers" and "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, [and] design and engineering methods," as well as other provisions to ensure that the discharge does not impair water quality or threaten public health. 33 U.S.C. § 1342(p)(3)(B)(i-ii).

NPDES permits issued to regulate the same or similar categories of point sources that discharge similar types of pollutants, such as MS4 dischargers, are known as "General Permits." *See* 40 C.F.R. §122.28(d). MS4 operators must submit a Notice of Intent to be covered under a general MS4 permit. *Id*. NPDES permits are issued for a term of five years. 40 C.F.R. § 122.46.

C. <u>The 2016 MS4 Permit</u>

On May 1, 2003, EPA issued a Final General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems ("2003 Permit") that covered MS4 operators in Massachusetts.[4] FS ¶ 13. The 2003 Permit expired on May 1, 2008.[5] FS ¶¶ 14–19. A multi-year, multi-stakeholder notice and comment process for updating the expired permit began in 2008. FS ¶ 15. On April 4, 2016, eight years later, EPA signed the long overdue, updated 2016 MS4 Permit with an effective date—15 months later—of July 1, 2017. *See* FS ¶ 20. When issuing the

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[4] In Massachusetts, EPA administers the NPDES program. *See Conservation Law Found., Inc. v. Boston Water and Sewer Com'n*, 2010 WL 5349854, *1 (D. Mass. 2010).

[5] The 2013 permit has been administratively continued. FS ¶ 14.

permit, EPA stated that "[t]he conditions in the general permit are established pursuant to the Clean Water Act (CWA) section 402(p)(3)(iii) to ensure that pollutant discharges from small MS4s are reduced to the Maximum Extent Practicable (MEP), protect water quality, and satisfy the appropriate requirements of the CWA." FS ¶ 23.[6]

The MS4 Permit establishes water-quality based requirements for small MS4s in Massachusetts to monitor and reduce nitrogen/phosphorous, metals, solids, bacteria/pathogens, chloride, and oil and grease from impaired receiving waters. FS ¶ 25. Among other things, the permit requires municipalities to: (1) find and eliminate sources of non-stormwater from their storm sewer system (known as Illicit Discharge Detection and Elimination or "IDDE"); (2) establish an ordinance for management of stormwater discharges from construction sites that disturb one or more acres of land; (3) address stormwater runoff from new developments and redevelopments that disturb one or more acres of land; and (4) provide educational material about stormwater to residents, industry, commercial entities, and construction operators. FS ¶ 26.

In the first year of the MS4 Permit, MS4 operators were to meet certain requirements, including but not limited to: (1) within the first 90 days, submit a Notice of Intent to have their stormwater discharges covered under the permit; (2) establish written procedures for winter road maintenance, including storage of salt and sand, minimizing the use of sodium chloride and other salts, and ensure that snow disposal activities do not result in disposal of snow into surface

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[6] The Massachusetts Department of Environmental Protection ("MassDEP") simultaneously issued the MS4 Permit and therefore concurred with EPA's determinations that the permit met the compliance requirements of the Clean Water Act. FS ¶ 21. The Commonwealth of Massachusetts maintains separate permitting authority for stormwater discharges under Massachusetts law. *See* Mass. Gen. Laws c. 21 § 43. On August 14, 2017, MassDEP announced that also would stay the effective date of the permit until July 1, 2018 due to the "federal postponement" and MassDEP's "goal to establish a coordinated federal-state implementation process." FS ¶¶ 38–39.

waters; (3) develop and update a written Stormwater Management Plan; (4) complete written IDDE procedures and document sanitary sewer overflows; and (5) create written procedures for inspecting construction sites for proper sediment controls. FS ¶ 27.

D. Petitions for Review Of The MS4 Permit

Of the more than 250 municipalities in Massachusetts subject to the MS4 permit, only two filed a petition pursuant to the Clean Water Act, 33 U.S.C. § 1369(b) for judicial review: the City of Lowell ("Lowell") and the Town of Franklin ("Franklin"). FS ¶ 28. In addition, petitions were filed by industry groups and two environmental organizations. The petitions have been consolidated before the D.C. Circuit Court of Appeals. FS ¶ 29.

On May 26, 2017, petitioners Massachusetts Coalition for Water Resources, Lowell, and Franklin asked EPA to postpone the effective date of the MS4 Permit for one year. FS ¶ 34. As discussed below, EPA agreed, and on June 29, 2017, stayed implementation of the permit. FS ¶ 35. Then, on July 20, 2017, EPA, joined by various petitioners, filed a motion requesting that the D.C. Circuit hold judicial review in abeyance so that EPA could reconsider the permit through alternative dispute resolution ("ADR"). FS ¶ 30.[7] On November 8, 2017, the D.C. Circuit granted the motion and ordered the case held in abeyance pending further order of the court. FS ¶ 32.

E. The Stay Notice

On June 29, 2017, EPA's Acting Region 1 Administrator signed the Stay Notice, which states in part:

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[7] Petitioners Conservation Law Foundation and Charles River Watershed Association ("CLF/CRWA") opposed the motion for abeyance, in part, because resolution of the various petitions through ADR is highly unlikely due to the petitioners' opposing viewpoints." FS ¶ 31.

> EPA would like to explore the use of alternative dispute resolution (ADR) in this case in order to engage with the various petitioners and jointly see if there might be a resolution that could avoid the need for litigation. EPA believes that it is fair to postpone the effective date of the permit so that eligible MS4s in Massachusetts that could seek coverage under the permit would not be subject to enforceable permit terms and conditions under the Massachusetts permit that could change as a result of ADR. Postponing the effective date for one year pending judicial review should give EPA ample time to determine what, if any, changes are appropriate in the permit and to determine next steps.
>
> Pending any such decision by the Agency, postponing the effective date of the permit for one year will postpone certain obligations—and the associated costs—that would otherwise be incurred in the first year's implementation of the Massachusetts permit. Such costs would include monetary and staff time for preparation and submittal of a Notice of Intent (NOI) to be covered by the permit. Also in the first year, in the absence of the postponement of the permit's effective date, the MS4s would have to update portions of their existing Stormwater Management Plans. Given the status of the litigation, the possibility that the parties will engage in ADR and that the Agency may decide to make changes to the permit, the Agency believes it is reasonable to defer imposition of these obligations and costs for the period of the postponement.

FS ¶¶ 34–35. EPA also stated that it wanted to align the effective date of the Massachusetts MS4 Permit with the separate New Hampshire small MS4 Permit, which has an existing effective date of July 1, 2018. FS ¶ 36. Based on the foregoing, EPA concluded that "justice requires postponement of the effective date." Motion, Exhibit 1.

III. ARGUMENT

A. Standards Of Review

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, review is based entirely on the agency's own document—namely, the Stay Notice—and the questions raised by plaintiffs' claims are purely legal in nature. The court need not wait for EPA to compile an administrative record before deciding pure questions of law. *See Animal Legal Def. Fund v. U.S. Dept. of Agric.*, 789 F.3d 1206, 1224 n.13 (11th Cir. 2015);

Becerra v. U.S. Dept. of the Interior, No. 3:17-cv-02376-EDL, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017) (addressing merits in § 705 case without administrative record).

Section 705 of the APA permits an agency or court to postpone the effectiveness of an agency action under certain circumstances:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. The APA also provides that "[t]he reviewing court shall . . . hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2).

B. The Stay Notice Is Arbitrary And Capricious And Otherwise Unlawful Under 5 U.S.C. § 706

1. EPA failed to consider relevant factors including foregone benefits when it concluded that "justice so requires" the stay.

The Stay Notice is unlawful because EPA provided no rational basis to find that "justice so require[d]" the delay. On its face, the Stay Notice reflects no consideration by EPA at all of the necessary relevant factors, including the benefits of the MS4 Permit to public health and the environment. As such, the Stay Notice is arbitrary, capricious and otherwise unlawful under Section 706 of the APA. *See State of California v. U.S. Bureau of Land Management*, __ F.Supp.2d __, 2017 WL 4416409, *11, (N.D. Cal. Oct. 4, 2017) ("*BLM*") (finding Section 705 stay unlawful where agency failed to satisfy "justice so requires" requirement).

"[A]dministrative agencies are required to engage in 'reasoned decisionmaking.'" *Michigan v. EPA*, — U.S. —, 135 S. Ct. 2699, 2706 (2015); *id.* at 2707 ("reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions") (emphasis in original). "It is a fundamental principle of the APA that an agency's decision is arbitrary when it 'entirely failed to consider an important aspect of the problem.'" *BLM*, 2017 WL 4416409, *11 (*quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Indeed, "[w]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion," courts must "undo [the agency's] action." *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999); *see also Trafalgar Capital Assoc. v. Cuomo*, 159 F.3d 21, 26 (1st Cir. 1998) (finding action arbitrary and capricious when agency's action lacked rational basis); *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997) (citing *Motor Vehicle* and upholding agency action where, unlike here, the Secretary had "studied the data" of the fisheries council's "extensive scientific analyses"); *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 81 (1st Cir. 1983) (finding EPA CWA decision "manifestly arbitrary and capricious" for failure to provide reasoned explanation).

In its Stay Notice, EPA failed to identify, let alone weigh, the various interests at stake contrary to reasoned decisionmaking. It mentioned *only* the advantages to the requesting municipalities of staying the MS4 Permit. *See* Motion, Exhibit 1 (discussing in vague terms costs municipalities may incur to comply with the MS4 Permit in the first year). And, as it is, EPA's discussion of the municipalities' potential unspecified avoided costs has no substance. EPA does not attempt to quantify the benefit to the municipalities of the delay, whether the delay benefits

all, most, or only some municipalities, and whether the delay actually costs those municipalities that had already begun to invest resources into meeting the new MS4 permit requirements.

EPA ignored the advantages of the MS4 Permit contravening both the APA and EPA's mandate under the CWA to administer the statute so as to achieve the Congressional declaration of goals and policy set out in 33 U.S.C. § 1251, which includes, among other things, the elimination of the discharge of toxic pollutants into our nation's waterways. EPA and Administrator Pruitt cannot simply choose to ignore their obligations under the Clean Water Act. *Cf. Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973) (agency obligations necessary to protect the environment "are to be reflected in the procedural process by which agencies render decisions"). The Stay Notice also flies in the face of EPA's own pronouncements that "[c]ommunities cannot afford to wait to address the flooding and public health hazards of stormwater," FS ¶ 10, and that "[s]ound investments in systems to manage stormwater can complement community development initiatives and promote economic vitality." FS ¶ 9; *see also* FS ¶¶ 6–8, 11–12.

EPA's failure to consider the public interest in carrying out its duties is striking. While EPA cannot dispute that the standard for issuing a stay under 5 U.S.C. § 705 is an equitable one, the Stay Notice reflects no balancing of the equities. In analogous judicial proceedings, courts "may, and frequently do, go much further both to give and to withhold relief in furtherance of the public interest than they are accustomed to go only when private interests are involved." *Yakus v. United States*, 321 U.S. 414, 441 (1944) (addressing standard for interlocutory injunction). Here, EPA is charged with implementing the Clean Water Act for the benefit of the public, yet it did not even weigh the public's interest in public health and the environment, much less analyze lost public benefits, when it slammed the brakes on the MS4 Permit. *See Ctr. for Sci. in the Pub.*

Interest v. Dep't of the Treasury, 573 F. Supp. 1168, 1176–77 (D.D.C. 1983), *appeal dismissed*, 727 F.2d 1161 (D.C. Cir. 1984) (Treasury failed to explain how the costs of the regulations outweigh the benefits.).

This omission is conspicuous considering that EPA found just last year that the MS4 Permit met the requirements of the Clean Water Act and would yield significant benefits to the general public by ameliorating pollution in stormwater discharges released into the Commonwealth's waterways. *See, e.g.*, FS ¶ 23–24. "[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions," *Michigan*, 135 S. Ct. at 2707 (emphasis in original). Given the clear evidence that EPA believed the permit to be beneficial just last year, not to mention consistent with the mandate of the Clean Water Act when it was issued, it was arbitrary and capricious for EPA to turn around one year later and stay the permit without addressing why it was rational to forgo those benefits in favor of delay. *See Citizens Awareness Network, Inc. v. U.S. Nuclear Reg. Com'n*, 59 F.3d 284, 290 (1st Cir. 1995) ("An agency changing its course must supply a reasoned analysis for the change") (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42).

In response to this Motion, EPA likely will argue that Section 705 gives it unvarnished authority to stay its own decisions pending judicial review. But if EPA were correct, the language "justice so requires" would be meaningless "contrary to a basic rule of statutory construction." *BLM*, 2017 WL 4416409, *11. As one district court recently stated in holding agency action unlawful in similar stay litigation under 5 U.S.C. § 705:

> If the words "justice so requires" are to mean anything, they must satisfy the fundamental understanding of justice: that it requires an impartial look at the balance struck between the two sides of the scale, as the iconic statue of the blindfolded goddess of justice holding the scales aloft depicts. *Merely to look at only one side of the scales, whether solely the costs or solely the benefits, flunks this basic requirement*. As the Supreme Court squarely held, an agency cannot

> ignore "an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Without considering both the costs *and* the benefits of postponement of the compliance dates, the [agency's] decision failed to take this "important aspect" of the problem into account and was therefore arbitrary.

Id. (emphasis added) (entering summary judgment and vacating stay). Just as in *BLM*, the failure of EPA and Administrator Pruitt to provide a rational, reasoned basis for the unexpected change of position and consider all relevant factors, along with their failure to weigh the purported benefits of delay against its potential costs—as reflected on the face of the Stay Notice—renders the stay arbitrary, capricious and otherwise unlawful under Section 706 of the APA.[8]

2. The stay notice fails to satisfy the four-part test for a stay of agency action under 5 U.S.C. § 705.

The determination of whether a stay of agency action pending judicial review is lawful is guided by "four factors:"

> (1) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies.

Sierra Club v. Jackson, 833 F. Supp.2d 11, 30 (D.D.C. 2012) ("*Sierra Club")*; *cf. Nken v. Holder*, 556 U.S. 418, 427 (2009) (discussing four-part test used by courts when considering a stay of agency action and citing *Virginia Petroleum Jobbers Ass'n v. Fed. Power Com'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (a stay is an "intrusion into the ordinary processes of administration and judicial review")). The standard applies equally to stays "at the agency level" and "judicial level: each is governed by the four-part" test. *Sierra Club*, 833 F. Supp.2d at 30.

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[8] In addition, EPA's new conclusion that the Massachusetts permit should be delayed so that it is effective on the same date as the New Hampshire permit has no rational basis. The two permits affect entirely different municipalities in different states. *See* Motion, Ex. 1.

As the *Sierra Club* court noted, the legislative history of the APA indicates that Congress intended 5 U.S.C. § 705 to codify the pre-existing equitable authority of courts and agencies to preserve the status quo: "[t]his section permits *either agencies or courts*, if the proper showing be made, to maintain the status quo . . .. The authority granted is equitable and should be used by *both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy*." *Id*. at 31 (citing Administrative Procedure Act, Pub. L. 1944–46, S. Doc. 248 at 277 (1946)) (emphasis in original).

Likely for this reason, EPA's past practice has been to use the four-factor test when considering a Section 705 stay request.[9] As a result, EPA was required to explain its departure from that practice when it issued the Stay Notice without meeting this standard. *See Encino Motorcars, LLC v. Navarro*, — U.S. —,136 S. Ct. 2117, 2125–26 (2016) (when an agency departs from its prior position, the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy) (internal quotations omitted); *see also FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.").

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[9] *See, e.g.*, 76 Fed. Reg. 28,318, 28,326 (May 17, 2011) (in considering a stay request under 5 U.S.C. § 705, "EPA evaluated . . . the merits criteria for granting stays—the likelihood of success on the merits, possibility of irreparable harm to the petition, harm to other parties, and the ultimate public interest"); 76 Fed. Reg. 4,780, 4,788 (Jan. 26, 2011) (denying a request to stay a rule because the petitioners did not satisfy four-factor test); 75 Fed. Reg. 49,556, 49,563 (Aug. 13, 2010) (same). In addition, the EPA Administrator, in an Environmental Appeals Board decision, announced that EPA was required to meet the same test as a court would have to meet in order to stay a rule under 5 U.S.C. § 705. *In re Pub. Serv. Co. of N. H*., 1 E.A.D. 389 (E.P.A.), 1977 WL 45581, at *2 (1977) (summarizing the four-part test by which a court considers a stay request, and holding that "[t]hese tests are also used by agencies in deciding whether to issue stays of their own orders").

Here, however, despite both EPA's past practice *and* the equitable nature of Section 705, EPA's Stay Notice failed to even mention the four-part test, let alone make findings to show that each part was satisfied. There is no mention as to whether EPA believes the two municipal operators that appealed the permit are likely to prevail on the merits of their challenge to the final MS4 Permit in the D.C. Circuit or even whether they have presented a substantial case on the merits; the notice does not discuss the harm to others from granting the stay; and the notice does not address the public interest. *See* 82 Fed. Reg. 32,357–59 (July 13, 2017); *see also Sierra Club*, 833 F. Supp.2d at 31 (finding EPA's stay of Clean Air Act rules arbitrary and capricious when "EPA neither employed nor mentioned the four-part test in its Delay Notice.").

The Supreme Court has observed that "[t]he authority to grant stays has historically been justified by the perceived need 'to prevent irreparable injury to the parties or to the public' pending review." *Nken*, 556 U.S. at 432. But EPA made no finding that the requesting municipalities would suffer any irreparable harm in the absence of a stay. Instead, EPA simply noted that the stay would allow permittees to avoid some undefined costs in the first year. EPA offered nothing to support this conclusion. *See* Motion, Ex. 1. It did not explain how completing the referenced Notice of Intent (based on an on-line template), or updating an existing Stormwater Management Plan, could constitute a significant, let alone, irreparable injury. For each of these reasons, EPA lacked authority to stay the MS4 Permit under 5 U.S.C. § 705 because it did not consider or address the requisite four-factor test.

C. The APA Does Not Authorize Stays For Purposes of Reconsideration Rather Than Judicial Review; EPA Acted Outside Of Its Statutory Authority.

Section 705 authorizes stays "pending judicial review." It does not authorize stays pending reconsideration of agency actions. Here, there is no rational relationship between the Stay Notice and judicial review. The central reason provided by EPA to justify the stay is not to

preserve the status quo "pending judicial review," but to give the agency "time to determine what, if any, changes are appropriate in the permit and to determine next steps." FS ¶ 35.[10] That EPA purports to conduct this review in the context of ADR does not matter. It is nothing more than an impermissible "sl[e]ight-of-hand." *Sierra Club*, 833 F. Supp.2d at 34. Further, it is noteworthy that after an eight-year process to issue the MS4 Permit, it took EPA just over four weeks to decide to stay its implementation. *See NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982) (courts should "scrutinize the procedures employed by the agency all the more closely where the agency has acted, within a compressed time frame, to reverse itself by the procedure under challenge"). Here, EPA failed to satisfy the First Circuit's admonition that agency decisions should "not collide directly with substantive statutory commands and procedural corners [should be] squarely turned." *Citizens Awareness Network*, 59 F.3d at 290 (internal quotations omitted).

First, in the Stay Notice, EPA "makes no mention of any concern about the substantive merit" of the MS4 Permit. *Sierra Club*, 833 F. Supp.2d at 34; *see also BLM*, 2017 WL 4416409, *11. In fact, the Stay Notice makes clear EPA's desire to avoid judicial review through the use of ADR, not to ensure that judicial review occurs. Second, just three weeks after EPA issued the Stay Notice, EPA moved the D.C. Circuit to hold judicial review in abeyance (and the court granted the motion on November 8). *See* FS ¶¶ 30, 32. This action directly undermines the notion that EPA stayed the permit to allow the D.C. Circuit to resolve challenges to it. District courts have rejected agencies' use of Section 705, precisely as here, when they have sought to delay,

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[10] Since the new administration took office, federal agencies have attempted to use stays under 5 U.S.C. § 705 to delay agency rules from taking effect. Courts have scrutinized these attempts and have rejected them when the agency has failed to establish that the stay met the APA's baseline requirements. *See, e.g.*, *BLM*, 2017 WL 4416409 (holding stay of Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule unlawful); *Becerra*, 2017 WL 3891678 (holding agency stay under Section 705 unlawful). *Cf. Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (rejecting EPA stay under Clean Air Act).

rather than protect, judicial review. *See, e.g., Becerra*, 2017 WL 3891678; *BLM*, __ F.Supp.2d __, 2017 WL 4416409, *10-11, (N.D. Cal. Oct. 4, 2017) (holding Section 705 stay unlawful where it was issued for the purpose of reviewing and reconsidering a mineral royalty rule, and describing stay justification as "lip service").

Here, EPA cannot change the MS4 Permit's terms and conditions without engaging in public notice-and-comment procedures regardless of ADR. *See* 40 C.F.R. §§ 124.10–12; *see also Clean Air Council*, 862 F.3d at 11 ("[a]gencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with . . . its requirements for notice and comment."). That EPA has applied the label of ADR to the process of reconsideration does not make the stay authorized under Section 705. Reconsideration is reconsideration and it is not a lawful basis for a stay under Section 705.[11]

D. Plaintiffs Have Standing

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*., 528 U.S 167, 180–81 (2000). An organization "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the

[11] Even assuming for the sake of argument that ADR justified the stay, no ADR resolution involving all the petitioners is reasonably possible, as EPA itself has acknowledged. FS ¶ 31. Two of the petitioners, Conservation Law Foundation and Charles River Watershed Association, appealed the permit because they believe it is not stringent enough; the remaining petitioners believe the permit is too stringent. FS ¶ 31.

relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. St. Apple Adver. Com'n*, 432 U.S. 333, 343 (1977). "[T]he presence of one Party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Each plaintiff squarely has standing.

1. Each plaintiff's members have standing to sue in their own right

The declarations plaintiffs have submitted to the Court (*see* Exhibit 3 to Motion) demonstrate that plaintiffs' individual members suffer concrete injuries as a result of EPA staying implementation of the MS4 Permit and thereby further delaying reductions in the level of harmful stormwater pollution in waters that those individuals use and enjoy. Plaintiffs' members live on or near rivers and streams in the Commonwealth that receive polluted stormwater discharges whenever it rains heavily enough for runoff to occur. FS ¶ 39. Members and their families regularly boat, canoe, kayak, fish, and swim in waterways that receive polluted stormwater and have specific plans to continue doing so. FS ¶ 40. They also observe wildlife and hike and bike in areas directly adjacent to those waterways while deriving enjoyment from the scenic and natural beauty of those waters. FS ¶ 41. And members' drinking water comes from water supplies that are impacted by polluted stormwater discharge. FS ¶ 42. Plaintiffs' members have limited their use of waterways affected by polluted stormwater discharges due to concerns about the health effects of ingesting or contacting noxious pollutants or consuming shellfish caught in those waters. FS ¶ 43. *See Laidlaw*, 528 U.S. at 184 (reasonable fear of harm from water pollution is an injury in fact).

In addition, plaintiffs' members' enjoyment of the recreational activities they engage in on and near the waters is diminished by their concern about stormwater pollutants entering those waterways after rains and reducing water quality, as well as having to experience the adverse

effects of stormwater pollutions such as excessive vegetation clogging waterways, alga and cyanobacteria blooms, and visible trash. FS ¶ 44. Plaintiffs' members would benefit from prompt implementation of the MS4 Permit, which is intended to reduce the volume of pollutants being discharged into Massachusetts' waterways through stormwater. FS ¶ 45. By staying the MS4 Permit, EPA postponed without justification the day when plaintiffs' members will receive the benefits of the permit, namely, a reduction in noxious water pollution to waters they use and enjoy. FS ¶ 46.

In short, as a result of EPA's delay in implementing the MS4 Permit, plaintiffs' members have been and will continue to be harmed by contaminated stormwater discharges that the MS4 Permit was intended to reduce. The injuries to plaintiffs' members' aesthetic, health, property, and recreational interests establish the requisite injury-in-fact to satisfy Article III standing requirements. *See Laidlaw*, 528 U.S. at 183 ("plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity") (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

Plaintiffs' members' injuries are "fairly traceable" to EPA's decision to delay implementation of the MS4 Permit because EPA's action has denied them the updated and additional protections afforded by the new MS4 Permit. FS ¶ 47. These injuries would be redressed by a favorable decision vacating the Stay Notice, which would trigger the requirements and deadlines contained in the 2016 MS4 Permit to reduce the discharges of polluted water that harm plaintiffs' members. FS ¶ 48. Courts have recognized that "[w]here an agency rule causes the injury," as here, "the redressability requirement may be satisfied . . . by vacating the challenged rule and giving the aggrieved party the opportunity to participate in a new rulemaking

the results of which might be more favorable to it." *See Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 657 (D.C. Cir. 2005). Here, redressability is even more direct since vacatur of the stay will result in the implementation of the new MS4 Permit, a result that plaintiffs *know* is more favorable, in part, because EPA itself has said so.

2. The interests raised by this lawsuit are central to each plaintiff's core mission; individual members are not required to resolve the claims

The interests this lawsuit seeks to protect—proper implementation of stormwater discharge restrictions under the Clean Water Act and NPDES Program—are indisputably central to each plaintiff organization's mission. FS ¶ 49. Over the past nine years, plaintiffs submitted numerous and extensive comments on the multiple drafts of the MS4 Permit, provided technical assistance and support to municipalities in their watersheds for implementing the new MS4 Permit, developed model bylaws and local zoning regulations and ordinances to address stormwater management practices, assisted communities in securing grant funding, facilitated and participated in stormwater workshops and working groups, and developed public outreach and educational materials related to the updated MS4 Permit. FS ¶ 50. These actions and activities, in addition to plaintiffs' broader and ongoing work to prevent and minimize stormwater pollution, further demonstrate that the specific issue at stake in this case is germane to plaintiffs' missions. *Id.*

In addition, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Resolution of the claims brought in this case turns entirely on the law and the existing record before the Court. *See Int'l Union v. Brock*, 477 U.S. 274, 287–88 (1986) (holding that the participation of individual members was not required where the lawsuit raised "a pure question of law"); *Camel Hair and Cashmere Inst. of America v. Associated Dry Goods Corp.*, 799 F.2d 6, 12 (1986) ("[a]ctions for declaratory, injunctive and other forms of

prospective relief have generally been held particularly suited to group representation"). For each of the foregoing reasons, plaintiffs have standing to bring this case.

IV. CONCLUSION

For the foregoing reasons, the Stay Notice is unauthorized and contrary to law. The APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). In keeping with the statutory language, "vacatur is the normal remedy" when a court identifies a legal deficiency in an agency action. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *see also BLM*, 2017 WL 4416409, *13 ("[v]acatur is the standard remedy for violations of the APA"). Plaintiffs respectfully request that the Court enter summary judgment in their favor on all counts of the Complaint, set aside the Stay Notice immediately, award plaintiffs their fees and costs, and provide such other relief as the Court deems just and equitable.

Respectfully submitted,

MASSACHUSETTS RIVERS ALLIANCE, NEPONSET RIVER WATERSHED ASSOCIATION, CONNECTICUT RIVER WATERSHED COUNCIL, INC. d/b/a CONNECTICUT RIVER CONSERVANCY, MERRIMACK RIVER WATERSHED COUNCIL, TAUNTON RIVER WATERSHED ALLIANCE, OARS, INC., IPSWICH RIVER WATERSHED ASSOCIATION, MYSTIC RIVER WATERSHED ASSOCIATION, JONES RIVER WATERSHED ASSOCIATION, AND NORTH AND SOUTH RIVERS WATERSHED ASSOCIATION,

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November 10, 2017

CERTIFICATE OF SERVICE

I, Irene C. Freidel, the undersigned counsel, hereby certify that the above document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

Irene C. Freidel
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