

1 XAVIER BECERRA  
 Attorney General of California  
 2 SARAH E. MORRISON  
 ERIC KATZ  
 3 Supervising Deputy Attorneys General  
 CATHERINE M. WIEMAN, SBN 222384  
 4 TATIANA K. GAUR, SBN 246227  
 ROXANNE J. CARTER, SBN 259441  
 5 JESSICA BARCLAY-STROBEL, SBN 280361  
 BRYANT B. CANNON, SBN 284496  
 6 Deputy Attorneys General  
 300 South Spring Street, Suite 1702  
 7 Los Angeles, CA 90013  
 Telephone: (213) 269-6329  
 8 Fax: (916) 731-2128  
 E-mail: Tatiana.Gaur@doj.ca.gov  
 9 *Attorneys for Plaintiff State of California, by and  
 through Attorney General Xavier Becerra and  
 10 California State Water Resources Control Board*

LETITIA JAMES  
 Attorney General of the State of New York  
 PHILIP BEIN  
 Senior Counsel  
 TIMOTHY HOFFMAN\*  
 Senior Counsel  
 Office of the Attorney General  
 Environmental Protection Bureau  
 28 Liberty Street  
 New York, NY 10005  
 Telephone: (716) 853-8465  
 Fax: (716) 853-8579  
 Email: Timothy.Hoffman@ag.ny.gov  
*Attorneys for Plaintiff State of New York*

11 *[Additional Parties and Counsel Listed on  
 Signature Page]*

12 IN THE UNITED STATES DISTRICT COURT  
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 **STATE OF CALIFORNIA BY AND THROUGH**  
**ATTORNEY GENERAL XAVIER BECERRA AND**  
 15 **CALIFORNIA STATE WATER RESOURCES**  
**CONTROL BOARD, STATE OF NEW YORK,**  
 16 **STATE OF CONNECTICUT, STATE OF ILLINOIS,**  
**STATE OF MAINE, STATE OF MARYLAND, STATE**  
 17 **OF MICHIGAN, STATE OF NEW JERSEY, STATE**  
**OF NEW MEXICO, STATE OF NORTH CAROLINA**  
 18 **EX REL. ATTORNEY GENERAL JOSHUA H. STEIN,**  
**STATE OF OREGON, STATE OF RHODE ISLAND,**  
 19 **STATE OF VERMONT, STATE OF WASHINGTON,**  
**STATE OF WISCONSIN, COMMONWEALTHS OF**  
 20 **MASSACHUSETTS AND VIRGINIA, THE NORTH**  
**CAROLINA DEPARTMENT OF ENVIRONMENTAL**  
 21 **QUALITY, THE DISTRICT OF COLUMBIA, AND**  
**THE CITY OF NEW YORK,**

22 Plaintiffs,

23 v.

24 **ANDREW R. WHEELER, AS ADMINISTRATOR OF**  
**THE UNITED STATES ENVIRONMENTAL**  
 25 **PROTECTION AGENCY; UNITED STATES**  
**ENVIRONMENTAL PROTECTION AGENCY; R. D.**  
 26 **JAMES, AS ASSISTANT SECRETARY OF THE**  
**ARMY FOR CIVIL WORKS; AND UNITED STATES**  
 27 **ARMY CORPS OF ENGINEERS,**

28 Defendants.

Case No.

**COMPLAINT FOR DECLARATORY  
 AND INJUNCTIVE RELIEF**

(Administrative Procedure Act, 5 U.S.C. §  
 551 *et seq.*)

## INTRODUCTION

1  
2 1. Plaintiffs, the States of California, New York, Connecticut, Illinois, Maine,  
3 Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont,  
4 Washington and Wisconsin, the Commonwealths of Massachusetts and Virginia, the North  
5 Carolina Department of Environmental Quality, the District of Columbia, and the City of New  
6 York (collectively, “States and Cities”), bring this action against defendants Andrew R. Wheeler,  
7 as Administrator of the United States Environmental Protection Agency (EPA); EPA; R. D.  
8 James, as Assistant Secretary for the United States Army Corps of Engineers (Army Corps); and  
9 the Army Corps (collectively, the Agencies). The States and Cities seek judicial review under the  
10 Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA) of a rule entitled “The Navigable  
11 Waters Protection Rule: Definition of ‘Waters of the United States’” (2020 Rule), promulgated  
12 by the Agencies on April 21, 2020. 85 Fed. Reg. 22,250 (Apr. 21, 2020).

13 2. The 2020 Rule defines the term “waters of the United States,” which establishes  
14 the waters that are protected by the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA or Act).

15 3. Because the term sets out which waters are subject to the Act’s permitting  
16 requirements — which are the central tools for limiting harmful pollutant discharges nationwide  
17 — the scope of the “waters of the United States” is of fundamental importance to achieving the  
18 CWA’s overarching objective to restore and maintain the integrity of the Nation’s waters. *See* 33  
19 U.S.C. §§ 1251(a), 1342, 1344. In addition, the definition of “waters of the United States” is  
20 critical for effective implementation of other key provisions of the Act, including establishment  
21 and achievement of water quality standards, certifications by states that federally permitted  
22 activities will comply with the Act and state law requirements, and control of oil spills. *Id.* §§  
23 1313, 1321, 1341.

24 4. The 2020 Rule continues the Agencies’ efforts to repeal and replace their 2015  
25 “Clean Water Rule” defining the “waters of the United States” (2015 Rule), which was based on  
26 extensive scientific analyses and factual findings about the connectivity of waterbodies. *See* 80  
27 Fed. Reg. 37,054 (June 29, 2015).

28 5. In 2019, the Agencies issued a rule repealing the 2015 Rule and adopting an earlier

1 definition of “waters of the United States” that had been issued by the Agencies in the 1980s  
2 (2019 Rule). 84 Fed. Reg. 56,626 (Oct. 22, 2019).

3 6. The 2020 Rule repeals the 2019 Rule and adopts a definition of “waters of the  
4 United States” that is much narrower and categorically excludes waters long understood as within  
5 the CWA’s protections. That new definition conflicts with the text of the CWA, contradicts the  
6 CWA’s objective, and overlooks the Agencies’ prior scientific findings and longstanding policy  
7 and practice, and the recommendations of the Agencies’ Science Advisory Board.

8 7. The 2020 Rule discards the “significant nexus” standard for “waters of the United  
9 States” that was set forth in Justice Kennedy’s concurring opinion in *Rapanos v. United States*,  
10 547 U.S. 715 (2006) and endorsed by a majority of the Justices on the Court. Rather than relying  
11 on the significant nexus standard, the 2020 Rule improperly relies on and implements the  
12 plurality opinion in *Rapanos* which did not command a majority of the Court’s Justices and is not  
13 consistent with the Act’s text, structure and purpose.

14 8. Contrary to the Act’s objective “to restore and maintain the chemical, physical and  
15 biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the 2020 Rule excludes many  
16 waters, including ephemeral streams and many wetlands, from the scope of “waters of the United  
17 States” and thereby deprives these waters of CWA protections.

18 9. By eliminating CWA protections for all ephemeral streams, many wetlands, and  
19 other waters that had been covered under the 2015 Rule and the 2019 Rule, the 2020 Rule also  
20 contradicts, without reasoned explanation or rational basis, the scientific evidence and the  
21 Agencies’ prior factual findings. Accepted science and the Agencies’ previous findings  
22 overwhelmingly demonstrate that the waters excluded from the Act’s protections by the 2020  
23 Rule significantly affect downstream water quality and require protection as “waters of the United  
24 States” under the CWA. The 2020 Rule is also inconsistent, without reasoned explanation or  
25 rational basis, with the Agencies’ long-standing policy and practice of relying on the “significant  
26 nexus” standard in Justice Kennedy’s concurring opinion in *Rapanos* to define “waters of the  
27 United States.”

28 10. A definition of “waters of the United States” that accords with the significant

1 nexus standard, the Act’s language and objective, and with the Agencies’ scientific findings and  
2 longstanding policy and practice, is critical for the States and Cities to secure the water quality  
3 and public health and welfare benefits of the Act. The 2020 Rule harms the States and Cities by  
4 limiting the waters subject to the Act’s protections, thereby exposing the States’ and Cities’  
5 waters to pollution entering from jurisdictions that are less protective of their waters; putting the  
6 States and Cities at a competitive disadvantage by incentivizing industry to relocate to upstream  
7 states with less stringent water quality protections; disrupting the States’ and Cities’ regulatory  
8 programs; and threatening injury to the States’ and Cities’ sovereign and proprietary interests.

9 11. The 2020 Rule violates the APA because the Agencies’ new definition of “waters  
10 of the United States” conflicts with the CWA and its objective, unreasonably disregards the  
11 Supreme Court’s interpretation of the Act and the Agencies’ prior factual findings and  
12 longstanding policy and practice, all without reasoned explanation.

13 12. Accordingly, the States and Cities seek a declaration that the 2020 Rule violates  
14 the APA because it is arbitrary and capricious and not otherwise in accordance with law, and  
15 request that the Court set aside and vacate the rule.

#### 16 JURISDICTION AND VENUE

17 13. This Court has jurisdiction over the subject matter of this action pursuant to 28  
18 U.S.C. § 1331 (action arising under the laws of the United States) and 5 U.S.C. § 702 (providing  
19 for judicial review of agency action under the APA). An actual controversy exists between the  
20 parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201(a). This Court  
21 may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201–  
22 2202 and 5 U.S.C. §§ 705–706.

23 14. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because  
24 plaintiff State of California resides in this judicial district and this action seeks relief against  
25 federal agencies and officials acting in their official capacities.

#### 26 INTRADISTRICT ASSIGNMENT

27 15. Pursuant to Civil Local Rules 3-5(b) and 3-2(c), there is no basis for assignment of  
28 this action to any particular location or division of this Court.

**PARTIES**

1  
2 16. The Plaintiff States of California, New York, Connecticut, Illinois, Maine,  
3 Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont,  
4 Washington and Wisconsin, the Commonwealths of Massachusetts and Virginia (collectively,  
5 States) are sovereign states of the United States of America. Plaintiff North Carolina Department  
6 of Environmental Quality is the State of North Carolina's executive agency with jurisdiction to  
7 implement water quality laws. The Plaintiff District of Columbia is a municipal corporation and  
8 is the local government for the territory constituting the permanent seat of the government of the  
9 United States. The District of Columbia is defined as a state under the Act. 33 U.S.C. § 1362(3).  
10 The Plaintiff City of New York is a municipal corporation and political subdivision of the State of  
11 New York. The States and the District of Columbia bring this action in their sovereign and  
12 proprietary capacities and as *parens patriae* on behalf of their citizens and residents to protect  
13 public health, safety, welfare, their waters and environment, and their economies. The City of  
14 New York brings this action in its governmental and proprietary capacities.

15 17. Defendant Andrew R. Wheeler is sued in his official capacity as Administrator of  
16 EPA.

17 18. Defendant EPA is the federal agency with primary regulatory authority under the  
18 CWA.

19 19. Defendant R. D. James is sued in his official capacity as Assistant Secretary of the  
20 Army for Civil Works within the Army Corps.

21 20. Defendant Army Corps has regulatory authority over the Act's Section 404 permit  
22 program for dredge and fill permits, codified at 33 U.S.C. § 1344.

**STATUTORY AND REGULATORY FRAMEWORK****The Administrative Procedure Act**

23  
24  
25 21. Federal agencies may issue, amend or repeal a rule only in accordance with the  
26 APA.

27 22. "[R]ule making" means "agency process for formulating, amending, or repealing a  
28 rule." 5 U.S.C. § 551(5).

1           23. Under the APA, a federal agency must publish notice of a proposed rulemaking in  
2 the Federal Register and “shall give interested persons an opportunity to participate in the rule  
3 making through submission of written data, views, or arguments.” *Id.* § 553(b), (c).

4           24. The opportunity for public comment under 5 U.S.C. § 553(c) must be meaningful,  
5 requiring that the agency allow comment on the relevant issues and provide adequate time for  
6 comment.

7           25. An agency may only issue a rule after “consideration of the relevant matter  
8 presented” in public comments. 5 U.S.C. § 553(c). Agencies must consider all important aspects  
9 of the problem that is the subject of the rulemaking.

10           26. An agency rule must comply with and implement statutory law and binding  
11 Supreme Court precedent.

12           27. When an agency promulgates a rule, the agency may not ignore or countermand its  
13 earlier factual findings relating to the matter without a reasoned explanation for doing so.

14           28. An agency that promulgates a rule that modifies its long-standing policy or  
15 practice must articulate a reasoned explanation and rational basis for the modification and must  
16 consider and evaluate the reliance interests engendered by the agency’s prior position.

17           29. The APA authorizes this Court to “hold unlawful and set aside agency actions,  
18 findings and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not  
19 in accordance with law.” 5 U.S.C. § 706(2)(A).

20           **The Clean Water Act**

21           30. The CWA’s “objective . . . is to restore and maintain the chemical, physical, and  
22 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

23           31. The Act’s central requirement is that pollutants, including dredged and fill  
24 materials, may not be discharged into “navigable waters” without a permit. *Id.* §§ 1311(a), 1342,  
25 1344, 1362(12). “Navigable waters” are defined as “the waters of the United States, including the  
26 territorial seas.” *Id.* §1362(7).

27           32. The Act’s coverage of waters is broad because “Congress recognized” that  
28 “[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution.”

1 *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985). Although the  
2 CWA defines “waters of the United States” as “navigable waters,” “the term ‘navigable’ is of  
3 ‘limited import’” because Congress also intended to regulate non-navigable waterbodies with a  
4 “significant nexus” to navigable waters. *Solid Waste Agency of Northern Cook County v. U.S.*  
5 *Army Corps of Engineers*, 531 U.S. 159, 167 (2001) (*SWANCC*) (internal citations omitted). The  
6 significant nexus standard was reiterated in Justice Kennedy’s concurring opinion in *Rapanos*,  
7 which explained that “[t]he required nexus must be assessed in terms of the statute’s goals and  
8 purposes.” *Rapanos*, 531 U.S. at 779.

9 33. The CWA controls pollution at its source by requiring permits for discharges into  
10 navigable waters and non-navigable waters with a significant nexus to navigable waters. *See* S.  
11 Rep. No. 92-414 at 77 (1972) (“[I]t is essential that discharge of pollutants be controlled at the  
12 source”). The Act’s permitting programs prohibit pollutant discharges to a water of the United  
13 States from a point source in violation of a permit’s terms or without a permit. 33 U.S.C.  
14 §§ 1311(a), 1342, 1344.

15 34. The CWA establishes two main categories of permits. Permits for the discharge of  
16 dredged and fill materials into “waters of the United States” are issued by the Army Corps under  
17 Section 404 of the Act, unless EPA authorizes a state to operate this permit program for such  
18 discharges within its borders. 33 U.S.C. § 1344(a), (h). The scope of the Section 404 permit  
19 program is governed by the definition of “waters of the United States.”

20 35. Permits for the discharge of other pollutants into waters of the United States, also  
21 referred to as National Pollutant Discharge Elimination System (NPDES) permits, are issued by  
22 EPA under Section 402 of the Act, unless EPA authorizes a state to operate this permit program  
23 for such discharges within its borders. 33 U.S.C. § 1342(a), (b). The scope of the Section 402  
24 permit program, too, is governed by the definition of “waters of the United States.”

25 36. The Section 402 permit program provides further protections for states that may be  
26 adversely affected by discharges into the waters of the United States located in other states. An  
27 affected state can lodge objections to a proposed permit with the EPA Administrator, in which  
28 case a public hearing on the objections must be held. 33 U.S.C. § 1342(d).

1           37.     In addition to the Section 404 and 402 permit programs, the Act provides several  
2 other protections for “waters of the United States.” Under Section 303 of the Act, states establish  
3 water quality standards for those waters within their borders, and, if necessary, impose additional  
4 pollution control measures to achieve those standards, called “Total Maximum Daily Loads”  
5 (TMDLs). 33 U.S.C. § 1313.

6           38.     Section 401 of the Act requires a state “water quality certification” when a  
7 federally permitted or licensed project in a state may result in a discharge into “waters of the  
8 United States.” The scope of the states’ Section 401 certification authority is also governed by  
9 the definition of “waters of the United States.” A state is authorized to deny, grant or grant with  
10 conditions a Section 401 water quality certification for such projects based on its determination  
11 whether a project complies with the Act and with applicable state water quality requirements. 33  
12 U.S.C. § 1341(a)(1). The federal permit or license may not be issued if the state denies  
13 certification. Section 401 also provides additional state protections when the EPA Administrator  
14 determines that such projects may adversely affect water quality in a neighboring state. In those  
15 circumstances the Administrator is required to notify that state, which can then object to the  
16 federal permit or license and obtain a public hearing from the federal permitting or licensing  
17 agency. *Id.*, § 1341(a)(2).

18           39.     Section 311 of the Act prohibits discharges or threatened discharges of oil or  
19 hazardous substances into the “waters of the United States.” 33 U.S.C. § 1321(b). The Act  
20 further provides for oil spill prevention planning by facilities and for funding response actions for  
21 oil spills into jurisdictional waters. *Id.*, § 1321(j)(5), (s). The scope and applicability of the  
22 Section 311 program is governed by the definition of “waters of the United States.”

23           40.     The Act also establishes nationwide minimum pollution controls that are  
24 applicable to the “waters of the United States,” creating a uniform “national floor” of protective  
25 measures against water pollution. *See* 33 U.S.C. §1370(1). Because many of the Nation’s waters  
26 cross state boundaries and because downstream states lack regulatory authority to directly control  
27 pollution sources in upstream states, the Act’s nationwide controls are crucial for protecting  
28 downstream states from pollution originating outside their borders. Without a protective



1 nationwide baseline that furthers the Act’s purpose of protecting water quality, upstream states  
2 may impose less stringent standards on pollution sources in their states. Those less stringent  
3 controls would harm the waters of downstream states.

4 **Agency Regulations and Guidance Defining “Waters of the United States”**

5 41. The Agencies defined “waters of the United States” in regulations issued in 1977,  
6 1980, 1982, 1986, and 1988 (collectively, 1980s regulations). 42 Fed. Reg. 37, 144 (July 19,  
7 1977); 45 Fed. Reg. 85,336 (Dec. 24, 1980); 47 Fed. Reg. 31,794 (July 22, 1982); 51 Fed. Reg.  
8 41,206 (Nov. 13, 1986); 53 Fed. Reg. 20,764. The 1980s regulations defined the “waters of the  
9 United States” to cover: (1) waters used or susceptible of use in interstate and foreign commerce,  
10 commonly referred to as navigable-in-fact or “traditionally navigable” waters; (2) interstate  
11 waters; (3) the territorial seas; and (4) other waters having a nexus with interstate commerce.

12 42. Following *SWANCC* and *Rapanos*, the Agencies issued guidance regarding  
13 implementation of the 1980s regulations’ definition of “waters of the United States.” The 2003  
14 *SWANCC* Guidance stated that the Agencies would not assert jurisdiction over intrastate and non-  
15 navigable isolated waters, such as abandoned gravel pits, based solely on use by migratory birds.  
16 68 Fed. Reg. 1995, 1997 (Jan. 15, 2003).

17 43. The 2008 *Rapanos* Guidance provided direction on how to implement the  
18 significant nexus standard in Justice Kennedy’s concurring opinion in that case.<sup>1</sup> Based on the  
19 significant nexus standard, the *Rapanos* Guidance included as jurisdictional the following  
20 categories of waters: (1) navigable waters and their adjacent wetlands; (2) non-navigable  
21 tributaries of navigable waters that are relatively permanent; and (3) wetlands that directly abut  
22 those non-navigable tributaries. Adjacent wetlands were defined in the Guidance to include those  
23 with a surface or shallow sub-surface connection to jurisdictional waters, wetlands separated from  
24 jurisdictional waters by barriers, and wetlands reasonably close in proximity to jurisdictional  
25 waters. *Rapanos* Guidance at 5.

26 \_\_\_\_\_  
27 <sup>1</sup> *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos*  
28 *v. United States & Carabell v. United States* (Dec. 2, 2008),  
[http://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](http://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf)

1           44.     The *Rapanos* Guidance further provided that non-navigable, non-relatively  
2 permanent tributaries and their adjacent wetlands would be assessed on a case-by-case basis  
3 according to the Agencies’ significant nexus analysis, which considered various hydrologic and  
4 ecological factors such as flow characteristics and various functions of those waters, “to  
5 determine if they significantly affect the chemical, physical and biological integrity of  
6 downstream traditional navigable waters.” *Rapanos* Guidance at 1, 8-11.

7           45.     Following long-standing criticism by stakeholders that the 1980s regulations  
8 lacked clarity and consistency, the Agencies promulgated the 2015 Rule, replacing the 1980s  
9 regulatory definition of “waters of the United States.” 80 Fed. Reg. at 37,054; *see* 82 Fed. Reg.  
10 34,899, 34,901. The 2015 Rule became effective on August 28, 2015. *Id.* at 37,054.

11           46.     The 2015 Rule defined the waters protected by the Act based on “the text of the  
12 statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the  
13 Agencies’ technical expertise and experience.” 80 Fed. Reg. at 37,055. The definition covered  
14 waters having a “significant nexus” with the integrity of downstream navigable-in-fact waters—  
15 the standard endorsed by a majority of the Supreme Court Justices in *Rapanos*. *See* 80 Fed. Reg.  
16 at 37,057.

17           47.     In promulgating the 2015 Rule, the Agencies performed rigorous scientific review  
18 and made extensive factual findings about categories of waters significantly affecting the integrity  
19 of downstream navigable waters. For example, the Agencies relied on a comprehensive report  
20 prepared by EPA’s Office of Research and Development, entitled “Connectivity of Streams and  
21 Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (2015  
22 Connectivity Report), which took into account more than 1200 peer-reviewed publications.<sup>2</sup> The  
23 2015 Connectivity Report analyzed the vast body of scientific evidence about how upstream non-  
24 navigable waters and wetlands affect the integrity of downstream navigable waters. In addition to  
25 that report itself, the Agencies also relied on EPA’s Science Advisory Board’s independent  
26 review of the Connectivity Report when they promulgated the 2015 Rule. 80 Fed. Reg. at 37,057.

27           <sup>2</sup> U.S. EPA, *Connectivity of Streams and Wetland to Downstream Waters: A Review and*  
28 *Synthesis of the Scientific Evidence (Final Report)*, EPA/600/R-14/475F (Washington, D.C.  
2015), available at <http://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>

1           48.     In 2017 the President issued Executive Order 13778 entitled “Restoring the Rule  
2 of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’  
3 Rule,” 82 Fed. Reg. 12,497 (April 25, 2017), which directed the Agencies to “consider  
4 interpreting the term ‘navigable waters’ . . . in a manner consistent with” the plurality opinion in  
5 *Rapanos* rather than Justice Kennedy’s concurring opinion, which had been endorsed by a  
6 majority of the Justices on the Court.

7           49.     In October 2019, the Agencies replaced the 2015 Rule with the 2019 Rule, which  
8 adopted a definition of “waters of the United States” that was identical to the definition in the  
9 1980s regulations. 84 Fed. Reg. 4,154 (Feb. 14, 2019). The Agencies stated that this definition  
10 “[could] not be implemented as promulgated” because it was issued before the *SWANCC* and  
11 *Rapanos* decisions and indicated that it would be implemented in accordance with the *SWANCC*  
12 Guidance and *Rapanos* Guidance. 84 Fed. Reg. 4,154, 4,198 (Feb. 14, 2019).

### 13 **The 2020 Rule**

14           50.     As directed by Executive Order No. 13778, in the 2020 Rule the Agencies relied  
15 principally on the *Rapanos* plurality opinion to significantly narrow the definition of “waters of  
16 the United States,” cutting back federal protections afforded by every iteration of CWA  
17 implementing regulations and guidance dating back many decades, including the 1980s  
18 regulations, the *SWANCC* Guidance, the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule.

19           51.     The 2020 Rule lists four categories of waters as “waters of the United States”:  
20 (1) the territorial seas and waters that are, were, or may be susceptible to use in interstate or  
21 foreign commerce;<sup>3</sup> (2) tributaries that meet the definition of “waters of the United States”;  
22 (3) lakes and ponds, and impoundments of jurisdictional waters that meet the rule’s definition of  
23 “waters of the United States”; and (4) wetlands adjacent to those waters. 85 Fed. Reg. at 22,338  
24 (to be codified as 33 C.F.R § 328.3(a)).

25           52.     To meet the “waters of the United States” definition under the 2020 Rule, a  
26 tributary, lake, pond, or impoundment must contribute flow in a “typical year” directly to

27           <sup>3</sup> The “territorial seas” are defined by the Act. 33 U.S.C. § 1362(8). Waters that are,  
28 were, or may be used for commerce purposes are navigable-in-fact “traditional navigable waters,”  
recognized in a long line of cases originating with *The Daniel Ball*, 77 U.S. 557, 563 (1870).

1 traditional navigable waters or indirectly to such waters through other jurisdictional waters (e.g.,  
2 through other tributaries, lakes, ponds, impoundments or adjacent wetlands). Tributaries must be  
3 either perennial (continuously flowing all year round) or intermittent (continuously flowing  
4 during certain times of the year and not just in direct response to precipitation). 85 Fed. Reg. at  
5 22,339 (to be codified as 33 C.F.R. § 328.3(c)(5), (8), (12)).

6 53. “Typical year” is defined to mean “when precipitation and other climatic variables  
7 are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the  
8 applicable aquatic resource based on a rolling thirty-year period.” 85 Fed. Reg. at 22,339 (to be  
9 codified as 33 C.F.R. § 328.3(c)(13)). The 2020 Rule does not identify which “other climatic  
10 variables” should be considered, or what is the “geographic area of the applicable aquatic  
11 resource.”

12 54. The 2020 Rule excludes several categories of waters from the Act’s protections.  
13 Ephemeral waters (those flowing only in direct response to precipitation) and their adjacent  
14 wetlands are excluded from the definition of tributaries and are not “waters of the United States.”  
15 85 Fed. Reg. at 22,339 (to be codified as 33 C.F.R. § 328.3(c)(3), (12)). *See* 85 Fed. Reg. at  
16 22,338 (to be codified as 33 C.F.R. § 328.3(b)(3)) (eliminating ephemeral streams); 85 Fed. Reg.  
17 at 22,338 – 22,339 (to be codified as 33 C.F.R. § 328.3(a)(2), (c)(12)) (covering only wetlands  
18 adjacent to tributaries, defined not to include ephemeral streams).

19 55. The 2020 Rule also does not include “interstate” waters as a separate category of  
20 the “waters of the United States,” and therefore excludes many waters that cross state borders and  
21 have long been protected by the Act. *See* 85 Fed. Reg. at 22,338 (to be codified as 33 C.F.R. §  
22 328.3(a)).

23 56. The 2020 Rule excludes from the “waters of the United States” many wetlands that  
24 are near other jurisdictional waters but lack a physical or surface hydrological connection to them.  
25 *Compare* 85 Fed. Reg. at 22,338 (to be codified as 33 C.F.R. § 328(c)(i)) (defining adjacent  
26 wetlands) with former 33 C.F.R. § 328.3 (c)(1) (Oct. 22, 2019) (broader definition of “adjacent”  
27 meaning “bordering, contiguous or neighboring” another jurisdictional water). As a result, the  
28 following wetlands that were formerly protected as “adjacent” wetlands under the *Rapanos*

1 Guidance, the 2015 Rule, and the 2019 Rule are no longer protected under the 2020 Rule: (1)  
2 wetlands with a shallow sub-surface, rather than surface, connection to jurisdictional waters; (2)  
3 wetlands physically separated from jurisdictional waters by human-made dikes or barriers, but  
4 lacking a direct hydrologic surface connection in a typical year; and (3) neighboring wetlands  
5 reasonably close to a jurisdictional water so as to have a functional ecological connection with  
6 such water. *See Rapanos* Guidance at 5. Under the 2019 Rule, all of these excluded wetlands  
7 were jurisdictional either by definition or through a case-specific significant nexus analysis under  
8 the *Rapanos* Guidance.

9 57. As a result of these new exclusions in the 2020 Rule, a vast number of streams and  
10 wetlands – previously covered by the Act for decades – will no longer receive CWA protections.  
11 The Agencies’ documents supporting the 2020 Rule estimate that at least 18 percent of all streams  
12 across the country are “ephemeral” and will no longer be protected under the 2020 Rule.<sup>4</sup> This  
13 percentage is significantly higher in the arid West, including California and New Mexico, where  
14 35 percent of all streams and 39 percent of stream length are ephemeral.<sup>5</sup> These Agency  
15 documents further show that the 2020 Rule will leave as much as 51 percent of wetlands across  
16 the country without federal protection.<sup>6</sup>

### 17 ***The 2020 Rule’s Deficiencies***

18 58. Impermissible Interpretation of the CWA. The 2020 Rule is flawed, because the  
19 Agencies unreasonably rejected a significant nexus analysis to define the “waters of the United  
20 States,” as set forth in Justice Kennedy’s opinion in *Rapanos* interpreting the Act, and instead  
21 relied on standard from the *Rapanos* plurality opinion that a majority of the Justices on the court  
22 rejected.

23 59. Thus, the 2020 Rule excludes ephemeral streams from the “waters of the United  
24 States” because, according to the Agencies, “the requirement that a tributary be perennial or  
25 intermittent and be connected to a traditional navigable water is reasonable and reflects the

26 \_\_\_\_\_  
27 <sup>4</sup> USACE Internal Communication, September 4-5, 2017, “Breakdown of Flow Regimes  
in NHD Streams Nationwide,” *available at* <http://www.eenews.net/stories/1060109323>

28 <sup>5</sup> *Id.*

<sup>6</sup> *Id.*

1 *Rapanos* plurality’s description of a ‘wate[r] of the United States’ as ‘*i.e.*, a relatively permanent  
2 body of water connected to traditional interstate navigable waters.’ [547 U.S.] at 742. 85 Fed.  
3 Reg. at 22,289 (internal quotation marks omitted).

4 60. In the 2020 Rule, the Agencies similarly and unreasonably relied on the *Rapanos*  
5 plurality opinion instead of the significant nexus standard to define wetlands that are protected  
6 under the Act and those that are excluded. The Agencies cited the *Rapanos* plurality for the  
7 inclusion of wetlands that are “inseparably bound up with” (*i.e.*, physically connected to) other  
8 jurisdictional waters, such as wetlands directly abutting or inundated by flooding from such  
9 waters. *Id.* at 22,309, 22,779 – 22,780. The Agencies also unreasonably cited the *Rapanos*  
10 plurality to exclude wetlands with a shallow sub-surface connection as well as wetlands lacking  
11 direct hydrologic surface connection to jurisdictional waters. *Id.* at 22,278 – 22,280.

12 61. The 2020 Rule is an impermissible interpretation of the Clean Water Act because  
13 its definition of “waters of the United States” excludes entire categories of waters that meet the  
14 significant nexus standard endorsed in *Rapanos* by a majority of the Supreme Court Justices and  
15 for which protection is necessary to achieve the Act’s objective.

16 62. Failure to Consider Prior Factual Findings. In the 2020 Rule, the Agencies have  
17 acted arbitrarily and capriciously and otherwise not in accordance with law by ignoring and  
18 countermanding their previous factual findings without reasoned explanation. Those factual  
19 findings, grounded in the best peer-reviewed science, bear directly on the significant effects that  
20 the waters excluded by the Rule have on downstream navigable waters.

21 63. The Agencies found in 2015, in association with their promulgation of the 2015  
22 Rule, that tributary streams, and wetlands and open waters in floodplains and riparian areas, are  
23 functionally connected to and strongly affect the chemical, physical and biological integrity of  
24 downstream traditional navigable waters, interstate waters, and the territorial seas. In 2015 the  
25 Agencies compiled and relied on a vast record demonstrating that the quality and health of  
26 downstream waters depend on the many functions performed by these upstream waters, whose  
27 effects on downstream waters are cumulative.

28 64. In particular, EPA’s 2015 Connectivity Report examined the chemical, physical,

1 and biological connections between upstream and downstream waters and drew several “major  
2 conclusions,” including the following:

- 3 • All tributary streams, including perennial, intermittent, and *ephemeral* streams,  
4 are physically, chemically, and biologically connected to downstream rivers.  
(Connectivity Report at ES-2) (emphasis added).
- 5 • Wetlands and open waters in riparian areas and floodplains are physically,  
6 chemically, and biologically integrated with rivers via functions that improve  
7 downstream water quality. (Connectivity Report at ES-2 to -3).
- 8 • Wetlands and open waters in non-floodplain landscape settings provide  
9 numerous functions that benefit downstream water integrity. (Connectivity  
Report at ES-3 to -4).

10 65. In the 2020 Rule, however, the Agencies virtually ignore their prior findings and  
11 the comprehensive, peer-reviewed synthesis of current scientific understanding in the 2015  
12 Connectivity Report.

13 66. Prior to finalizing the 2020 Rule, the Agencies engaged EPA’s Science Advisory  
14 Board (SAB) to review the rule. 85 Fed. Reg. at 22, 261. The SAB issued its draft commentary  
15 on the 2020 Rule on December 31, 2019, and a public hearing was held regarding the SAB’s  
16 review on January 17, 2020, less than a week before the Agencies signed the Final Rule. *Id.*

17 67. The SAB’s draft comments reflected much of the commenting public’s and the  
18 commenting States’ opposition to the 2020 Rule, finding that:

19 The proposed [2020 Rule] is not fully consistent with established EPA recognized  
20 science, may not fully meet the key objectives of the CWA — “to restore the  
21 chemical, physical and biological integrity’ of the Nation’s waters,” and is subject  
22 to a lack of clarity for implementation. The departure of the proposed [Final Rule]  
from EPA recognized science threatens to weaken protection of the nation’s waters  
. . . . These changes are proposed without a fully supportable scientific basis, while  
potentially introducing substantial new risks to human and environmental health.

23 *SAB Draft Commentary on Proposed Final Rule*, p. 2 (Oct. 16, 2019).<sup>7</sup>

24 \_\_\_\_\_  
25 <sup>7</sup> The SAB’s comments on the 2020 Rule were finalized after the Agencies issued on  
26 January 23, 2020 a pre-publication version of the 2020 Rule. *SAB Commentary on the Proposed  
27 Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act* (Feb. 27,  
2020), available at:  
28 [https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/729C61F75763B8878525851F00632D1C/\\$File/EPA-SAB-20-002+.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/729C61F75763B8878525851F00632D1C/$File/EPA-SAB-20-002+.pdf). The final SAB comments found that the 2020 Rule “decreases  
protection for our Nation’s waters and does not provide a scientific basis in support of its

1           68. The Agencies’ response to these and similar comments in the 2020 Rule  
2 acknowledges the rule’s lack of scientific support. *See* 85 Fed. Reg. at 22,261 (“[T]he agencies  
3 used the Connectivity Report to inform certain aspects of the definition of ‘waters of the United  
4 States,’ but recognize that science cannot dictate where to draw the line between Federal and State  
5 waters, as this is a legal question that must be answered based on the overall framework and  
6 construct of the CWA.”).

7           69. The Agencies offer no new evidence in the 2020 Rule contradicting their previous  
8 findings. Rather, the rule rests on a limited, unsupported theory of physical connectivity that  
9 focuses solely on surface water connections for determining jurisdiction. And the rule completely  
10 ignores the chemical and biological connectivity of waters, in disregard of the CWA’s objective  
11 to restore and maintain the integrity of the Nation’s waters. Moreover, the Agencies’ avoidance  
12 of science in the 2020 Rule is predicated on their decision to ignore the significant nexus standard  
13 in framing the legal question they purport to answer.

14           70. Lack of Reasoned Explanation for Changing Long-Standing Policy and Practice.  
15 The rule is also arbitrary and capricious and otherwise unlawful because the Agencies have failed  
16 to provide a reasoned explanation and rational basis for changing their long-standing policy and  
17 practice—in the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule—of interpreting “waters of  
18 the United States” based on the significant nexus standard, and including within the scope of  
19 protected waterbodies all interstate waters in order to prevent unregulated discharges of pollutants  
20 into those waters in upstream states that then flow into downstream states and adversely affect  
21 water quality in those downstream states.

22           71. Further, the 2020 Rule is arbitrary and capricious because the Agencies have failed  
23 to take into account and consider the States’ and Cities’ reliance on the Agencies’ long-standing  
24 policy and practice set forth in the *Rapanos* Guidance, the 2015 Rule and the 2019 Rule. These  
25 rules and guidance interpreted “waters of the United States” in accordance with the significant  
26 nexus standard. Under the Agencies’ prior policy and practice, federal protections under the Act  
27 \_\_\_\_\_  
28 consistency with the objective of restoring and maintaining ‘the chemical, physical and biological  
integrity’ of these waters.” *Id.*, p. 2.



1 were afforded to a much broader scope of waters and the States and Cities relied on these federal  
2 regulatory programs to help protect the quality and integrity of their waters. The 2020 Rule  
3 deprives the States and Cities of the benefit of these longstanding federal protections under the  
4 Act. However, the Agencies have failed to evaluate or take into account the Cities' and States'  
5 reliance interests.

6 72. Typical Year Requirement. The 2020 Rule's definition of "typical year" for  
7 purposes of defining tributaries, lakes, ponds, and impoundments that are "waters of the United  
8 States" is arbitrary and capricious because it is unclear, unsupported, and unworkable. The  
9 Agencies have stated that the "typical year" requirement of the 2020 Rule is intended to measure  
10 the "characteristics of a waterbody at times that are not too wet and not too dry." 85 Fed. Reg. at  
11 22,315. The Agencies failed to provide a factual or scientific basis or analysis for imposing the  
12 "typical year" requirement to exclude from the Act's protections many waters that either flow  
13 infrequently or flood. Such waters have significant impacts on the quality of downstream  
14 navigable waters.

15 73. The Agencies did not assess the effects of the "typical year" requirement on the  
16 chemical, physical, or biological integrity of downstream navigable waters now or in the future,  
17 nor did they compare those effects to the protections long afforded by previous regulations. To  
18 the extent that a "typical year" depends on a rolling average of past data, the 2020 Rule does not  
19 take into account future changes due to climate change, including changes in precipitation,  
20 increased storm intensity, rising sea levels, and altered hydrologic patterns of streams and  
21 wetlands. To the extent that the "typical year" requirement relies on three 30-day periods of  
22 precipitation data preceding the observation date, it does not take into account intra-year  
23 variability in precipitation during the remaining nine months of the year.

24 74. The "typical year" requirement is also confusing and will be difficult to  
25 implement. While in the 2020 Rule preamble the Agencies provide a long list of tools, models,  
26 calculations, data, and factors<sup>8</sup> that could be used to define a "typical year," the Agencies

27 <sup>8</sup> The list includes precipitation data from the National Oceanic and Atmospheric  
28 Administration's Global Historic Climatology Network, from "three 30-day periods preceding the

1 prescribe no methodology for doing so.

## 2 THE 2020 RULE HARMS THE STATES AND CITIES

3 75. The 2020 Rule harms the sovereign, environmental, economic, and proprietary  
4 interests of the States and Cities.

5 76. The States' and Cities' jurisdictions cover vast areas across the country, including  
6 the shores of the Pacific Ocean, the Atlantic Ocean, the Great Lakes, the Chesapeake Bay and its  
7 tributaries, Lake Champlain, the Sierra Nevada, Cascades, Rocky, and Appalachian mountains, as  
8 well as large areas of the arid West. Innumerable waterbodies within the States' and Cities'  
9 jurisdictions are located downstream from or otherwise hydrologically connected with a vast  
10 network of waterbodies in other jurisdictions. Although the States and Cities have authority to  
11 control water pollution generated by sources within their borders, they also are significantly  
12 impacted by water pollution flowing from out-of-state sources which the States and Cities lack  
13 authority to regulate directly under state or local laws.

14 77. The States and Cities rely on the Act and its uniform nationwide floor of water  
15 pollution controls as the primary mechanisms for protecting them from the effects of out-of-state  
16 discharges of pollutants. Under the 2020 Rule the chemical, physical, and biological integrity of  
17 the States and Cities' waters will suffer because fewer out-of-state sources of pollution that  
18 impact the States and Cities' waters will be controlled by the Act.

19 78. The 2020 Rule undermines the integrity of the Nation's waters. The rule allows  
20 unpermitted pollutant discharges to large classes of waters that have long been protected by CWA  
21 implementing regulations. Under the 2020 Rule, these waters will no longer be protected from  
22 pollutant discharges by Section 402 discharge permits or Section 404 dredge and fill permits.

23 79. Under the 2020 Rule, Section 402 permits will not be required to protect  
24 ephemeral streams, waters deemed not to contribute flow to a jurisdictional water in a "typical  
25 year," and other waters that are no longer defined as "waters of the United States." In contrast,

26 \_\_\_\_\_  
27 observation date," to assess a "normal" range between the 30<sup>th</sup> and 70<sup>th</sup> percentiles; alternative  
28 methods, including different statistical percentiles, evaluation periods, or weighting approaches;  
and drought indices which take into account evapotranspiration and water storage, such as the  
Palmer Drought Severity Index, Web-based Water-Budget interactive Modeling Program, and the  
Climate Analysis for Wetlands Tables.

1 even the 2019 Rule required the Agencies to use the *Rapanos* Guidance, which either included  
2 those waters or provided for case-by-case significant nexus evaluations of them. Ephemeral  
3 waters and waters that do not meet the “typical year” requirement are significant for downstream  
4 waters—both ecologically and hydrologically—especially in arid and semi-arid watersheds  
5 because ephemeral or atypical flows recharge aquifers that store water for current and future  
6 drinking water supplies. When polluted, those waters can also negatively impact downstream  
7 traditionally navigable waters. The Agencies’ data demonstrate that from 2013 through 2018,  
8 most non-relatively permanent waters (primarily ephemeral streams) that were evaluated were  
9 found to have a significant nexus to downstream waters and thus determined to be jurisdictional  
10 under the Act. *See* Agencies’ “Resource and Programmatic Assessment” for the 2020 Rule  
11 (RPA), p. 22.<sup>9</sup>

12 80. Except for Michigan and New Jersey, which have assumed control over the  
13 Section 404 program within their borders, the State and Cities rely on the Army Corps to operate  
14 the Section 404 program that regulates the dredging and filling of waters within their borders. The  
15 Agencies have acknowledged that the 2020 Rule will protect fewer wetlands than the 2019 Rule  
16 and that fewer CWA Section 404 permits limiting dredging or filling in wetlands will be issued  
17 under the 2020 Rule. RPA, pp. 27, 84; *see* Agencies’ “Economic Analysis” for the 2020 Rule  
18 (EA), p. 93.<sup>10</sup> Under the Section 404 program, “[w]here no federal permit is required,  
19 compensatory mitigation under federal regulation will not be required for unavoidable impacts to  
20 non-jurisdictional waters.” RPA, p. 86.

21 81. Under the 2020 Rule, states will no longer be required to establish or maintain  
22 water quality standards under Section 303 for certain categories of waters, and consequently those  
23 waters and waters downstream of them will be subject to impairment. The Agencies acknowledge  
24 that the Rule “result(s) in reduced protection for aquatic ecosystems” because states “may not

25 \_\_\_\_\_  
26 <sup>9</sup> EPA and Department of the Army, *Resource and Programmatic Assessment for the*  
*Navigable Waters Protection Rule: Definition of “Waters of the United States”* (Jan. 23, 2020),  
EPA-HQ-OW-2018-0149.

27 <sup>10</sup> EPA and Department of the Army, *Economic Analysis for the Navigable Waters*  
*Protection Rule: Definition of “Waters of the United States”* (Jan. 22, 2020), EPA-HQ-OW-  
28 2018-0149.

1 assess non-jurisdictional waters and may identify fewer waters as impaired and therefore develop  
2 fewer TMDLs” to protect impaired waters under Section 303(c). RPA at 62.

3 82. Section 401 state water quality certifications, which typically contain conditions  
4 designed to mitigate the adverse impacts of such discharges on state water quality, will also not  
5 be required for federally permitted or licensed projects that discharge into waters that were  
6 protected under prior regulations but are no longer protected under the 2020 Rule. As a result, the  
7 States and the District of Columbia will be deprived of the Section 401 mechanism to ensure  
8 water quality is protected.

9 83. The 2020 Rule risks more damage from oil spills. As the Agencies acknowledge,  
10 Section 311 programs for prevention of and response to oil and hazardous substance discharges  
11 are administered by the Agencies and “cannot be assumed by states or tribes.” RPA at 64. Under  
12 the rule, states may not be reimbursed for costs they incur to clean up oil spills into waters that  
13 are no longer protected and facilities would no longer be required to engage in spill prevention  
14 and response planning for such waters under federal law. *See* RPA at 67, 70.

15 84. The States and Cities have relied on the Agencies’ long-standing interpretation and  
16 application of the “waters of the United States” definition based on the significant nexus standard  
17 and the Act’s text, structure and purpose, as set forth in the *Rapanos* Guidance and the 2015 Rule.  
18 By abandoning this long-standing position and policy, the 2020 Rule disrupts the States’ and  
19 Cities’ regulatory programs that rely on protective federal regulation under the Act. The  
20 immediate withdrawal of federal protections under the 2020 Rule forces the States and Cities  
21 either to incur the financial and administrative burdens associated with instituting or expanding  
22 their own water protection programs or to allow their waters to degrade. Filling the regulatory  
23 gap created by the 2020 Rule will require difficult and time-consuming processes involving state  
24 program creation and expansion, state legislative and regulatory changes, and state appropriation  
25 and expenditure of additional funds necessary to do so. The Agencies have failed to consider the  
26 States and Cities’ reliance interests in the 2020 Rule.

27 85. The 2020 Rule also puts the States and Cities at an unfair economic disadvantage  
28 vis-a-vis other states and cities that elect not to protect the waters that are no longer protected

1 under the 2020 Rule. To mitigate out-of-state pollution that occurs as a result of the 2020 Rule the  
2 States and Cities face having to impose disproportionately strict controls on pollution generated  
3 within their borders, thereby raising the costs of doing business in the States and Cities.

4 86. Increased pollution discharges under the 2020 Rule will also impair the States' and  
5 Cities' water recreation industries by making waters less desirable for fishing, boating, and  
6 swimming, and curtailing revenues associated with such activities.

7 87. The 2020 Rule impairs the States' and Cities' proprietary interests as well. Many  
8 States own or hold in trust the fish and other animals within their borders. The additional  
9 discharges of dredge and fill materials into wetlands and other waters caused by the 2020 Rule  
10 will destroy habitat provided by these waters, reducing wildlife populations. The States and Cities  
11 also own, operate, finance, or manage property within their borders, including lands, roads,  
12 bridges, universities, office buildings, drinking water systems, sewage and stormwater treatment  
13 or conveyance systems, and other infrastructure and improvements. By allowing the increased  
14 pollution of waters and the filling of wetlands—and the resulting loss of wetland functions such  
15 as pollution filtration and floodwater storage—the 2020 Rule threatens damage to the States and  
16 Cities' properties and increases the costs of operating and managing them.

17 88. The relief requested by the States and Cities, if granted, will redress the many  
18 injuries caused by the 2020 Rule.

19 **FIRST CAUSE OF ACTION**

20 **Violation of the Administrative Procedure Act, 5 U.S.C. § 706**  
21 **Arbitrary and Capricious and Not in Accordance with Law**  
22 **Impermissible Interpretation of “Waters of the United States”**

23 89. The States and Cities incorporate by reference in this claim the allegations in all  
24 preceding paragraphs of the complaint.

25 90. The APA provides that this Court “shall” “hold unlawful and set aside” agency  
26 action that is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with  
27 law.” 5 U.S.C. § 706(2)(A).  
28



1 100. In adopting the 2020 Rule, the Agencies also failed to provide reasoned  
2 explanation for abandoning their own long-standing policy and practice of interpreting “waters of  
3 the United States” in compliance with the significant nexus standard as set forth in the *Rapanos*  
4 Guidance, the 2015 Rule, and the 2019 Rule and of including all interstate waters within the  
5 scope of waters protected by the CWA.

6 101. The Agencies also failed to consider and take into account the serious reliance  
7 interests engendered by the Agencies’ prior long-standing policy and position regarding the scope  
8 of the “waters of the United States” definition.

9 102. For these reasons, the 2020 Rule is arbitrary, capricious, and not in accordance  
10 with law, and must be set aside.

11 **THIRD CAUSE OF ACTION**  
12 **Violation of the Administrative Procedure Act, 5 U.S.C. § 706**  
13 **Arbitrary and Capricious and Not in Accordance with Law**  
14 **Failure to Consider Statutory Objective and Impacts on Water Quality**

15 103. The States and Cities incorporate by reference in this claim the allegations in all  
16 preceding paragraphs of the complaint.

17 104. An agency action is not in accordance with law if the agency fails to consider the  
18 applicable statutory requirements.

19 105. An agency action is arbitrary and capricious if the agency fails to consider  
20 important issues or fails to articulate a reasoned explanation for the action.

21 106. When the Agencies promulgated the 2020 Rule, they were required to consider  
22 whether it met the Act’s objective of restoring and maintaining the chemical, physical and  
23 biological integrity of the Nation’s waters as set forth in 33 U.S.C. § 1251(a).

24 107. Protection of water quality is the critically important issue that must be considered  
25 by the Agencies in defining “waters of the United States” under the CWA.

26 108. When the Agencies promulgated the 2020 Rule, they did not consider that the  
27 rule’s significantly less protective definition of “waters of the United States” would impair water  
28 quality and fail to meet the Act’s objective of restoring and maintaining the integrity of the  
Nation’s waters.

1 109. The Agencies also failed to articulate a reasoned explanation for their failure to  
2 meet the Act’s objective.

3 110. The 2020 Rule conflicts with the Act’s objective to protect water quality, and the  
4 Agencies fail to articulate a reasoned explanation for not meeting the Act’s objective. As a result,  
5 the 2020 Rule is arbitrary and capricious and not in accordance with law.

6 **REQUEST FOR RELIEF**

7 WHEREFORE, the States and Cities respectfully request that this Court issue a judgment  
8 and order:

- 9 1. declaring that the 2020 Rule is arbitrary, capricious, and not in accordance with law;
- 10 2. declaring the 2020 Rule unlawful, setting it aside, and vacating it;
- 11 3. awarding the States and Cities their reasonable fees, costs, expenses, and  
12 disbursements, including attorneys’ fees, associated with this litigation under the  
13 Equal Access to Justice Act, 28 U.S.C. § 2412(d); and
- 14 4. awarding the States and Cities such additional and further relief as the Court may  
15 deem just, proper, and necessary.

16 Dated: May 1, 2020

Respectfully Submitted,

17 XAVIER BECERRA  
 18 Attorney General of California  
 SARAH E. MORRISON  
 19 ERIC KATZ  
 Supervising Deputy Attorneys General  
 CATHERINE M. WIEMAN  
 20 ROXANNE J. CARTER  
 JESSICA BARCLAY- STROBEL  
 21 BRYANT B. CANNON  
 Deputy Attorneys General

22 *Tatiana K. Gaur*

---

23 TATIANA K. GAUR  
 24 Deputy Attorney General  
 Attorneys for Plaintiff State of California,  
 25 by and through Attorney General Xavier  
 26 Becerra and California State Water  
 Resources Control Board



1 For the STATE OF NEW YORK  
2 LETITIA JAMES  
3 Attorney General of the State of New York  
4 Philip Bein  
5 Senior Counsel

6 /s/ Timothy Hoffman  
7 Timothy Hoffman\*  
8 Senior Counsel  
9 Office of the Attorney General  
10 Environmental Protection Bureau  
11 28 Liberty Street  
12 New York, NY 10005  
13 Telephone: (716) 853-8465  
14 Fax: (716) 853-8579  
15 Email: Timothy.Hoffman@ag.ny.gov

16 For the STATE OF ILLINOIS  
17 KWAME RAOUL  
18 Attorney General  
19 /s/ Jason E. James  
20 Jason E. James\*  
21 Assistant Attorney General  
22 Matthew J. Dunn  
23 Chief, Environmental Enforcement/Asbestos  
24 Litigation Division  
25 Office of the Attorney General  
26 Environmental Bureau  
27 69 West Washington, 18th Floor  
28 Chicago, IL 60602  
Telephone: (312) 814-0660  
Email: jjames@atg.state.il.us

For the STATE OF CONNECTICUT  
WILLIAM TONG  
Attorney General

/s/ Matthew I. Levine  
Matthew I. Levine  
David H. Wrinn\*  
Assistant Attorneys General  
Office of the Attorney General  
165 Capitol Avenue  
P.O. Box 120  
Hartford, CT 06141-0120  
Telephone: (860) 808-5250  
Email: Matthew.Levine@ct.gov  
Email: David.Wrinn@ct.gov

For the STATE OF MAINE  
AARON M. FREY  
Maine Attorney General

/s/ Jillian R. O'Brien  
Jillian R. O'Brien, Cal. SBN 251311  
Assistant Attorney General  
6 State House Station  
Augusta, Maine 04333-0006  
Telephone: (207) 626-8800  
Email: Jill.OBrien@maine.gov

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

For the STATE OF MARYLAND  
BRIAN E. FROSH  
Attorney General of Maryland

/s/ Joshua M. Segal  
Joshua M. Segal\*  
Special Assistant Attorney General  
Office of the Attorney General  
200 St. Paul Place  
Baltimore, MD 21202  
Telephone: (410) 576-6446  
Email: jsegal@oag.state.md.us

For the STATE OF MICHIGAN  
DANA NESSEL  
Attorney General of Michigan

/s/ Daniel P. Bock  
Daniel P. Bock\*  
Assistant Attorney General  
Michigan Department of Attorney General  
Environment, Natural Resources and  
Agriculture Division  
P.O. Box 30755  
Lansing, MI 48909  
Telephone: (517) 335-7664  
Email: bockd@michigan.gov

For the STATE OF NEW JERSEY  
GURBIR S. GREWAL  
Attorney General

/s/ Lisa Morelli  
Lisa Morelli, Cal. SBN 137092  
Deputy Attorney General  
Environmental Practice Group  
Division of Law  
R.J. Hughes Justice Complex  
25 Market Street, P.O. Box 093  
Trenton, New Jersey 08625  
Telephone: (609)376-2745  
Email: Lisa.Morrelli@law.njoag.gov

For the STATE OF NEW MEXICO  
HECTOR BALDERAS  
Attorney General of New Mexico

/s/ William Grantham  
William Grantham\*  
Assistant Attorney General  
201 Third Street NW, Suite 300  
Albuquerque, New Mexico 87102  
Telephone: (505) 717-3520  
Email: wgrantham@nmag.gov

1 For the STATE OF NORTH CAROLINA ex rel.  
2 Attorney General Joshua H. Stein and for the  
3 NORTH CAROLINA DEPARTMENT OF  
4 ENVIRONMENTAL QUALITY  
5 JOSHUA H. STEIN  
6 Attorney General  
7 Daniel S. Hirschman  
8 Senior Deputy Attorney General

9 /s/ Amy L. Bircher  
10 Amy L. Bircher\*  
11 Special Deputy Attorney General  
12 Marc Bernstein  
13 Special Deputy Attorney General  
14 North Carolina Department of Justice  
15 P.O. Box 629  
16 Raleigh, NC 27602  
17 Telephone: (919) 716-6400  
18 Email: abircher@ncdoj.gov

19 For the STATE OF RHODE ISLAND  
20 PETER F. NERONHA  
21 Attorney General

22 /s/ Alison B. Hoffman  
23 Alison B. Hoffman\*  
24 Special Assistant Attorney General  
25 Office of the Attorney General  
26 150 South Main Street  
27 Providence, RI 02903  
28 Telephone: (401) 274-4400  
Email: AHoffman@riag.ri.gov  
*pro hac vice application to be filed*

For the STATE OF OREGON  
ELLEN F. ROSENBLUM  
Attorney General of the State of Oregon

/s/ Paul Garrahan  
Paul Garrahan\*  
Attorney-in-Charge, Natural Resources  
Section  
Oregon Department of Justice  
1162 Court St. NE  
Salem, OR 97301-4096  
Telephone: (503) 947-4593  
Fax: (503) 378-3784  
Email: paul.garrahan@doj.state.or.us

For the STATE OF VERMONT  
THOMAS J. DONOVAN, JR.  
Attorney General of Vermont

/s/ Laura B. Murphy  
Laura B. Murphy\*  
Assistant Attorney General  
109 State Street  
Montpelier, VT 05609  
Telephone: (802) 828-3186  
Email: laura.murphy@vermont.gov  
*pro hac vice application to be filed*

1 For the STATE OF WASHINGTON  
2 ROBERT W. FERGUSON  
3 Attorney General

4 /s/ Ronald L. Lavigne

5 Ronald L. Lavigne\*  
6 Senior Counsel  
7 Office of the Attorney General  
8 2425 Bristol Court SW, 2nd Fl.  
9 Olympia, WA 98504  
10 Telephone: (305) 586-6751  
11 Email: ronald.lavigne@atg.wa.gov  
12 *pro hac vice application to be filed*

For the STATE OF WISCONSIN  
JOSHUA L. KAUL  
Wisconsin Attorney General

/s/ Gabe Johnson-Karp

Gabe Johnson-Karp\*  
Assistant Attorney General  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707  
Telephone: (608) 267-8904  
Email: johnsonkarp@doj.state.wi.us  
*pro hac vice application to be filed*

13 For the COMMONWEALTH OF  
14 MASSACHUSETTS  
15 MAURA HEALEY  
16 Attorney General

17 /s/ Seth Schofield

18 Seth Schofield\*  
19 Senior Appellate Counsel  
20 David S. Frankel  
21 Special Assistant Attorney General  
22 Energy and Environment Bureau  
23 Office of the Attorney General  
24 One Ashburton Place, 18th Flr.  
25 Boston, MA 02108  
26 Telephone: (617) 963-2436 / 2294  
27 Email: seth.schofield@mass.gov  
28 Email: david.frankel@mass.gov

For the COMMONWEALTH OF VIRGINIA  
MARK R. HERRING  
Attorney General  
Donald D. Anderson  
Deputy Attorney General  
Paul Kugelman, Jr.  
Senior Assistant Attorney General  
Chief, Environmental Section

/s/ David C. Grandis

David C. Grandis\*  
Senior Assistant Attorney General  
Office of the Attorney General  
202 North Ninth Street  
Richmond, VA 23219  
Telephone: (804) 225-2741  
Email: dgrandis@oag.state.va.us  
*pro hac vice application to be filed*

1 For the DISTRICT OF COLUMBIA  
2 KARL A. RACINE  
3 Attorney General

4 /s/ Brian Caldwell

5 Brian Caldwell\*  
6 Assistant Attorney General  
7 Social Justice Section  
8 Office of the Attorney General  
9 for the District of Columbia  
10 441 Fourth Street N.W., Ste # 600-S  
11 Washington, D.C. 20001  
12 Telephone: (202) 727-6211  
13 Telephone: (202) 445-1952 (m)  
14 Email: brian.caldwell@dc.gov  
15 *pro hac vice application to be filed*

For the CITY OF NEW YORK  
JAMES E. JOHNSON  
Corporation Counsel of the City of New York

/s/ Nathan Taylor

Nathan Taylor\*  
New York City Law Department  
100 Church Street, Rm 6-144  
New York, NY 10007  
Telephone: (646) 940-0736 (m)  
Telephone: (212) 356-2315  
Email: NTaylor@law.nyc.gov  
*pro hac vice application to be filed*

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
*\*Application for admission pro hac vice forthcoming*