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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
CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, STATE OF NEW YORK,
STATE OF CONNECTICUT, STATE OF ILLINOIS,
STATE OF MAINE, STATE OF MARYLAND, STATE
OF MICHIGAN, STATE OF NEW JERSEY, STATE
OF NEW MEXICO, STATE OF NORTH CAROLINA
EX REL. ATTORNEY GENERAL JOSHUA H. STEIN,
STATE OF OREGON, STATE OF RHODE ISLAND,
STATE OF VERMONT, STATE OF WASHINGTON,
STATE OF WISCONSIN, COMMONWEALTHS OF
MASSACHUSETTS AND VIRGINIA, THE NORTH
CAROLINA DEPARTMENT OF ENVIRONMENTAL
QUALITY, THE DISTRICT OF COLUMBIA, AND
THE CITY OF NEW YORK,

22 Plaintiffs,

23 v.

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

27 Defendants.
 28

Case No.

**COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF**

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 JURISDICTION AND VENUE

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

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

26 INTRADISTRICT ASSIGNMENT

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

PARTIES

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

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

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

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

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

23 **STATUTORY AND REGULATORY FRAMEWORK**

24 **The Administrative Procedure Act**

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

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

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

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

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

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

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

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

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

20 **The Clean Water Act**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 _____
27 ¹ *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos*
28 *v. United States & Carabell v. United States* (Dec. 2, 2008),
http://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf

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

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

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

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

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

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

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

13 **The 2020 Rule**

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

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

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

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

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

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

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

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

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

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

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

17 ***The 2020 Rule’s Deficiencies***

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

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

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

28 ⁵ *Id.*

⁶ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 74. The "typical year" requirement is also confusing and will be difficult to
25 implement. While in the 2020 Rule preamble the Agencies provide a long list of tools, models,
26 calculations, data, and factors⁸ that could be used to define a "typical year," the Agencies

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

1 prescribe no methodology for doing so.

2 THE 2020 RULE HARMS THE STATES AND CITIES

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

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

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

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

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

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

1 even the 2019 Rule required the Agencies to use the *Rapanos* Guidance, which either included
2 those waters or provided for case-by-case significant nexus evaluations of them. Ephemeral
3 waters and waters that do not meet the “typical year” requirement are significant for downstream
4 waters—both ecologically and hydrologically—especially in arid and semi-arid watersheds
5 because ephemeral or atypical flows recharge aquifers that store water for current and future
6 drinking water supplies. When polluted, those waters can also negatively impact downstream
7 traditionally navigable waters. The Agencies’ data demonstrate that from 2013 through 2018,
8 most non-relatively permanent waters (primarily ephemeral streams) that were evaluated were
9 found to have a significant nexus to downstream waters and thus determined to be jurisdictional
10 under the Act. *See* Agencies’ “Resource and Programmatic Assessment” for the 2020 Rule
11 (RPA), p. 22.⁹

12 80. Except for Michigan and New Jersey, which have assumed control over the
13 Section 404 program within their borders, the State and Cities rely on the Army Corps to operate
14 the Section 404 program that regulates the dredging and filling of waters within their borders. The
15 Agencies have acknowledged that the 2020 Rule will protect fewer wetlands than the 2019 Rule
16 and that fewer CWA Section 404 permits limiting dredging or filling in wetlands will be issued
17 under the 2020 Rule. RPA, pp. 27, 84; *see* Agencies’ “Economic Analysis” for the 2020 Rule
18 (EA), p. 93.¹⁰ Under the Section 404 program, “[w]here no federal permit is required,
19 compensatory mitigation under federal regulation will not be required for unavoidable impacts to
20 non-jurisdictional waters.” RPA, p. 86.

21 81. Under the 2020 Rule, states will no longer be required to establish or maintain
22 water quality standards under Section 303 for certain categories of waters, and consequently those
23 waters and waters downstream of them will be subject to impairment. The Agencies acknowledge
24 that the Rule “result(s) in reduced protection for aquatic ecosystems” because states “may not
25

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

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

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

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

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

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

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

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

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

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

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

19 **FIRST CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **REQUEST FOR RELIEF**

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

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

16 Dated: May 1, 2020

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pro hac vice application to be filed

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**Application for admission pro hac vice forthcoming*