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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,**  
 17 **STATE OF MICHIGAN, STATE OF NEW JERSEY,**  
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 20 **WISCONSIN, COMMONWEALTHS OF**  
**MASSACHUSETTS AND VIRGINIA, THE NORTH**  
 21 **CAROLINA DEPARTMENT OF ENVIRONMENTAL**  
**QUALITY, THE DISTRICT OF COLUMBIA, AND**  
 22 **THE CITY OF NEW YORK,**

23 Plaintiffs,

24 v.

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

Defendants.

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**Case No. 3:20-cv-03005-RS**

**PLAINTIFFS' NOTICE OF MOTION  
 AND MOTION FOR A PRELIMINARY  
 INJUNCTION OR STAY;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

Date: June 25, 2020  
 Time: 1:30 pm  
 Dept: San Francisco Courthouse,  
 Courtroom 3 – 17th Floor  
 Judge: Honorable Richard Seeborg  
 Action Filed: 5/1/2020

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**NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION OR STAY****TO ALL PARTIES AND COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that, on June 25, 2020, at 1:30 pm, or as soon as it may be heard, Plaintiffs, by and through their undersigned counsel, will, and hereby do, move for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and Civil Local Rules 7-2 and 65-2, or a stay pursuant to the Administrative Procedure Act, 5 U.S.C. § 705. This motion will be made before the Honorable Judge Richard Seeborg, San Francisco Courthouse, Courtroom 3 – 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102.

Plaintiffs hereby move for a preliminary injunction enjoining Defendants from implementing *The Navigable Waters Protection Rule: Definition of “Waters of the United States,”* 85 Fed. Reg. 22,250 (Apr. 21, 2020) (2020 Rule or Rule), which will become effective on June 22, 2020, or a stay of the Rule’s effective date. In support of this motion, Plaintiffs submit the accompanying Memorandum of Points and Authorities, the declarations in support of this motion, a Request for Judicial Notice, and a proposed order.

**INTRODUCTION**

Plaintiffs (the States and Cities) seek immediate relief enjoining Defendants (the Agencies) from implementing a regulation that adopts a new definition of “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA or the Act), or staying the regulation’s effective date. *See* 85 Fed. Reg. 22,250.<sup>1</sup> The 2020 Rule is scheduled to take effect on June 22, 2020, and will remove 4.8 million miles of streams and millions of acres of wetlands from the CWA’s protections nationwide, with western states to experience a disproportionately greater loss of protections.<sup>2</sup> Enjoining or staying the Rule is necessary to maintain the status quo and to prevent widespread harm to national water quality and disruption to the States’ and Cities’ water pollution control operations.

The CWA is comprehensive, landmark legislation whose overriding objective is “to

<sup>1</sup> Federal Register notices and other documents cited herein have been submitted to the Court as part of Plaintiffs’ Request for Judicial Notice, filed herewith. *See* Declaration of Bryant B. Cannon in Support of Plaintiffs’ Request for Judicial Notice in Support of Motion for Preliminary Injunction or Stay.

<sup>2</sup> Declaration of Dr. Mažeika Sulliván (Sulliván Decl.) ¶¶ 3, 21, 24, 34.

1 restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33  
2 U.S.C. § 1251(a). The Act establishes “broad federal authority to control pollution” in order to  
3 protect water quality, and “Congress chose to define the waters covered by the Act broadly.”  
4 *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121,133 (1985). But the 2020 Rule  
5 unlawfully eliminates whole categories of waters from federal protection, including many streams  
6 and wetlands that the Agencies previously found, applying the best science, to be vital for  
7 maintaining the water quality of downstream “navigable” waters.

8 The States and Cities are more than likely to succeed on the merits of their claims. The  
9 2020 Rule violates the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA), because it is  
10 arbitrary and capricious and not in accordance with law. The Agencies ignored their previous  
11 factual findings and the vast scientific record which established that protecting broad categories of  
12 waters—including wetlands and ephemeral streams—is essential for meeting the Act’s objective  
13 to protect water quality. The Agencies also adopted vague, unworkable requirements without a  
14 rational basis. The Rule’s interpretation of “waters of the United States” is also inconsistent with  
15 the text, structure, and purpose of the CWA.

16 Unless enjoined or stayed, the 2020 Rule will cause imminent, significant and irreparable  
17 harm to the States and Cities during the pendency of this litigation. The Rule immediately  
18 weakens water quality protections for numerous waters, including all ephemeral streams, and  
19 threatens to allow discharge of noxious pollutants into formerly protected waters without any  
20 regulatory limits. By reducing protections for many wetlands, the Rule also allows their  
21 uncontrolled filling, which will destroy the important functions wetlands perform in filtering out  
22 pollutants, storing flood waters, and providing habitat. The 2020 Rule’s sweeping changes to the  
23 regulatory landscape leave a huge regulatory gap that threatens a widespread disruption of the  
24 States’ and Cities’ water quality control programs and the degradation of their waters. Without a  
25 strong federal baseline of CWA pollution controls, harmful polluting activities can begin  
26 immediately. Such activities in jurisdictions upstream, which the States and Cities lack effective  
27 authority to control, will cause water pollution to flow downstream and harm the States and Cities.  
28 The States and Cities will be unable to fund or develop new water pollution control programs or

1 expand existing ones in advance of the Rule’s effective date or during the pendency of this action.

2 The Agencies’ stated rationale for the Rule—to establish a purportedly clearer “waters of  
3 the United States” definition that is consistent with states’ rights and the Constitution—is both  
4 legally incorrect and unsupported by the record. When weighing the Agencies’ interests against  
5 the significant environmental, programmatic, proprietary and public health harms from the 2020  
6 Rule, the balance of equities tips clearly in favor of the States’ and Cities’ interests.

7 For these reasons, the 2020 Rule should be promptly enjoined or stayed to prevent  
8 significant and irreparable harm to the States and Cities while this litigation proceeds.

## 9 STATUTORY AND REGULATORY BACKGROUND

### 10 I. THE ADMINISTRATIVE PROCEDURE ACT

11 The APA authorizes a court to “hold unlawful and set aside agency action, findings and  
12 conclusions” it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in  
13 accordance with law.” 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious where  
14 the agency: (1) has relied on factors which Congress has not intended it to consider; (2) failed to  
15 consider all important aspects of the problem; (3) offered an explanation for its decision that runs  
16 counter to the evidence before the agency; or (4) is so implausible that it could not be ascribed to a  
17 difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v.*  
18 *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*). Agencies may not ignore or  
19 countermand their earlier factual findings without a reasoned explanation, “even when reversing a  
20 policy after an election.” *Organized Village of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956,  
21 968 (9th Cir. 2015); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (*Fox*  
22 *TV*). Moreover, agencies issuing a rule that abandons prior policy or practice must take into  
23 account the “serious reliance interests” engendered by the Agencies’ prior position. *See Encino*  
24 *Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

### 25 II. THE CLEAN WATER ACT

26 The CWA’s “objective . . . is “to restore and maintain the chemical, physical and  
27 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve its objective the  
28 CWA prohibits the discharge of pollutants from a point source to “navigable waters” without a

1 permit or in violation of a permit. *Id.*, §§ 1311(a), 1342, 1344, 1362(12). “Navigable waters” are  
2 “the waters of the United States, including the territorial seas.” *Id.* § 1362(7).

3 The Act creates a uniform “national floor” of water quality protections by establishing  
4 minimum pollution controls for “waters of the United States.” *See* 33 U.S.C. § 1370 (requiring  
5 states to impose permit standards that are no less stringent than federal standards); *Arkansas v.*  
6 *Oklahoma*, 503 U.S. 91, 110 (1992) (the Act authorizes EPA “to create and manage a uniform  
7 system of interstate water pollution regulation”). The CWA establishes that national floor by  
8 requiring permits for two categories of discharges to “waters of the United States”: (1) the  
9 discharge of pollutants from “point sources” (*e.g.*, pipes and ditches); and (2) the discharge of  
10 dredged and fill materials. Permits for discharges from point sources are issued under Section 402  
11 by EPA or by authorized states. 33 U.S.C. § 1342(a), (b). Nearly all states operate the Section  
12 402 permit programs.<sup>3</sup> Permits for the discharge of dredged and fill materials under Section 404  
13 are issued by the Army Corps of Engineers or by authorized states. *Id.* § 1344(a), (h). Nearly all  
14 states rely on the Army Corps to operate the Section 404 program.<sup>4</sup>

15 The Act contains other protections for “waters of the United States.” Under Section 303,  
16 states are required to establish water quality standards for those waters within their borders and to  
17 impose additional pollution restrictions on waters that fail to meet those standards. 33 U.S.C. §  
18 1313. Under Section 401, federally permitted or licensed projects within a state that may result in  
19 a discharge into “waters of the United States” are required to obtain a “water quality certification”  
20 from the state, certifying the projects will comply with the Act and applicable state laws. *Id.*  
21 § 1341. Section 404 dredge and fill permits issued by the Army Corps are among the federal  
22 permits triggering Section 401 certification requirements.

23 Because many of the Nation’s waters cross state boundaries and downstream states are  
24 limited in their ability to control sources of pollution in upstream states, *see Int’l Paper Co. v.*  
25 *Ouellette*, 479 U.S. 481, 490-91 (1987) (*Ouellette*), nationwide controls provide important

26  
27 <sup>3</sup> <https://www.epa.gov/npdes/npdes-state-program-information>.

28 <sup>4</sup> <https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program>.

1 protections for downstream states. Those controls “prevent the ‘Tragedy of the Commons’ that  
2 might result if jurisdictions [could] compete for industry and development by providing more  
3 liberal limitations than their neighboring states.” *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir.  
4 1977) (citation omitted). Downstream states would be disadvantaged if they had to impose more  
5 stringent controls to address upstream pollution in order to safeguard public health and welfare.  
6 *See U.S. v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974) (*Ashland Oil*).

### 7 **III. DEFINITION OF “WATERS OF THE UNITED STATES” AND THE 2020 RULE**

8 The CWA does not define the “waters of the United States” and the Agencies have  
9 defined this term by regulation and guidance. “Waters of the United States” has also been  
10 interpreted by the Supreme Court in several opinions.

11 Prior to the 2020 Rule, the Agencies have promulgated three primary regulations that  
12 defined “waters of the United States”: (1) regulations issued in the 1980s (1980s definition); (2)  
13 the Clean Water Rule issued in 2015 (2015 Clean Water Rule); and (3) a regulation issued in 2019  
14 (2019 Rule). The 2019 Rule is substantially identical to the 1980s definition. The 2020 Rule  
15 repeals the 2019 Rule and replaces it with a significantly narrower definition of the “waters of the  
16 United States” that excludes waterbodies covered under the Agencies’ prior regulations and  
17 guidance.

#### 18 **A. The 1980s Definition**

19 The Agencies defined “waters of the United States” in regulations issued in 1977, 1980,  
20 1982, 1986, and 1988. 42 Fed. Reg. 37, 144 (July 19, 1977); 45 Fed. Reg. 85,336 (Dec. 24, 1980);  
21 47 Fed. Reg. 31,794 (July 22, 1982); 51 Fed. Reg. 41,206 (Nov. 13, 1986); 53 Fed. Reg. 20,764  
22 (June 6, 1988). The 1980s definition included: (1) waters used or susceptible of use in interstate  
23 and foreign commerce, commonly referred to as navigable-in-fact or “traditionally navigable”  
24 waters; (2) interstate waters; (3) the territorial seas; and (4) other waters having a nexus with  
25 interstate commerce.

#### 26 **B. Supreme Court Caselaw and the Agencies’ Guidance**

27 After the 1980s regulations were promulgated, the Supreme Court issued two decisions  
28 regarding the scope of “waters of the United States”: *Solid Waste Agency of Northern Cook*

1 *County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos v. United*  
2 *States*, 547 U.S. 715 (2006). In *SWANCC*, the Court held that the waters of the United States did  
3 not encompass isolated, intrastate, non-navigable waters based on their use as habitat for migratory  
4 birds. *Id.* In 2003, the Agencies issued guidance to implement the 1980s definition based on  
5 *SWANCC* (*SWANCC Guidance*).<sup>5</sup>

6 In *Rapanos*, the Court reversed a Sixth Circuit decision holding that the Army Corps had  
7 correctly interpreted “waters of the United States” to include wetlands connected to traditional  
8 navigable waters via drains. 547 U.S. at 757. The Court issued several opinions, none of which  
9 was joined by a majority of the Justices. The plurality opinion limited the “waters of the United  
10 States” to “only those relatively permanent, standing or continuously flowing bodies of water  
11 ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans,  
12 rivers, [and] lakes.’” *Id.* at 739. Justice Kennedy issued a concurring opinion rejecting the  
13 plurality’s “relatively permanent waters” test as “inconsistent with the Act’s text, structure, and  
14 purpose.” *Id.* at 776. Justice Kennedy concluded instead that “waters of the United States”  
15 include traditional navigable waters and other waters that have a “significant nexus” to navigable  
16 waters. *Id.* at 779. Justice Kennedy therefore concurred in the judgment so as to ensure the case  
17 would be “remanded to the Court of Appeals for proper consideration of the nexus requirement.”  
18 *Id.* at 759. Writing for four Justices in dissent, Justice Stevens concluded that the Army Corps’  
19 interpretation was permissible under the Act and agreed with Justice Kennedy’s opinion that the  
20 plurality’s “relatively permanent waters” standard was “‘without support in the language and  
21 purposes of the Act or in our cases interpreting it.’” *Id.* at 800 (quoting Kennedy concurrence).

22 In 2008, the Agencies issued guidance explaining how to implement the 1980s definition  
23 based on *Rapanos* (*Rapanos Guidance*). *Clean Water Act Jurisdiction Following the U.S.*  
24 *Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2,  
25 2008).<sup>6</sup> The *Rapanos* Guidance explained that the “significant nexus” standard for determining

26 \_\_\_\_\_  
27 <sup>5</sup> [https://www.epa.gov/sites/production/files/2016-04/documents/swancc\\_guidance\\_jan\\_03.pdf](https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf).

28 <sup>6</sup> [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 “waters of the United States” covered by the Act was the “controlling” standard. *Id.* at 3. The  
2 guidance then found that the following categories of waters constituted “waters of the United  
3 States”: (1) navigable waters and their adjacent wetlands; (2) non-navigable tributaries of  
4 navigable waters that are relatively permanent; and (3) wetlands that directly abut those non-  
5 navigable tributaries. *Id.* at 5-7. The guidance further provided that the Agencies would rely on a  
6 case-by-case significant nexus analysis to assess whether non-navigable, non-relatively permanent  
7 tributaries and their adjacent wetlands were subject to the Act. *Id.* at 8-11.

### 8 **C. The 2015 Clean Water Rule**

9 The 2015 Clean Water Rule replaced the 1980s definition of “waters of the United  
10 States.” *The Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37,054  
11 (June 29, 2015). The rule defined the waters protected by the Act based on “the text of the statute,  
12 Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’  
13 technical expertise and experience.” *Id.* at 37,055. Like the *Rapanos* Guidance, the 2015 Clean  
14 Water Rule relied on the “significant nexus” standard. *See id.* at 37,057.

15 In promulgating the 2015 Clean Water Rule, the Agencies relied on a comprehensive  
16 report prepared by EPA’s Office of Research and Development, entitled “Connectivity of Streams  
17 and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”  
18 (Connectivity Report), which took into account more than 1,200 peer-reviewed publications.<sup>7</sup> The  
19 Agencies also relied on the independent review of the Connectivity Report by EPA’s Science  
20 Advisory Board (SAB). 80 Fed. Reg. at 37,057. The Connectivity Report detailed the importance  
21 of upstream non-navigable waters and wetlands and provided comprehensive evidence about how  
22 they affect the integrity of downstream navigable waters.

### 23 **D. The 2019 Rule**

24 The Agencies replaced the 2015 Clean Water Rule with the 2019 Rule, which adopted a  
25 definition of “waters of the United States” identical to the 1980s definition. 84 Fed. Reg. 4154  
26 (Feb. 14, 2019). The Agencies stated that the 2019 Rule “[could] not be implemented as

27 <sup>7</sup> U.S. EPA, *Connectivity of Streams and Wetland to Downstream Waters: A Review and*  
28 *Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (Jan. 2015), available at  
<http://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

1 promulgated” because the definition it adopted (the 1980s definition) was issued before the  
 2 *SWANCC* and *Rapanos* decisions. 84 Fed. Reg. at 4198. Instead, the Agencies indicated that the  
 3 2019 Rule would be implemented in accordance with the *SWANCC* and *Rapanos* Guidances. *Id.*

#### 4 **E. The 2020 Rule**

5 The Agencies issued the 2020 Rule on April 21, 2020. 85 Fed. Reg. at 22,250. Unlike the  
 6 *Rapanos* Guidance, the 2015 Clean Water Rule, and the 2019 Rule, the 2020 Rule improperly  
 7 relies on the “relatively permanent waters” standard in the *Rapanos* plurality opinion instead of the  
 8 “significant nexus” standard in Justice Kennedy’s concurring opinion. The 2020 Rule  
 9 significantly narrows CWA jurisdiction, excluding many waters that had previously been found by  
 10 the Agencies to require the Act’s protection because they significantly affect the integrity of  
 11 downstream waters. The Rule categorically excludes ephemeral streams and eliminates  
 12 protections for many wetlands and tributaries regardless of their impact on the physical, chemical,  
 13 and biological health of downstream waters. *See* 85 Fed. Reg. at 22,338 (new 33 C.F.R. §  
 14 328.3(b)(3)) (eliminating ephemeral streams) and new §§ 328.3(a)(2), (c)(i) (covering only  
 15 wetlands adjacent to tributaries, defined not to include ephemeral streams)); *id.* (*compare* former  
 16 33 C.F.R. § 328.3 (c)(1) (broader definition of “adjacent” meaning “bordering, contiguous or  
 17 neighboring” another jurisdictional water) *with* new 33 C.F.R. § 328(c)(1) (defining adjacent  
 18 wetlands)). The Rule also eliminates interstate waters as a category of protected waters under the  
 19 Act. 85 Fed. Reg. at 22,283.

20 The effects of the 2020 Rule are staggering. Protections for millions of miles of headwater  
 21 streams and millions of acres of wetlands, vital for sustaining water quality across the country, will  
 22 be lost.<sup>8</sup> While western states will experience disproportionately greater loss in federal protections,  
 23 all states will be significantly impacted.<sup>9</sup> If the Rule takes effect, it will cause irreparable harm to  
 24 the States’ and Cities’ environmental, proprietary, sovereign and economic interests.

25  
 26  
 27  
 28 <sup>8</sup> Sullivan Decl. ¶ 3.

<sup>9</sup> Sullivan Decl. ¶ 3.

**ARGUMENT**

**I. STANDARD FOR PRELIMINARY INJUNCTION AND STAY**

“The purpose of a preliminary injunction is merely to preserve the relative position of the parties until a trial on the merits can be held.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). To obtain a preliminary injunction, a plaintiff must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities is in the plaintiff’s favor; and (4) the injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies the “serious questions” test to preliminary injunctions. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, “‘serious questions going to the merits’ and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135.

In the alternative, this Court can “postpone the effective date” of the 2020 Rule pending judicial review, a remedy expressly authorized by the APA. 5 U.S.C. § 705. The standard for a stay under Section 705 is the same as the standard for a preliminary injunction. *See Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016); *Bauer v. DeVos*, 325 F.Supp.3d 74, 104-05 (D.D.C. 2018). Here, the States and Cities satisfy the requirements for issuance of a preliminary injunction and stay under Section 705 of the APA.

**II. THE STATES AND CITIES ARE LIKELY TO SUCCEED ON THE MERITS**

**A. The 2020 Rule Is Arbitrary and Capricious**

Agencies are “free to change their existing policies” only if they “provide a reasoned explanation for the change.” *Encino Motorcars, LLC.*, 136 S. Ct. at 2125. Here the Agencies have failed to provide the requisite explanation for their drastic policy change, rendering the 2020 Rule arbitrary and capricious.

**1. The Rule Ignores and Countermands, Without Reasoned Explanation, the Agencies’ Previous Factual Findings and the Science Supporting Protections for Newly-Excluded Waters.**

Agency action is arbitrary and capricious when “the agency ignores or countermands its

1 earlier factual findings without reasoned explanation for doing so.” *Fox TV*, 556 U.S. at 537  
2 (Kennedy, J., concurring). “An agency cannot simply disregard contrary or inconvenient factual  
3 determinations that it made in the past, any more than it can ignore inconvenient facts when it  
4 writes on a blank slate.” *Id.* In the 2020 Rule, the Agencies have ignored and disregarded  
5 voluminous previous “inconvenient factual determinations” which establish that the waters  
6 excluded by the 2020 Rule have significant impacts on the quality of downstream navigable  
7 waters. The Agencies pay scant attention to EPA’s own Connectivity Report and offer no  
8 scientific evidence contradicting their previous findings. When they proposed the Rule, the  
9 Agencies acknowledged the SAB’s finding of “strong scientific support for the conclusion that  
10 ephemeral, intermittent, and perennial streams exert a strong influence on the character and  
11 functioning of downstream waters and that tributary streams are connected to downstream waters.”  
12 84 Fed. Reg. at 4175-76. But rather than rely on their own extensive prior record and findings—  
13 which are critical to any reasoned consideration of protected waters under the Act—the Agencies  
14 largely disregard them.

15 **a. Upstream Non-Navigable Waters Require Protection Because**  
16 **They Significantly Affect Downstream Navigable Waters.**

17 The Connectivity Report and SAB Review detail how the quality of downstream  
18 navigable waters is significantly affected by different kinds of tributary streams (including  
19 ephemeral streams), wetlands, and other waters. *See* 80 Fed. Reg. at 37,057. The Connectivity  
20 Report’s “purpose [was] to summarize current scientific understanding about the connectivity and  
21 mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical,  
22 and biological integrity of downstream waters.” Connectivity Report at ES-1. The Connectivity  
23 Report and SAB Review concluded that tributary streams—the great majority of which are  
24 headwater streams (smaller tributaries that carry water to the main channel of a river)—as well as  
25 wetlands and open waters in floodplains and riparian areas, are functionally connected to and  
26 strongly affect the chemical, physical, and biological integrity of downstream navigable waters,  
27 interstate waters, and the territorial seas. *Id.* at ES-2 to ES-3; *see* 80 Fed. Reg. at 37,057-58.  
28 Contrary to the Act’s objective to protect water quality, the 2020 Rule ignores those findings.

In 2015, the Agencies also determined that waters in a region “are ‘similarly situated’

1 where they function alike and are sufficiently close to function together in affecting downstream  
2 waters.” See U.S. EPA, *Technical Support Document for the Clean Water Rule: Definition of*  
3 *Waters of the United States* 164 (May 27, 2015) (2015 TSD). That determination was consistent  
4 with the scientific consensus that waters in particular landscapes are functionally connected and  
5 produce combined effects on downstream water quality. *Id.* at 164-171. The Agencies found that  
6 the “region” to best evaluate the significance of downstream water quality effects is “the  
7 watershed that drains to the nearest traditional navigable water, interstate water or territorial sea,”  
8 *Id.* at 175 (emphasis in original). That finding was consistent with decades of scientific literature,  
9 and with the Agencies’ longstanding approach for addressing water resources management issues.  
10 *Id.* at 174-177. But the 2020 Rule ignores the scientific consensus about watershed processes and  
11 disregards the Agencies’ prior findings that waterbodies function together in affecting downstream  
12 waters. *Id.* at 164-171; Connectivity Report at ES-5, ES-13.

13 In 2015, the Agencies further determined that a water’s impact on the quality of  
14 downstream navigable waters must be assessed by its effects on the chemical, physical or  
15 biological integrity of those waters: a water has a significant effect on downstream waters based  
16 on the “functions by which streams, wetlands, and open waters influence the timing, quantity, and  
17 quality of resources available to downstream waters.” Connectivity Report at ES-6; see 2015 TSD  
18 at 103. The Connectivity Report identified five categories of functions: as a “source” of water and  
19 food; a “sink” removing contaminants; a “refuge” protecting organisms; allowing “transformation”  
20 of nutrients and contaminants; and creating a delayed release of storm water and other materials.  
21 Connectivity Report ES-6. These specific functions significantly affect the chemical, physical or  
22 biological integrity of downstream waters and are firmly grounded in science and agency  
23 expertise. 2015 TSD at 177-89; 80 Fed. Reg. at 37,067-68. But in the 2020 Rule the Agencies  
24 disregard basic science regarding the connectivity of waters. See Sullivan Decl. ¶¶ 6-7, 11-22.

25 The Agencies also previously found that a bed and bank and an ordinary highwater mark,  
26 the well-recognized physical indicators of a tributary’s existence, “demonstrate volume, frequency  
27 and duration of flow,” and in the Agencies’ experience are accurate indicators of active water  
28 channels. 2015 TSD at 235-43. The Agencies found that “presence of physical channels” like bed

1 and bank structures “is a compelling line of evidence for surface water connections from  
2 tributaries.” Connectivity Report at ES-15. But in the 2020 Rule, the Agencies disregarded their  
3 prior findings about this obvious physical evidence and substituted an unworkable definition of  
4 tributaries that relies on difficult-to-measure flow requirements in a “typical year” that are  
5 inconsistent with established science regarding waters’ structural and functional connectivity.

6 **b. Both Ephemeral and Intermittent Streams Significantly Affect**  
7 **Downstream Water Quality and Require Protection.**

8 The 2020 Rule also disregards, without reasoned explanation or scientific support, the  
9 Agencies’ extensive previous factual findings that ephemeral streams and intermittent streams that  
10 flow less than seasonally are tributaries that, both individually and in the aggregate, significantly  
11 affect downstream water quality. Connectivity Report at ES-5 to ES-7. The Agencies ignore their  
12 prior finding that the “onset of flows in ephemeral and intermittent stream channels, particularly  
13 those following long dry periods and initiated by floods (i.e., first flushes), are important in  
14 transporting and transforming large amounts of unique materials for long distances downstream,  
15 which then can have significant [water quality] effects.” *Id.* at 3-23. The Agencies provide no  
16 reasoned explanation for how the 2020 Rule’s exclusion of these waters squares with their prior  
17 detailed findings that these waters significantly affect downstream rivers by minimizing  
18 downstream flooding or by contributing flow. 2015 TSD at 246-47.<sup>10</sup>

19 **c. Non-abutting Wetlands and Wetlands without Direct Surface**  
20 **Water Connection to Navigable Waters Significantly Affect**  
21 **Downstream Water Quality and Require Protection.**

22 The Agencies previously found that a wetland need not touch a downstream water, or  
23 have a direct surface water connection to it, for the wetland to significantly affect the chemical and  
24 biological integrity of that water. Connectivity Report at 4-2, 4-5, 6-6 to 6-7. Abundant evidence,  
25 previously recognized by the Agencies, but now ignored, establishes that such wetlands perform  
26 myriad functions that are important to the integrity of downstream waters. These include acting as  
27 sources of key nutrients and dissolved organic compounds, and providing spawning and rearing

28 <sup>10</sup> See also Connectivity Report at 1-10, 3-5, 3-7, 3-23, 3-28.

1 habitat for multiple species of fish and other aquatic organisms. *Id.* at 4-4. The 2020 Rule  
 2 eliminates protections for many if not most of the Nation’s wetlands, countermanding the  
 3 Agencies’ prior factual findings without reasoned explanation.

4 **d. The Agencies Misrepresent Their Prior Factual Findings**  
 5 **Supporting the Protections of Excluded Waters.**

6 In most instances, the Agencies simply ignore their previous scientific analyses. In the  
 7 few instances where the Agencies refer to their prior findings, they misrepresent them. For  
 8 example, the Agencies refer to a SAB “hypothetical illustration”<sup>11</sup> of how a gradient can represent  
 9 streams’ and wetlands’ connectivity with downstream waters. *See* 85 Fed. Reg. at 22,288. The  
 10 Agencies claim that this single SAB figure supports the Rule’s elimination of protections for  
 11 countless wetlands and ephemeral streams. *Id.* But the SAB Panel that reviewed the Connectivity  
 12 Report instead emphasized that “relatively low levels of connectivity can be meaningful in terms  
 13 of impacts on the chemical, physical, and biological integrity of downstream waters.”<sup>12</sup>  
 14 Moreover, in some instances it is the relative *lack* of physical connection between the wetlands  
 15 and downstream waters that makes those wetlands important for improved downstream water  
 16 quality. Connectivity Report at 4-26 to 4-27. As the Agencies previously found, non-floodplain  
 17 wetlands function to trap stormwater or agricultural runoff, store water, and capture materials and  
 18 nutrients, thereby preventing or reducing pollution to and flooding of downstream waters. *Id.* at 4-  
 19 29 to 4-30.

20 The Agencies also attempt to justify the Rule’s abandonment of protections for many  
 21 waters by referring to, *see* 85 Fed. Reg. at 22,314, the SAB statements that “[s]patial proximity is  
 22 one important determinant of the magnitude, frequency and duration of connections between  
 23 wetlands and streams” and “[a]s the distance between a wetland and a flowing water system  
 24 increases, these connections become less obvious.”<sup>13</sup> But the Agencies previously found that even

25 \_\_\_\_\_  
 26 <sup>11</sup> *See* U.S. EPA Science Advisory Board, *SAB Review of the Draft EPA Report*  
 27 *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the*  
 28 *Scientific Evidence, Letter to EPA Administrator Gina McCarthy* 54 (Oct. 17, 2014), EPA-HQ-  
 OW-2018-0149-0386 (SAB Review).

<sup>12</sup> SAB Review at 2.

<sup>13</sup> SAB Review at 55, 60.

1 relatively long distances between waters do not sever important functional connections that  
2 significantly affect downstream water quality. For example, the Agencies' prior findings establish  
3 that riparian and floodplain wetlands have strong functional connections to downstream waters  
4 even when they are geographically distant. Connectivity Report at 4-5. Similarly, the Agencies  
5 found that non-floodplain wetlands affect even distant downstream waters by storing waters and  
6 acting as sinks or transformers for various pollutants, and through groundwater flows that travel  
7 over long distances. *Id.* at 4-2, 6-6 to 6-7. Without reasoned explanation, the Agencies have  
8 abandoned their prior findings that these functional connections strongly affect the chemical,  
9 physical, and biological integrity of downstream navigable waters. *See* 80 Fed. Reg. at 37,057.

10 In summary, the Agencies disregard without reasoned explanation their previous science-  
11 based findings regarding the significance of many streams and wetlands to downstream water  
12 quality and offer no evidence that contradicts those findings. The Agencies' severe curtailment of  
13 the Act's protections without reasoned explanation renders the Rule arbitrary and capricious.

14 **2. The 2020 Rule Disregards the Clean Water Act's Primary Objective  
to Protect Water Quality.**

15 The 2020 Rule is arbitrary and capricious because it fails to address the evidence before the  
16 Agencies demonstrating that the 2020 Rule will conflict with the Act's primary objective by  
17 degrading water quality. A regulation is arbitrary and capricious "if the agency relied on factors  
18 which Congress has not intended it to consider [or] entirely failed to consider an important aspect  
19 of the problem." *State Farm*, 463 U.S. at 43. An agency fails to consider an important aspect of  
20 the problem when it fails to address evidence that runs counter to the agency's decision. *Genuine*  
21 *Parts Co. v. EPA*, 890 F.3d 304, 308 (D.C. Cir. 2018). Protection of water quality is more than  
22 "an important aspect of the problem;" indeed, it is the very *objective* of the Act and should have  
23 been central to the Agencies' decision-making. *See*, e.g., 33 U.S.C. § 1251(a) (objective to restore  
24 and maintain national water integrity); *id.* § 1251(a)(2) (goal to achieve "water quality which  
25 provided for the protection and propagation of fish, shellfish, and wildlife and provides for  
26 recreation in and on the water"). Courts have made clear that EPA cannot "ignore the directive  
27 given to it by Congress in the Clean Water Act, which is to protect water quality." *Nat'l Cotton*  
28



1 *Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009); *see also Mercy Catholic Med. Ctr v.*  
 2 *Thompson*, 380 F.3d 142, 158 (3d Cir. 2004) (A rule is arbitrary and capricious if it “frustrates the  
 3 regulatory goal” of the agency); *Office of Communic’n of the United Church of Christ v. FCC*, 779  
 4 F.2d 702, 707 (D.C. Cir. 1985) (“Rational decision making also dictates that the agency simply  
 5 cannot employ means that actually undercut its own purported goals.”).

6 The Agencies prepared a “Resource and Programmatic Assessment” (RPA)<sup>14</sup> for the 2020  
 7 Rule, describing the Rule’s “potential effects . . . on the regulation of aquatic resources across the  
 8 country.” In the RPA, the Agencies acknowledge that far fewer waters will meet the “waters of  
 9 the United States” definition, but state that they “have not relied on the information as an  
 10 independent basis” for the Rule. RPA at 6. Although the Agencies state they are “unable to  
 11 quantify the change” in waters protected, *see, e.g., id.* at 10, the RPA shows that for all categories  
 12 of waters, the Rule harms, rather than protects, water quality.

13 For example, the RPA acknowledges that the 2020 Rule eliminates federal protection for  
 14 many tributaries, including all ephemeral streams, as well as ephemeral lakes and ponds. *Id.* at 20-  
 15 24. Similarly, the RPA acknowledges that fewer wetlands will be protected. *Id.* at 26-28. Indeed,  
 16 the 2020 Rule will remove protections for millions of miles of streams and millions of acres of  
 17 wetlands.<sup>15</sup> Thus, the 2020 Rule clearly has a significant impact on water quality, even if the  
 18 Agencies have not precisely quantified the waters that the Rule excludes from the Act’s protection.

19 The RPA also acknowledges that the 2020 Rule negatively impacts the Act’s major  
 20 programs for protecting water quality. *Id.* at 59 (“many CWA programs—including water quality  
 21 standards, state and tribal [Section] 401 certification programs, discharge permits, and oil spill  
 22 prevention and planning programs—apply only to waters subject to CWA jurisdiction.”). Yet the  
 23 Agencies ignore the significant water quality degradation that would result from the Rule’s  
 24 impacts on the Section 402 point source permit program and the Section 404 dredge and fill permit  
 25 program, both of which regulate discharges of pollutants to “waters of the United States.”

26 \_\_\_\_\_  
 27 <sup>14</sup> U.S. EPA and Department of the Army, Corps of Engineers, *Resource and*  
 28 *Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of*  
*the United States”* (Jan. 23, 2020), EPA-HQ-OW-2018-0149.

<sup>15</sup> Sulliván Decl. ¶¶ 3, 5, 21, 24, 34.

1           The Section 402 program currently requires permits for approximately 655,200 facilities or  
2 activities discharging into waters across the country. RPA at 75. Because of the Rule, many  
3 waters now protected by Section 402 permits will no longer be considered “waters of the United  
4 States” and will be subject to increased, unregulated pollution. But the Agencies disregard the  
5 magnitude of these impacts, stating that “to estimate the potential effects of [the Rule] on the  
6 Section 402 program . . . was not appropriate at the national level.” *Id.* at 80. With respect to the  
7 Section 404 program, the Agencies state they are “uncertain” about the number of unpermitted  
8 dredge and fill activities that will occur because of the Rule, but acknowledge that “compensatory  
9 mitigation under federal regulation will not be required for unavoidable impacts to non-  
10 jurisdictional waters.” *Id.* at 84, 86. Ignoring these impacts on water quality, the Agencies simply  
11 state that protections “depend[] on state or tribal regulations . . . where such regulations exist.” *Id.*  
12 at 86.

13           Similarly, the Agencies acknowledge that the 2020 Rule will result in water quality  
14 degradation by undermining the Section 401 program that states use to certify that federally  
15 permitted projects will meet state water quality requirements. As the Agencies explain, “many  
16 states, territories and tribes rely on the CWA Section 401 certification program for ensuring that  
17 water quality standards are met” when, for example, Section 404 permits are issued by the Army  
18 Corps. *Id.* at 84. Under the Rule, the states will no longer be able to rely on Section 401 to protect  
19 excluded waters: “In instances of reduced CWA coverage, such as the final rule’s exclusion of  
20 federal streams, the applicability of Section 401 will likewise be reduced.” *Id.* at 75. Absent the  
21 Act’s protections, many wetlands will now be destroyed by dredge and fill operations without the  
22 back-stop for water quality protection provided by Section 401, directly undermining the Act’s  
23 objective to protect water quality.

24           The 2020 Rule also will increase risks of damage to the environment and public health from  
25 oil and hazardous substance spills into waters that were previously “waters of the United States.”  
26 Section 311 “prohibits discharges or substantial threats of discharges of oil or hazardous  
27 substances in harmful quantities” into jurisdictional waters. RPA at 63; *see* 33 U.S.C. § 1321(b).  
28 It also requires immediate reporting of such spills to the federal government and gives the federal

1 government authority to respond and enforce. *Id.* Section 311 further mandates “federal [oil] spill  
2 prevention and preparedness plans” and “facility response planning.” RPA at 70. By significantly  
3 narrowing “waters of the United States,” the Agencies exclude many waters from those protective  
4 measures even though they acknowledge that “[i]mplementation of CWA Section 311 programs  
5 cannot be assumed by states or tribes.” *Id.* at 64.

6 The Rule also will undermine the Act’s “Total Maximum Daily Loads” (TMDLs) program,  
7 which requires states to impose additional measures to achieve water quality standards for “waters  
8 of the United States.” *See* 33 U.S.C. § 1313. The Agencies acknowledge that the Rule may  
9 “result in reduced protection for aquatic ecosystems” because states “may not assess non-  
10 jurisdictional waters and may identify fewer waters as impaired and therefore develop fewer  
11 TMDLs.” RPA at 62. But rather than ensure the Rule complies with the Act’s water quality  
12 objective, the Agencies state they cannot “quantitatively estimat[e] the potential effects” on the  
13 TMDL program, and suggest that “some states may now be able to focus limited resources on . . .  
14 more priority waters,” *id.* at 61-62, as if removing the Act’s protections benefits states.

15 The Agencies also demonstrate indifference to the Rule’s harmful impacts on the water  
16 quality of drinking water supplies. The Agencies acknowledge that “[o]ver 65 percent of  
17 Americans who are served by public water systems rely on systems which primarily draw their  
18 water from rivers, streams, lakes and reservoirs,” that “[a]ctions that have the potential to change  
19 water quality have the potential to affect downstream public system operations,” and that there are  
20 “potential effects of the change in CWA jurisdiction on drinking water quality.” *Id.* at 96-97.  
21 However, the Agencies again determine they “cannot appropriately or accurately assess the  
22 potential effects of the Rule on public water systems.” *Id.* Instead, the Agencies simply state that  
23 those effects “depend on . . . the capabilities of individual drinking water utilities to respond . . .  
24 [and] whether there are state and tribal protections in place.” *Id.*

25 The Rule is arbitrary and capricious because it fails to adequately consider and implement  
26 the Act’s water quality objective and instead consistently undermines that objective.

1                   **3. The 2020 Rule’s “Typical Year” Requirement and Distinction**  
 2                   **Between Intermittent and Ephemeral Streams Are Vague and Lack**  
 3                   **Rational Basis.**

4                   In place of accepted science, the 2020 Rule imposes vague, unworkable requirements that  
 5                   lack rational bases. The Rule requires that for non-traditionally navigable waters to receive the  
 6                   Act’s protections, they must “contribute surface water flow” to another jurisdictional water in a  
 7                   “typical year.” The “typical year” requirement—the linchpin concept behind the Rule’s reduced  
 8                   protections for tributaries, adjacent wetlands, and lakes and ponds—eliminates wetlands and  
 9                   waters that have a tendency to flood during extreme precipitation events. The Rule will  
 10                  conversely cause greater flooding problems downstream as those wetlands are being filled without  
 11                  the protections of the Act’s section 404 permit program.<sup>16</sup>

12                  The Rule’s definition of “typical year” as a year “when precipitation and other climatic  
 13                  variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area  
 14                  of the applicable aquatic resource based on a rolling thirty-year period,” *see* 85 Fed. Reg. at  
 15                  22,274, is also largely incomprehensible.<sup>17</sup> The Agencies suggest numerous alternative  
 16                  methodologies for calculating the “normal periodic range” of precipitation, and for identifying the  
 17                  appropriate “geographic area” for the “applicable aquatic resource,” but settle on none, *see id.* at  
 18                  22,274-75, leaving the concept of a “typical year” wholly uncertain.<sup>18</sup> For example, the 2020 Rule  
 19                  leaves uncertain whether the “geographic area” is a small headwater watershed or the watershed of  
 20                  a major interstate river system.<sup>19</sup> The Rule’s preamble states that the “typical year” requirement is  
 21                  intended to encompass “times when it is not too wet and not too dry,” *see id.* at 22,274, but the  
 22                  Agencies provide no reasons for this limiting principle, which explicitly excludes many flood  
 23                  events, thereby leaving wetlands unprotected and exacerbating downstream flooding.

24                  The 2020 Rule’s backward-looking approach for identifying a “typical year” also ignores  
 25                  the effects of climate change.<sup>20</sup> As the National Climate Assessment observes, what has been

26                  <sup>16</sup> Declaration of William Nechamen (Nechamen Decl.) ¶¶ 23-24.

27                  <sup>17</sup> Declaration of Roy A. Jacobson Jr. (Jacobson Decl.) ¶¶ 17-18; Declaration of Patricia  
 Riexinger (Riexinger Decl.) ¶¶ 28, 30.

28                  <sup>18</sup> Nechamen Decl., ¶¶ 25, 30.

<sup>19</sup> *Id.* ¶ 26.

<sup>20</sup> *Id.* ¶¶ 27-30; Riexinger Decl. ¶ 29.

1 typical in the past will not reflect what the future holds:

2 Significant changes in water quantity and quality are evident across the country.  
 3 These changes, which are expected to persist, present an ongoing risk to coupled  
 4 human and natural systems and related ecosystem services. Variable precipitation and  
 5 rising temperature are intensifying droughts, increasing heavy downpours, and  
 6 reducing snowpack. Reduced snow-to-rain ratios are leading to significant differences  
 7 between the timing of water supply and demand. Groundwater depletion is  
 8 exacerbating drought risk. Surface water quality is declining as water temperature  
 9 increases and more frequent high-intensity rainfall events mobilize pollutants such as  
 10 sediments and nutrients.<sup>21</sup>

11 Because of these changes, the Agencies' concept of a "typical year" is both uncertain  
 12 and lacks relevance to current and future conditions in the real world. The 2020 Rule's  
 13 pervasive reliance on this factor renders the Rule's entire framework irrational.

14 Equally unworkable and irrational, the Rule eliminates all ephemeral streams and some  
 15 intermittent streams from CWA protections but sets forth no objective or reproducible  
 16 methodology for determining whether a stream is ephemeral or intermittent.<sup>22</sup> In the Rule's  
 17 preamble, the Agencies list many alternative tools and technical methods for doing so without  
 18 explaining how and whether any of them should be used. *See* 85 Fed. Reg. at 22,292-94.

19 The 2020 Rule's typical year requirement and failure to distinguish between intermittent  
 20 and ephemeral streams are vague, unworkable and lack rational basis.

21 **4. The Agencies Have Failed to Consider the Significant Reliance  
 22 Interests Engendered by Their Long-Standing Implementation of the  
 23 Significant Nexus Standard.**

24 An agency that changes its long-standing position is required to consider significant  
 25 reliance interests that have been engendered by that position. *See California v. Azar*, 950 F.3d  
 26 1067, 1113 (9th Cir. 2020) (citing *Encino Motorcars, LLC.*, 136 S. Ct. at 2126). Specifically, the  
 27 agency must acknowledge the serious reliance interests of those impacted by the change, evaluate  
 28 these interests, and "explain why it felt appropriate" to change its position. *See S.A. v. Trump*, 363  
 F.Supp.3d 1048 (N.D Cal. 2018). An agency that fails to even mention the fact that its prior  
 policy had engendered reliance has acted arbitrarily and capriciously. *See Nat'l Ass'n. for the*

<sup>21</sup> U.S. Global Change Research Program, Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States, Chapter 3: Water 152 (2018), available at <https://nca2018.globalchange.gov/chapter/3/>

<sup>22</sup> Jacobson Decl. ¶¶ 19-23; Declaration of Daniel Zarrilli (Zarrilli Decl.) ¶¶ 21-22; Declaration of Lee Currey (Currey Decl.) ¶ 11.

1 *Advancement of Colored People v. Trump*, 298 F.Supp.3d 209, 240 (D.D.C. Apr. 24, 2018).

2 Since *Rapanos*, the Agencies have used the significant nexus standard—in the *Rapanos*  
3 Guidance, the 2015 Clean Water Rule, and the 2019 Rule—to make jurisdictional determinations  
4 under the Act,<sup>23</sup> and the States and Cities have structured their water quality control programs  
5 based on it.<sup>24</sup> The 2020 Rule abandons the significant nexus standard without addressing the  
6 States’ and Cities’ reliance on it. For this reason as well the Rule is arbitrary and capricious.

7 **B. The 2020 Rule Is Unlawful Because Its Interpretation of “Waters of the**  
8 **United States” Is Contrary to the CWA.**

9 The Court should evaluate the 2020 Rule’s interpretation of “waters of the United States”  
10 under the two-step framework established by *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).  
11 If Congress’s intent is clear, “that intent must be given effect as law.” *The Wilderness Society v.*  
12 *U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1059 (9th Cir. 2003). If not, a court moves to  
13 *Chevron*’s second step to determine “‘whether the agency’s answer is based on a permissible  
14 construction of the statute.’” *Id.* (quoting *Chevron*, 467 U.S. at 843). “[A]n agency’s  
15 interpretation of the statute will be permissible unless ‘arbitrary, capricious, or manifestly contrary  
16 to the statute.’” *Id.* (quoting *Chevron*, 467 U.S. at 844).

17 <sup>23</sup> The *Rapanos* Guidance included as jurisdictional waters: navigable waters and their  
18 adjacent wetlands, non-navigable tributaries of navigable waters, and wetlands abutting those  
19 non-navigable tributaries. *Rapanos* Guidance at 1. Adjacent wetlands were defined to include  
20 wetlands with a surface or shallow sub-surface connection to jurisdictional waters, wetlands  
21 separated from jurisdictional waters by man-made or natural barriers, such as dikes, natural berms  
22 and dunes, and wetlands reasonably close in proximity to jurisdictional waters. *Id.* at 5. The  
23 *Rapanos* Guidance also provided protection for non-navigable, non-relatively permanent  
24 tributaries and their adjacent wetlands, on a case-by-case basis based on a significant nexus  
25 analysis, which assessed various hydrologic and ecological factors, including “the flow  
26 characteristics and function of the tributary itself and the functions performed by all wetlands  
27 adjacent to the tributary to determine if they significantly affect the chemical, physical and  
28 biological integrity of downstream traditional navigable waters.” *Id.* at 1. The water functions  
considered in that analysis include a water’s capacity to carry pollutants to downstream waters or  
reduce the pollutants to downstream waters, transfer nutrients to downstream foodwebs, hold  
flood waters, provide aquatic habitat, and trap sediments and other pollutants. *See id.* at 8-11.

<sup>24</sup> Jacobson Decl. ¶¶ 14, 25, 34 ; Zarrilli Decl. ¶ 20 ; Currey Decl. ¶ 7; Declaration of  
Steve Mrazik (Mrazik Decl.) ¶ 5; Declaration of Danny Smith (Smith Decl.) ¶ 16; Declaration of  
Jeffrey Seltzer (Seltzer Decl.) ¶ 19; Declaration of Jonathan Bishop (Bishop Decl.) ¶ 31;  
Declaration of Teresa Seidel (Seidel Decl.) ¶ 4; Declaration of Rebecca Roose (Roose Decl.) at ¶  
11; Nechamen Decl ¶ 31.

1           The 2020 Rule fails because it relies on an impermissible and unreasonable interpretation  
2 of the term “waters of the United States,” as informed by the Act’s structure and water quality  
3 protection objective. Indeed, Agencies’ interpretation of that term based on the “relatively  
4 permanent waters” test was rejected by a majority of the justices in *Rapanos* as being inconsistent  
5 with the Act’s text, structure, and purpose. *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring),  
6 800 (Stevens, J., dissenting). The Agencies justify their construction on the ground that it strikes a  
7 balance between water protection and state sovereignty, as intended by Congress, but Congress’  
8 intention was not to limit the Act’s scope, but instead to create a federal-state partnership. The  
9 Agencies also justify their reinterpretation of “waters of the United States” on the ground that their  
10 prior interpretations raised constitutional concerns, but Justice Kennedy’s concurring opinion in  
11 *Rapanos* made it clear that those interpretations were not constitutionally flawed. Finally, the  
12 Agencies’ exclusion of interstate waters from “waters of the United States” contravenes the Act’s  
13 text and purpose and is therefore an unreasonable interpretation that renders the Rule arbitrary and  
14 capricious.

15           **1. The Interpretation of “Waters of the United States” in the 2020 Rule  
16 Is Inconsistent with the Act’s Text, Structure, and Purpose.**

17           The 2020 Rule fails under *Chevron* because it adopts an interpretation of “waters of the  
18 United States” that is inconsistent with the Act’s text, structure and purpose. Indeed, the Agencies’  
19 interpretation was rejected by the majority of the Justices of the Supreme Court in *Rapanos*  
20 precisely because it was contrary to the CWA’s text, objective and structure.

21           The Court’s plurality opinion in *Rapanos* limited the “waters of the United States” to  
22 “only those relatively permanent, standing or continuously flowing bodies of water ‘forming  
23 geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and]  
24 lakes.’” 547 U.S. at 739. The plurality excluded non-relatively permanent tributaries, such as  
25 ephemeral streams, from its definition because their inclusion would purportedly intrude on state  
26 authority over land use without a “clear and manifest” statement from Congress and would stretch  
27 “the outer limits of Congress’s commerce power.” *Id.* at 738.

28           Justice Kennedy’s concurring opinion rejected the plurality’s “relatively permanent  
waters” test as “inconsistent with the Act’s text, structure, and purpose” and held instead that

1 “waters of the United States” include both traditional “navigable” waters and non-navigable waters  
2 with a “significant nexus” to navigable waters. *Id.* at 776, 779. Justice Kennedy observed that  
3 “[t]he plurality’s first requirement—permanent standing water or continuous flow, at least for a  
4 period of ‘some months,’—makes little practical sense in a statute concerned with downstream  
5 water quality.” *Id.* at 769 (internal citations omitted). “Congress could draw a line to exclude  
6 irregular waterways,” such as ephemeral streams flowing as a result of storms that are typical of  
7 the western United States, “but nothing in the statute suggests that it has done so.” *Id.* at 769-770.

8 Justice Kennedy also disagreed with the plurality’s second limitation requiring  
9 “continuous surface connection to other jurisdictional waters.” *Id.* at 772. Whether there is a  
10 significant nexus turns on the “critical functions” performed by waters “related to the integrity of  
11 other waters--functions such as pollutant trapping, flood control, and runoff storage.” *Id.* at 779.  
12 (citation omitted). Wetlands possess that significant nexus when “either alone or in combination  
13 with similarly situated lands in the region, [they] significantly affect the chemical, physical, and  
14 biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780.  
15 Moreover, wetlands that are adjacent to a navigable water need not have a direct hydrologic  
16 surface water connection to that water because “the absence of hydrologic connection (in the sense  
17 of interchange of waters)” can “show[] the wetlands’ significance for the aquatic system” and  
18 thereby satisfy the “significant nexus” standard. *Id.* at 786.

19 In a four-Justice dissent, Justice Stevens agreed with the concurring opinion that the  
20 plurality’s “relatively permanent waters” standard was “‘without support in the language and  
21 purposes of the Act or in our cases interpreting it.’” *Id.* at 800 (quoting Kennedy concurrence).  
22 Thus, a majority of the Justices of the Supreme Court have found that the plurality’s standard is an  
23 unlawful interpretation of the Act.

24 Prior to the 2020 Rule, the Agencies consistently recognized that the significant nexus  
25 standard in Justice Kennedy’s concurring opinion was the controlling legal standard for identifying  
26 “waters of the United States.” The Agencies adopted the significant nexus standard in the 2008  
27 *Rapanos* guidance, the 2015 Clean Water Rule, and the 2019 Rule. The 2020 Rule nonetheless  
28 adopts the *Rapanos* plurality test that was rejected by a majority of the Justices:



1 In this final rule the agencies interpret the term “the waters” in the phrase  
2 “the waters of the United States” to encompass relatively permanent  
3 flowing and standing waterbodies that are traditional navigable waters in  
4 their own right or that have a specific surface water connection to  
5 traditional navigable waters, as well as wetlands that abut or are otherwise  
6 inseparably bound up with such relatively permanent waters. As the  
7 plurality decision in *Rapanos* notes, the term “the waters” is most  
8 commonly understood to refer to “streams and bodies forming  
9 geographical features such as oceans, rivers, lakes,” or “the flowing or  
10 moving masses, as of waves or floods, making up such streams or bodies.”  
11 547 U.S. at 732.

12 85 Fed. Reg. at 22,273.

13 Thus the 2020 Rule excludes ephemeral streams because “[a]ccording to the *Rapanos*  
14 plurality . . . the ordinary meaning of the term ‘waters’ does not include areas that are dry most of  
15 the year, and which may occasionally contain ‘transitory puddles or ephemeral flows of water.’  
16 547 U.S. at 733.” 85 Fed. Reg. at 22,273. The Agencies reasoned that ephemeral streams should  
17 be excluded because “the requirement that a tributary be perennial or intermittent and be  
18 connected to a traditional navigable water is reasonable and reflects the [*Rapanos*] plurality’s  
19 description of a ‘wate[r] of the United States’ as ‘i.e., a relatively permanent body of water  
20 connected to traditional interstate navigable waters.’” *Id.* at 22,289 (internal citations omitted).

21 The Agencies similarly relied on the *Rapanos* plurality to define protected wetlands as  
22 those that are “inseparably bound up with” (i.e., according to the Agencies, physically connected  
23 to) other jurisdictional waters, such as wetlands directly abutting or inundated by flooding from  
24 such waters. *See id.* at 22,273, 22,309 (“Wetlands that abut another jurisdictional water have a  
25 continuous surface or physical connection to those waters and are therefore inseparably bound up  
26 with them. *See, e.g., [Rapanos, 547 U.S.]* at 740 (Scalia, J., plurality).”) The exclusion of  
27 wetlands that lack direct hydrologic connection with a jurisdictional water and wetlands with a  
28 shallow sub-surface connection to jurisdictional waters was also based on the *Rapanos* plurality.  
*Id.* at 22,266 (quoting *Rapanos* plurality opinion that such “physically unconnected” wetlands “do  
not have the ‘necessary connection’ to jurisdictional waters that triggers CWA jurisdiction”),  
22,278-79 (citing *Rapanos* plurality opinion for the proposition that the Act does not protect  
waters with only “groundwater connections” to other jurisdictional waters).

1 Because the 2020 Rule is based on an interpretation of “waters of the United States” is  
2 “inconsistent with the Act’s text, structure, and purpose” and is “without support in the language  
3 and purposes of the Act or in our cases interpreting it,” the Rule is arbitrary and capricious and not  
4 accordance with law. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring), 800 (Stevens, J.,  
5 dissenting).

6 **2. The Agencies’ Rationale for Narrowing “Waters of the United**  
7 **States” Based on Section 101(b) and the Act’s Funding and Grants**  
8 **Provisions Is Not Supported by the Act’s Text, Structure or Purpose.**

9 The Agencies justify their new and significantly narrower interpretation of “waters of the  
10 United States” by asserting that it “strikes a reasonable and appropriate balance between Federal  
11 and State waters and carries out Congress’ overall objective to restore and maintain the integrity of  
12 the nation’s waters in a manner that preserves the traditional sovereignty of States over their own  
13 land and water resources.” 85 Fed. Reg. at 22,252. The Agencies base that rationale on Section  
14 101(b) of the Act, which provides that “[i]t is the policy of Congress to recognize, preserve, and  
15 protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution  
16 [and] to plan the development and use (including restoration, preservation and enhancement) of  
17 land and water resources.” 33 U.S.C. § 1251(b). There is nothing in the Act to suggest that, as the  
18 Agencies assert, Congress intended to balance water quality with state sovereignty by limiting the  
19 scope of “waters of the United States.” Instead, the language, structure, and legislative history of  
20 the Act make it clear that Congress intended to give states a primary role in protecting the quality  
21 of the “waters of the United States” in their states.

22 That role is reflected in Section 402 of the Act, which allows states, upon approval by  
23 EPA, to issue permits for discharges from point sources that are more stringent than federal  
24 requirements. *Id.* § 1342(b). It is also reflected in other provisions of the Act, including Section  
25 404, which allows states to assume administration of the dredge and fill permit program; Section  
26 303, which authorizes states to establish water quality standards for in-state waters and establish  
27 total maximum daily loads for waters that do not meet water quality standards; and Section 401,  
28 which requires applicants for a federal permit or license to obtain a state certification that any  
activity that may result in a discharges to “waters of the United States” will comply with the Act

1 and applicable state laws. *Id.* §§ 1341, 1344(h), 1313. The Act’s legislative history also shows  
2 that the primary purpose of Section 101(b) is to provide for state operation of the Section 402  
3 permit program. *A Legislative History of the Water Pollution Control Act Amendments of 1972*,  
4 Committee Print Compiled for the Senate Committee on Public Works by the Library of Congress,  
5 Ser. No. 93–1, p. 403 (1973) (describing the “responsibility of states to prevent and abate pollution  
6 by assigning them a large role in the national discharge permit system established by the Act”).

7 In addition, the Supreme Court has observed that the rights and responsibilities of states to  
8 which Section 101(b) refers are the specific grants of authority to states under the Act. In *EPA v.*  
9 *California ex. rel. State Water Resources Control Bd.*, the Court observed that “[c]onsonant with  
10 its policy ‘to recognize, preserve, and protect the primary responsibilities and rights of States to  
11 prevent, reduce, and eliminate pollution,’ Congress also provided that a State may issue [Section  
12 402] permits ‘for discharges into navigable waters within its jurisdiction,’ but only upon EPA  
13 approval of the State’s proposal to administer its own program.” 426 U.S. 200, 207 (1976)  
14 (quoting 33 U.S.C. §§ 1251(b) and 1342(b)) (footnote omitted). In *Ouellette*, the Court observed  
15 that Section 101(b) gives states “a significant role in protecting their own natural resources” and  
16 gave as examples the authority given to states to issue Section 402 permits to “require discharge  
17 limitations more stringent than those required by the Federal Government,” and to issue Section  
18 401 water quality certifications for federally licensed projects in their states. 479 U.S. 481, 489-  
19 490 (1987) (citing 33 U.S.C. §§ 1251(b), 1341(a)(1), 1370, 1342(b)). “The CWA therefore  
20 establishes a regulatory ‘partnership’ between the Federal Government and the source State.” 479  
21 U.S. at 490; *see also City of Arcadia v. U.S. EPA*, 411 F.3d. 1103, 1106 (9th Cir. 2005) (citing  
22 Section 101(b) for “the basic goals and policies that underlie the Clean Water Act – namely, that  
23 states remain at the front line in combating pollution.”).

24 In misconstruing Section 101(b), the Agencies employ a distorted federalism that  
25 contradicts the CWA. When Congress passed the Act, it repudiated the prior approach to water  
26 pollution control that relied on state action without the backing of a comprehensive and protective  
27 federal baseline. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981) (“the Federal water  
28 pollution program . . . has been inadequate in every vital aspect”) (quoting legislative history).

1 Nothing in the CWA suggests that its water quality protections should be restricted by a narrow  
2 definition of the “waters of the United States.” The 2020 Rule’s federalism rationale amounts to  
3 an abdication of federal responsibility and directly undermines the important national floor of  
4 water quality protections that Congress set out to establish with the CWA.

5 Indeed, the 2020 Rule disserves federalism because it punishes states that adopt strong  
6 clean water safeguards by allowing states with weaker laws to increase pollution and thereby harm  
7 downstream states. *See Rapanos*, 547 U.S. at 777 (citing Section 101(b) and noting that “the Act  
8 protects downstream States from out-of-state pollution that they themselves cannot regulate”). By  
9 eviscerating the federal baseline of water pollution controls, the Rule also encourages industry to  
10 relocate to states with weaker protections where the costs of doing business are lower, thus  
11 incentivizing states to weaken their standards to compete for business. This is precisely the race to  
12 the bottom that Congress enacted the CWA to prevent.

13 Nor can the Agencies justify narrowing the “waters of the United States” definition by  
14 invoking Section 101(b)’s acknowledgement of the “primary responsibilities and rights of States”  
15 to “plan the development and use (including restoration, preservation and enhancement) of land  
16 and water resources.” *See* 85 Fed. Reg. at 22,262. While development impacting a waterbody  
17 deemed to be a “water of the United States” may be subject to CWA permitting, that fact does not  
18 take primary *planning* responsibility away from state or local authorities; it merely establishes that  
19 a CWA permit among other local, state, or federal permits may be needed for the activity.

20 Equally without merit is the Agencies’ contention that “waters of the United States” must  
21 be defined narrowly because the Act’s “non-regulatory programs,” such as research and funding  
22 programs to assist states in water quality protection, apply to “the Nation’s waters” broadly. *See*  
23 85 Fed. Reg. at 22,253, 22,269. Controlling pollution under the Act’s regulatory programs and  
24 assisting states through research and grant programs are complementary, not mutually exclusive,  
25 ways to achieve Act’s objective. *See Shanty Town Assocs. Ltd. P’ship v. EPA*, 843 F.2d 782, 791-  
26 92 (4th Cir. 1988) (describing Congress’ intent that EPA use “the threat [of withholding grant  
27 funds] and promise of federal financial assistance . . . to influence the states to adopt nonpoint  
28 source pollution control programs that will accomplish the Act’s water quality goals”) (internal

1 citations omitted). Since the “United States” and the “Nation” are virtually synonymous, the  
2 contention that “waters of the United States” are different from “the Nation’s waters” is baseless.

### 3           **3. The Agencies’ Constitutional Concerns Are Without Basis.**

4           There also is no merit to the Agencies’ contention that their reinterpretation of “waters of  
5 the United States” in the 2020 Rule is necessary to “avoid regulatory interpretations of the [Act]  
6 that raise constitutional questions.” 85 Fed. Reg at 22,269. These newfound concerns lack  
7 credibility because the 2019 Rule expressly relied on the *Rapanos* Guidance and the significant  
8 nexus standard, demonstrating the Agencies had no constitutional concerns with that very same  
9 standard just a year ago. 84 Fed. Reg. at 4,198. More importantly, and as Justice Kennedy stated  
10 in *Rapanos*, compliance with the “significant nexus” standard “will raise no serious constitutional  
11 or federalism difficulty” and “prevents problematic applications of the statute” that could raise  
12 such concerns. *Rapanos*, 547 U.S. at 782-83 (Kennedy, J., concurring). The Agencies rely on  
13 *SWANCC* (85 Fed. Reg. at 22,273) to argue that the Rule’s narrow scope avoids Commerce Clause  
14 implications, but *SWANCC* concerned abandoned intrastate ponds and mudflats that were isolated  
15 and lacked a “significant nexus” to other waters protected by the Act, and in any case did not  
16 decide any constitutional questions. *See id.* at 766-67 (Kennedy, J., concurring); *SWANCC*, 531  
17 U.S. at 160-61.

18           In fact, the polluting activities controlled by the Act, such as point source discharges, are  
19 economic in nature and subject to regulation under the Commerce Clause. *See, e.g., Chem. Waste*  
20 *Mgmt., Inc. v. Hunt*, 504 U.S. 334, 340 n.3 (1992) (solid waste is an “article of commerce”);  
21 *Wickard v. Filburn*, 317 U.S. 111 (1942). Employing the significant nexus standard to protect  
22 both navigable waters and the waters that significantly affect them provides ““appropriate and  
23 needful control of activities and agencies which, though intrastate, affect that [interstate]  
24 commerce.”” *Rapanos*, 547 U.S. at 783 (Kennedy, J., concurring) (quoting *Oklahoma ex rel.*  
25 *Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941)). As the Court stated in *Hodel v.*  
26 *Virginia Surface Min. & Reclamation Ass’n., Inc.*, “the power conferred by the Commerce Clause  
27 [is] broad enough to permit congressional regulation of activities causing air or water pollution, or  
28 other environmental hazards that may have effects in more than one State.” 452 U.S. 264, 282

1 (1981).

2 Because the “significant nexus” standard avoids constitutional concerns and because the  
3 2019 Rule as implemented by the Agencies’ guidance applies that standard, there are no  
4 constitutional concerns that the 2020 Rule would need to cure.

5 **4. The Rule’s Exclusion of Interstate Waters from the Waters of the**  
6 **United States Is Contrary to the Act and Controlling Precedent.**

7 Protection of interstate waters under the Act, regardless of their navigability, has been  
8 longstanding and essential. Without these protections, “[s]tates with cities and industries situated  
9 upstream on the non-navigable tributaries of our great rivers could freely use them for dumping  
10 raw sewage and noxious industrial wastes upon their downstream neighboring states.” *Ashland*  
11 *Oil*, 504 F.2d at 1326. In the CWA Congress intended to prevent harms to downstream states  
12 from such detrimental upstream activities.

13 In a departure from all previous agency definitions of “waters of the United States,” the  
14 2020 Rule no longer includes interstate waters as a category of protected waters. Interstate waters  
15 will be protected only if they otherwise meet the new definition of “waters of the United States.”  
16 As a result, the States and Cities will be exposed to uncontrolled pollution flowing from upstream  
17 states. The Rule’s failure to protect all interstate waters is contrary to the language, structure, and  
18 history of the Act and defies controlling precedent.

19 The CWA’s language demonstrates that it protects all interstate waters. Enacted in 1972,  
20 Section 303(a) of the Act provides, in pertinent part, that any pre-existing “water quality standard  
21 applicable to *interstate waters* . . . shall remain in effect,” unless determined by EPA to be  
22 inconsistent with any applicable requirements in effect prior to 1972. 33 U.S.C. §1313(a)  
23 (emphasis added). The Agencies ignore section 303(a)’s plain language and state that it “was  
24 referring to interstate navigable waters,” despite the fact that the word “navigable” is not in section  
25 303(a). 85 Fed. Reg. at 22,284.

26 The Agencies’ interpretation of the Act to exclude interstate waters also ignores the  
27 purpose of the 1972 Amendments, which was to expand, not narrow, federal protection of waters.  
28 *See* S. Rep. No. 92-414, 92d Cong. 1st Sess. 7 (1972) (prior mechanisms for abating water

1 pollution “ha[d] been inadequate in every vital respect”); *City of Milwaukee*, 451 U.S. at 317 (in  
2 passing the CWA, Congress “occupied the field by establishment of a comprehensive regulatory  
3 program . . . *not merely another law ‘touching interstate waters’*” (emphasis added)). The 1972  
4 Amendments superseded the federal common law of nuisance as a means to protect interstate  
5 waters, in favor of a statutory “all-encompassing program of water pollution regulation.” *City of*  
6 *Milwaukee*, 451 U.S. at 318. As explained by the Agencies in 2015, “[s]ince the federal common  
7 law of nuisance (as well as the statutory provisions regulating water pollution in the Federal Water  
8 Pollution Control Act) applied to interstate waters whether navigable or not, the [Act] could only  
9 occupy the field of interstate water pollution if it too extended to non-navigable as well as  
10 navigable interstate waters.” *See* 2015 TSD at 210.

11 The Agencies’ attempt to distinguish seminal Supreme Court cases demonstrating the  
12 Act’s applicability to interstate waters regardless of navigability all but ignore the Court’s analysis  
13 in those cases. *See* 85 Fed. Reg. at 22,286 n. 43. In both *Ouellette* and *Arkansas v. Oklahoma*, the  
14 Court explained that the Act had established a broad statutory scheme for addressing interstate  
15 water pollution disputes. The Court in *Ouellette* observed that, regardless of navigability, “the Act  
16 applies to virtually all surface water in the country,” and that “the control of interstate pollution is  
17 primarily a matter of federal law.” 479 U.S. at 486, 492 (citations omitted). Similarly, the Court  
18 in *Arkansas* stated that, regardless of navigability, “the Act’s purpose [is] authorizing the EPA to  
19 create and manage a uniform system of interstate water pollution regulation . . . controlled by  
20 federal law.” 503 U.S. at 110 (emphasis in original). As explained by the Agencies in 2015,  
21 “[n]othing in either decision limits the applicability of the [Act] to interstate water pollution  
22 disputes involving navigable interstate waters or interstate waters connected to navigable waters.”  
23 2015 TSD at 211 n. 16.

### 24 **III. THE 2020 RULE THREATENS THE STATES AND CITIES WITH IMMINENT AND** 25 **IRREPARABLE HARM**

26 “Environmental injury, by its nature, can seldom be adequately remedied by money  
27 damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is  
28 sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction

1 to protect the environment.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987);  
2 *see Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009) (same).  
3 “Irreparable harm should be determined . . . according to each statute’s structure and purpose.”  
4 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018) (citation  
5 and quotations omitted). “[E]nvironmental harm or pollution of navigable waters may be  
6 considered as irreparable harm because of the difficulty in proving damages.” *Sierra Club v. City*  
7 *of Colo. Springs*, 05-cv-01994-WDM-BNB, 2009 U.S. LEXIS 73922, at \*46 (D. Colo. Aug. 20,  
8 2009). “Plaintiffs need only show a *threat* of irreparable harm, not that irreparable harm already  
9 ha[s] occurred.” *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010) (emphasis in  
10 original). Injuries where “sovereign interests and public policies [are] at stake” are irreparable.  
11 *Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001).

12 The 2020 Rule threatens States and Cities with irreparable harm upon its effective date of  
13 June 22, 2020. The Rule will immediately remove the Act’s longstanding protections for vast  
14 numbers of diverse and important streams and wetlands across the country, and will result in  
15 increased pollution and harm to the integrity of downstream waters including drinking water  
16 supplies. Downstream jurisdictions, including the States and Cities, will receive increased water  
17 pollution flowing from upstream jurisdictions. The Rule will also disrupt water protection  
18 programs within the States’ and Cities’ borders, and it will be impracticable for them to fill  
19 regulatory gaps created by the Rule before its effective date or during the pendency of this action.  
20 The Rule harms the States’ and Cities’ proprietary interests as well, threatening destruction of  
21 wildlife as well as real property from increased flooding. None of the foregoing harms are  
22 redressable through an award of money damages, and all of them are imminent and irreparable.

23 **A. The 2020 Rule Threatens to Cause Severe Environmental Injury to Water**  
24 **Resources Nationwide, Including Within the States’ and Cities’ Borders.**

25 The 2020 Rule will likely cause significant and widespread harm to the Nation’s waters  
26 by eliminating CWA protections for substantial numbers of streams and wetlands that are vital for  
27 sustaining water quality. The Rule removes protections for 4.8 million miles of streams and  
28



1 millions of acres of wetlands nationwide.<sup>25</sup> The arid West will be particularly hard hit, with more  
 2 than 85 percent of stream miles in plaintiff New Mexico's key watersheds no longer protected.<sup>26</sup>  
 3 Lost wetland protections include the majority of plaintiff North Carolina's forested, swamp,  
 4 pocosins, Carolina Bay and other unique wetlands.<sup>27</sup> More than half of Tennessee's wetlands and  
 5 more than 40 percent of wetland acres in New Mexico are at risk of destruction.<sup>28</sup>

6 The harms threatened will be extensive, cumulative, and lasting. The 2020 Rule threatens  
 7 to damage aquatic ecosystems and entire watersheds by leaving their upstream source waters  
 8 without protection from pollution.<sup>29</sup> The Rule completely eliminates protections for ephemeral  
 9 streams, whose numbers are increasing due to climate change.<sup>30</sup> Ephemeral streams comprise the  
 10 majority of stream length in many parts of the country and perform essential functions that  
 11 maintain downstream water quality.<sup>31</sup> The Rule leaves unprotected vast numbers of the Nation's  
 12 floodplain wetlands and removes protections for all 16.3 million acres of the country's non-  
 13 floodplain wetlands.<sup>32</sup> Due to the lost beneficial functions of pollutant trapping and water storage  
 14 that these upstream waters perform, downstream waters will suffer increased pollution and will  
 15 flood more frequently.<sup>33</sup> The Rule also threatens the biological integrity of the Nation's waters by  
 16 excluding from the Act's protections waters that are habitat for fish and other animals.<sup>34</sup> Scores of  
 17 threatened and endangered species would face increased degradation.<sup>35</sup>

21 <sup>25</sup> Sulliván Decl. ¶¶ 3, 21, 24, 34.

22 <sup>26</sup> Sulliván Decl. ¶¶ 3, 24.

23 <sup>27</sup> *Id.* ¶¶ 3, 37.

24 <sup>28</sup> *Id.* ¶¶ 3, 36-39.

25 <sup>29</sup> *Id.* ¶¶ 3-5, 14, 21-22.

26 <sup>30</sup> *Id.* ¶¶ 4, 19, 53.

27 <sup>31</sup> *Id.* ¶¶ 4, 19, 24-33.

28 <sup>32</sup> *Id.* ¶¶ 5, 16, 34-43.

<sup>33</sup> *Id.* ¶¶ 5, 15, 17, 34, 38, 41-42.

<sup>34</sup> *Id.* ¶¶ 4, 16, 27-33, 38; Declaration of Annee Ferranti (Ferranti Decl.) ¶¶ 10-15;  
 Declaration of Lacey Greene (Greene Decl.) ¶¶ 10-12; Declaration of Steve Parmenter (Parmenter  
 Decl.) ¶¶ 13-17.

<sup>35</sup> Sulliván Decl. ¶¶ 4, 27, 40-41, 49; Ferranti Decl. ¶¶ 14-15; ; Parmenter Decl. ¶¶ 14-16;  
 Greene Decl. ¶¶ 8-10.

1 The States and Cities will suffer substantial reductions in protections for their ephemeral  
2 streams and wetlands,<sup>36</sup> which perform the essential functions of filtering pollutants, providing  
3 habitat, and absorbing flood waters.<sup>37</sup>

4 In New Mexico, current Section 402 pollutant discharge controls include stormwater  
5 permits for over 1,000 facilities.<sup>38</sup> Because of the Rule, 25 to 45 percent of the stormwater general  
6 permits and 50 percent of the individual permits will no longer be in force.<sup>39</sup> As a result,  
7 sediment, phosphorus, nitrogen, metals, acidic wastewater, pesticides, paint solvents, phenols,  
8 solvents, phthalates and other pollutants will discharge into New Mexico waters without  
9 regulatory limit.<sup>40</sup> This pollution will have profound adverse impacts on water quality in the  
10 Tijeras Arroyo, Gila River, and Rio Hondo watersheds, as well as on other waters in the state.<sup>41</sup>

11 Similarly, North Carolina would suffer a large loss of wetlands under the 2020 Rule,  
12 including its pocosins and Carolina bays, which support over 70 percent of rare and endangered  
13 plants and animals statewide.<sup>42</sup> The loss of protections for these wetlands, and the resulting  
14 decline in in-state water quality and loss of wildlife habitat, would also impact the state's  
15 commercial and recreational fisheries, which had an estimated revenue of \$430 million and  
16 economic impact of \$3.9 billion in 2017, respectively.<sup>43</sup>

18 <sup>36</sup> Roose Decl. ¶¶ 7-8 (in New Mexico, loss of protections for 20 to 70 percent of  
19 Cimarron River Watershed wetlands and 85 percent of stream miles within Upper Pecos River  
20 Basin); Jacobson Decl. ¶¶ 11-14, 24 (in New York, more than 4,664 miles of stream in jeopardy;  
21 estimated loss of jurisdiction over 3,146 acres of interstate waters on New York border and loss  
22 of 1,500 acres of wetlands on Lower Genesee River); Nechamen Decl. ¶ 32-34 (summarizing  
23 impacts in the State of New York); Declaration of Lauren Driscoll (Driscoll Decl.) ¶¶ 4, 8 (in  
24 Washington, lost protections for 40 percent of wetlands and 20 percent of stream miles in Thorp  
25 Watershed); Zarrilli Decl. ¶¶ 6, 20-21 (up to 36 percent of stream miles at risk in New York City  
26 Watershed, which provides drinking water to 9 million people); Declaration of Kathleen M.  
27 Baskin (Baskin Decl.) ¶¶ 11-14; Riexinger Decl. ¶ 2; Mrazik Decl. ¶¶ 6-7; Declaration of Charles  
28 Horbert (Horbert Decl.) ¶ 7; Declaration of David Siebert (Siebert Decl.) ¶ 6.

<sup>37</sup> Bishop Decl. ¶¶ 6, 8; Ferranti Decl. ¶ 15; Zarrilli Decl. ¶ 8; Declaration of Diane Dow  
(Dow Decl.) ¶ 8; Siebert Decl. ¶¶ 8-11, 17; Nechamen Decl. ¶¶ 2, 9, 12-19, 32-25; Smith Decl. ¶¶  
6-11; 13-14.

<sup>38</sup> Roose Decl. ¶ 9.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶¶ 14-17.

<sup>42</sup> Smith Decl. ¶ 12.

<sup>43</sup> *Id.* ¶ 13.

1           **B. The 2020 Rule Threatens to Severely Harm Downstream States with**  
 2           **Increased Interstate Water Pollution.**

3           The States and Cities rely on the nationwide floor of pollution controls under the Act to  
 4 protect their natural resources and their citizens from upstream pollution.<sup>44</sup> By excluding  
 5 numerous waters from the Act's jurisdiction, the 2020 Rule allows upstream states to pollute the  
 6 States' and Cities' waters without federal controls under the Section 402 and 404 permit programs.  
 7 Such pollution itself constitutes irreparable harm. *Sierra Club v. U.S. Dept. of Agriculture, Rural*  
 8 *Utilities Service*, 841 F.Supp.2d 349, 358 (D.D.C. 2012). Six examples make this point.

9           First, the Colorado River is an important source of drinking water for the City of San  
 10 Diego in California, and San Diego will be subject to increased pollution flowing downstream  
 11 from that waterbody originating in upstream states.<sup>45</sup> Second, water flowing downstream from  
 12 New Hampshire into Massachusetts, Rhode Island, and Maine threatens pollution of these  
 13 downstream states' waters.<sup>46</sup> Third, New York, relying on the Army Corps' operation of the  
 14 Section 404 program, does not regulate smaller wetlands, and unless it surmounts the difficult  
 15 hurdles and high cost of expanding its program to cover them, many of the State's wetlands will be  
 16 filled and therefore will not function to reduce downstream pollution before its waters flow into  
 17 New Jersey.<sup>47</sup> Fourth, Maryland has invested over \$5 billion to restore the Chesapeake Bay, but  
 18 its efforts will be undermined by implementation of the 2020 Rule since the Bay's health relies  
 19 upon water protections in five other states—Delaware, Virginia, West Virginia, Pennsylvania, and  
 20 New York—and the District of Columbia.<sup>48</sup> Fifth, the 2020 Rule will also harm Maryland by  
 21 removing protection for an estimated 10,000 acres of wetlands in the Nanticoke River watershed  
 22 within Delaware, thus eliminating the flood protection functions these wetlands provide to  
 23 communities downstream in Maryland.<sup>49</sup> Sixth, the Amargosa River that flows from Nevada into

24 \_\_\_\_\_  
 25 <sup>44</sup> Declaration of Donald T. Witherhill (Witherill Decl.) ¶ 9.

26 <sup>45</sup> Bishop Decl. ¶¶ 20-21; *see also* Mrazik Decl. ¶ 9; Driscoll Decl. ¶ 12; Nechamen Decl.  
 27 ¶ 20.

28 <sup>46</sup> Baskin Decl., ¶¶ 6-8; Witherill Decl. ¶ 9.

<sup>47</sup> Dow Decl. ¶¶ 13-15.

<sup>48</sup> Currey Decl. ¶ 5.

<sup>49</sup> *Id.* ¶ 7.

1 California is ephemeral for the majority of its length, including for 27 miles from Beatty, Nevada,  
2 to the California border, and is subject to land use activities, such as Nevada’s largest working  
3 dairy farm and hazardous waste disposal, that may discharge pollutants.<sup>50</sup>

4 The States and Cities have no direct regulatory authority over pollution from upstream  
5 jurisdictions. For example, 99.5 percent of the Potomac River watershed, 83 percent of the  
6 Anacostia River watershed, and 80 percent of the Rock Creek watershed lie outside the District of  
7 Columbia’s boundaries, and if the “waters and wetlands upstream that are chemically, physically,  
8 and biologically connected to the downstream waters of the District are no longer subject to  
9 federal regulations, degradation of water quality upstream will impede the District’s ability to meet  
10 local water quality standards and restore District waters to a swimmable and fishable condition.”<sup>51</sup>  
11 Similarly, Michigan’s water quality—which has significant impacts on public health and the well-  
12 being of Michigan residents—depends on adequate protection in other Great Lakes states.<sup>52</sup>

13 Significantly, many upstream states have their own restrictions preventing them from  
14 imposing stricter water pollution controls than those under the CWA.<sup>53</sup> Further, while the CWA  
15 provides an administrative mechanism for states to raise objections to EPA about the sufficiency  
16 of out-of-state Section 402 permits, *see* 33 U.S.C. § 1342(d), this provision will not apply when  
17 Section 402 permits are no longer required for the upstream waters.<sup>54</sup> In addition, while the CWA  
18 gives states authority under Section 401 over certification of water quality for dredge and fill  
19 activities subject to Section 404 permits, Section 401 will not be available where those permits are  
20 no longer required.

21 Thus, once implemented, the 2020 Rule will allow increased upstream pollution that will  
22 significantly degrade the quality of the States’ and Cities’ waters.

23 **C. The 2020 Rule Harms the States and Cities by Severely Disrupting Their**  
24 **Water Pollution Control Programs.**

25 The 2020 Rule will immediately disrupt regulatory programs in the States and Cities. For

26 <sup>50</sup> Parmenter Decl. ¶¶ 5-6, 12-13.

27 <sup>51</sup> Seltzer Dec. ¶ 23.

28 <sup>52</sup> Seidel Decl. ¶ 4.

<sup>53</sup> Bishop Decl. ¶ 21; Sullivan Decl. ¶ 23.

<sup>54</sup> Bishop Decl. ¶ 24.

1 example, New Mexico does not operate its own Section 402 permit program and relies wholly on  
 2 federal permits issued by EPA under Section 402 to protect its waters from pollutant discharges.<sup>55</sup>  
 3 In New Mexico, 89 percent of rivers are ephemeral and will immediately lose protection under  
 4 Section 402, resulting in hundreds of unregulated discharges of pollutants.<sup>56</sup> It is not possible for  
 5 New Mexico to create its own program to fill that regulatory gap by June 22, 2020, given the  
 6 regulatory hurdles, size, cost, and complexity of the task.<sup>57</sup>

7 Many other states will experience similar immediate gaps in protection for waters and  
 8 wetlands and expanding their existing programs to fill those gaps would be fraught with  
 9 difficulties.<sup>58</sup> The Rule's June 22, 2020 effective date does not provide the States and Cities with  
 10 sufficient time and resources to enact new statutes, adopt new regulations, or hire and train staff to  
 11 implement new programs.<sup>59</sup> In Washington, it would take four to five years to do so at a startup  
 12 cost of \$4.9 million.<sup>60</sup> Further, expansion of programs by the States and Cities would face  
 13 political obstacles, requiring new legislation and regulations, allocation of funds, and hiring and  
 14 training of new staff.<sup>61</sup> It is very unlikely that these actions could be accomplished during the  
 15 pendency of this litigation. During that time, many vital water resources and the ecosystem  
 16 services they provide to the States and Cities will be impaired and lost. The harm to the waters of  
 17 the States and Cities is irreparable because their water quality will degrade for a long period of  
 18 time before the States and Cities can take effective actions to mitigate the problem.

19 The 2020 Rule disrupts other water quality control programs in the States and Cities,  
 20 imposing administrative costs and burdens that cannot be recouped through money damages  
 21 claims, thereby constituting irreparable harm. The 2020 Rule disrupts the States' Section 401  
 22 water quality certification programs by eliminating state certification of dredging and filling

23 \_\_\_\_\_  
 24 <sup>55</sup> Roose Decl. ¶¶ 10, 19.

<sup>56</sup> *Id.* ¶¶ 6, 19-22.

<sup>57</sup> *Id.*

25 <sup>58</sup> Mrazik Decl. ¶ 6; Baskin Decl. ¶¶ 11-14; Roose Decl. ¶¶ 9-10; Driscoll Decl. ¶ 6;  
 26 Siebert Decl. ¶ 6; Jacobson Decl. ¶ 30; Currey Decl. ¶¶ 10-11.

<sup>59</sup> Smith Decl. ¶ 17.

<sup>60</sup> Driscoll Decl. ¶ 7.

27 <sup>61</sup> *Id.* ¶¶ 5, 7, 11; Baskin Decl. ¶¶ 19-22; Jacobson Decl., ¶¶ 32-33; Bishop Decl. ¶¶ 27-29,  
 28 32-33; Roose Decl. ¶¶ 19-22.

1 projects in wetlands that were previously regulated under Section 404 but are no longer regulated  
2 under the Rule.<sup>62</sup> Many of the States have developed protocols with the Army Corps to efficiently  
3 process federal and state approvals, including Section 401 certifications, for projects when Section  
4 404 wetlands and other waters are involved. Under the 2020 Rule, federal participation will cease  
5 in many cases, raising the costs and administrative burdens to the States.<sup>63</sup>

6 The TMDL program under Section 303(d) imposes additional controls on sources of  
7 pollution where water quality standards for a waterbody have not yet been achieved. Because of  
8 the increase in wetland destruction under the 2020 Rule and the associated loss of wetland  
9 functions, including pollutant filtration, water quality in downstream waterbodies will degrade. As  
10 a result, the States will likely have to develop stricter TMDLs to address this water quality  
11 deterioration, undermining the gains made by existing TMDLs and imposing additional burdens  
12 and costs on State agencies and regulated entities.<sup>64</sup>

13 In sum, the 2020 Rule will irreparably harm the States and Cities by disrupting water  
14 quality control programs within their borders.

15 **D. The 2020 Rule Threatens Irreparable Harm to the States' and Cities'  
16 Proprietary and Economic Interests.**

17 The 2020 Rule will cause increased flooding and destruction of wildlife and wildlife  
18 habitat, threatening irreparable harm to the States' and Cities' proprietary and economic interests.  
19 More than half of the nation's wetlands will lose protection, paving the way for their filling and  
20 the loss of their essential flood mitigation functions. Between 1984 and 2014, floods in the United  
21 States caused an estimated \$8 billion in property damage and over 80 fatalities annually.<sup>65</sup>  
22 Wetlands protect lives and property from floodwaters by retaining large volumes of stormwater  
23 that would otherwise inundate downstream waters.<sup>66</sup> Reduced protections under the Rule threaten  
24 flooding of many properties owned by the States and Cities.<sup>67</sup> For example, New York owns 658

25 <sup>62</sup> Mrazik Decl. ¶ 6; Bishop Decl. ¶ 27; Jacobson Decl. ¶¶ 30; Siebert Decl. ¶ 6.

26 <sup>63</sup> Horbert Decl. ¶ 6; Baskin Decl. ¶ 20; Siebert Decl. ¶ 18.

27 <sup>64</sup> Baskin Decl. ¶¶ 16-17.

28 <sup>65</sup> Nechamen Decl. ¶ 35.

<sup>66</sup> *Id.* ¶¶ 12-18.

<sup>67</sup> Horbert Decl. ¶ 11; Dow Decl. ¶¶ 4, 7-8.

1 facilities with replacement value of over \$254 million located in 100-year floodplains that are  
 2 directly at risk from the 2020 Rule.<sup>68</sup> This does not include State-owned or managed roads,  
 3 bridges, culverts, rail lines, airports and marine facilities that are also located in flood zones and  
 4 will also be threatened by implementation of the 2020 Rule.<sup>69</sup> In the District of Columbia, more  
 5 than \$1 billion in District-owned property and approximately 10,000 District residents are located  
 6 within floodplains.<sup>70</sup> The total economic loss from a 100-year storm along the Potomac and  
 7 Anacostia Rivers is estimated at \$316 million.<sup>71</sup>

8 Wildlife owned or held in trust by the States are imperiled by the 2020 Rule.<sup>72</sup> The Rule  
 9 will adversely impact the habitat of fish, birds, and other animals, thereby threatening harm to their  
 10 populations and to the States' proprietary interests. California wildlife are "publicly owned" and it  
 11 is the "state's policy to conserve and maintain wildlife for citizens' use and enjoyment."<sup>73</sup>  
 12 Wisconsin holds legal title to, and custody and protection of, all wild animals in the State.<sup>74</sup> All  
 13 fish and wildlife in New York "are owned by the State, and held for the use and enjoyment of the  
 14 people of the State."<sup>75</sup> Under the 2020 Rule loss of habitat will likely occur in many riparian and  
 15 floodplain wetlands are no longer protected by the CWA, including wetlands that provide habitat  
 16 for numerous species of fish, amphibians, reptiles, mammals, birds, and invertebrates.<sup>76</sup>

17 By harming wildlife and wildlife habitat the 2020 Rule also threatens the States' and  
 18 Cities' economic interests. In Wisconsin, for example, waterfowl and migratory bird hunting, bird  
 19 watching, and fishing are significant economic drivers, with fishing generating an annual \$2.75  
 20 billion in spending and \$200 million in state sales and income taxes.<sup>77</sup> The Rule's reduced federal

21 \_\_\_\_\_  
 22 <sup>68</sup> Nechamen Decl. ¶ 38

<sup>69</sup> *Id.*

<sup>70</sup> Seltzer Decl. ¶ 3.

<sup>71</sup> *Id.* ¶ 15.

<sup>72</sup> Siebert Decl. ¶ 10.

<sup>73</sup> *Betchart v. Department of Fish & Game*, 158 Cal.App.3d 1104, 1106 (1984); Cal. Fish  
 24 & Game Code, § 1801.

<sup>74</sup> Siebert Decl. ¶ 10.

<sup>75</sup> N.Y. Envtl. Conserv. Law § 15-0103(8).

<sup>76</sup> Parmenter ¶ 8, 14-17; Ferranti Decl. ¶ 14-15; Riexinger Decl. ¶ 11.

<sup>77</sup> Siebert Decl. ¶ 15. New York also currently has a strong recreational economy, ranking  
 27 second in the nation in angler expenditures and sixth as a fishing destination for out-of-state  
 28 visiting anglers. Riexinger Decl. ¶ 13.

1 protections imperil not only wetland habitat for waterfowl, migratory birds, and fish such as trout  
 2 and northern pike, but also threaten the quality of recreational experiences related to these species,  
 3 and in turn reduce economic activity.<sup>78</sup> In New Mexico, visitors spent \$846 million on recreation  
 4 in 2017, supporting 13,000 direct jobs. The recreational economies of New Mexico and other  
 5 States and Cities will be harmed by the Rule’s reduced protections.<sup>79</sup> In North Carolina, the loss  
 6 of protections for wetlands, and the resulting decline of water quality and loss of wildlife habitat,  
 7 would impact the State’s commercial and recreational fisheries, which had an estimated revenue  
 8 of \$430 million and economic impact of \$3.9 billion in 2017, respectively.<sup>80</sup>

9 Moreover, some government entities have invested significant funds toward protecting  
 10 water quality, relying on the baseline protections in prior definitions of “waters of the United  
 11 States.” The District of Columbia has already spent \$26.4 million on clean-up of the Anacostia  
 12 River and the District’s water utility is in the process of implementing a \$2.7 billion “Clean Rivers  
 13 Project” to improve water quality.<sup>81</sup> Maryland has already spent over \$5 billion in Chesapeake  
 14 Bay restoration.<sup>82</sup> The 2020 Rule places these investments at risk as increased upstream pollution  
 15 would undermine such local efforts.<sup>83</sup>

16 None of these harms can be remedied through an award of money damages against the  
 17 federal government. Accordingly, they are irreparable. *Amoco Prod. Co.*, 480 U.S. at 545; *Cal. ex*  
 18 *rel. Lockyer*, 575 F.3d at 1020.

19 **IV. PRELIMINARILY ENJOINING OR STAYING THE 2020 RULE APPROPRIATELY**  
 20 **BALANCES THE EQUITIES AND SERVES THE PUBLIC INTEREST.**

21 The balance of the equities and the public interest support issuing a preliminary injunction  
 22 or stay of the 2020 Rule to maintain the status quo. *See Winter*, 555 U.S. at 24-26. The public  
 23 interest lies in protecting the integrity of the Nation’s waters and maintaining the ability of the

24 \_\_\_\_\_  
 25 <sup>78</sup> Siebert Decl. ¶ 15.

26 <sup>79</sup> Roose Decl. ¶ 25. California’s water-dependent recreational economies would also  
 suffer as a result of out-of-state pollution negatively impacting the State’s water quality under the  
 Rule. Bishop Decl. ¶ 25.

27 <sup>80</sup> Smith Decl. ¶ 13.

28 <sup>81</sup> Seltzer Decl. ¶ 25.

<sup>82</sup> Currey Decl. ¶ 5.

<sup>83</sup> *Id.*



1 Agencies and the States and Cities to operate programs to achieve the CWA’s water quality  
2 objective. As detailed above and in the supporting declarations, the Rule threatens to cause  
3 irreparable and lasting harm to the States and Cities, their residents, and to the Nation’s waters.

4 The Agencies offer little to balance against the harms caused by the Rule. As discussed in  
5 Section II.B.2 above, their claims that the Rule protects states’ rights rests on a profound  
6 misreading of Section 101(b) of the CWA. In fact, the Rule causes states great harm by allowing  
7 out-of-state pollution discharges and wetland destruction to impair navigable waters of  
8 downstream states and by eliminating protections for interstate waters. The Agencies’ claim that  
9 the Rule provides “clarity and predictability for regulators and the regulated community,” 85 Fed.  
10 Reg. at 22,325, is simply wrong because the Rule employs vague and confusing concepts such as  
11 the “typical year” requirement and undefined distinctions between intermittent and ephemeral  
12 streams.

13 When weighing the public interest, particular attention should be given to preserving the  
14 status quo. *Chalk v. U.S. Dist. Court Cent. Dist. Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). Here,  
15 the status quo is the *Rapanos* significant nexus standard, as implemented by the *Rapanos*  
16 Guidance, the 2015 Clean Water Rule, and the 2019 Rule. *See Cal. Dep’t of Parks & Recreation v.*  
17 *Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006) (status quo is “the last uncontested  
18 status that preceded the parties’ controversy”). Preliminarily enjoining or staying the 2020 Rule  
19 would preserve the status quo and prevent irreparable harm to the States and Cities, their residents,  
20 and to the Nation’s waters, while still protecting the Agencies’ stated interests in protecting those  
21 waters. The public interest and the balance of equities accordingly tips sharply in the Plaintiffs’  
22 favor, and the Court should grant their requested relief.

## 23 **V. NATIONWIDE INJUNCTIVE RELIEF IS REQUIRED.**

24 The “scope of injunctive relief is dictated by the extent of the violation established, not by  
25 the geographical extent of the plaintiff class.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).  
26 Indeed, “[t]here is no general requirement that an injunction affect only the parties in the suit.”  
27 *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987); *see Trump v. Int’l Refugee Assistance*  
28 *Project*, 137 S.Ct. 2080, 2088 (2017). To the contrary, a plaintiff is entitled to the injunctive relief



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## CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Andrew R. Wheeler, et al.**

Case No.: **3:20-cv-03005-RS**

I hereby certify that on May 18, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION OR STAY; MEMORANDUM OF POINTS AND AUTHORITIES**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 18, 2020, at Los Angeles, California.

Ernestina Provencio

\_\_\_\_\_  
Declarant

/s/ Ernestina Provencio

\_\_\_\_\_  
Signature

LA2020300885