UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, MAINE, MARYLAND, MICHIGAN, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON; COMMONWEALTHS OF MASSACHUSETTS and VIRGINIA; DISTRICT OF COLUMBIA; and CITY OF NEW YORK,

Plaintiffs,

v.

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,

Defendants.

COMPLAINT

Case No. 19-11673

Plaintiffs, the States of New York, California, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, Oregon, Rhode Island, Vermont and Washington, the Commonwealths of Massachusetts and Virginia (States), and the District of Columbia and the City of New York, each represented by its Attorney General or Chief Legal Officer, allege as follows against defendants Andrew R. Wheeler, as Administrator of the United States Environmental Protection Agency (EPA); EPA; R. D. James, as Assistant Secretary for the United States Army Corps of Engineers (Army Corps); and the Army Corps (collectively, the Agencies):

INTRODUCTION

1. On October 22, 2019, the Agencies promulgated a rule entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules" (Recodification Rule). 84 Fed. Reg. 56,626. The Recodification Rule defines the term "waters of the United States," which establishes the waters that are protected by the Clean Water Act, 33 U.S.C. § 1251 *et seq*. (CWA or Act). The Recodification Rule repeals the current definition contained in the Agencies' 2015 rule entitled "Clean Water Rule: Definition of 'Waters of the United States'" (Clean Water Rule), and replaces that definition with one that was issued by the Army Corps in 1986, and issued in substantially identical form by EPA in 1988 (1986 definition). The States, District of Columbia, and City of New York challenge the Recodification Rule in this action.

2. The Act's central requirement is that pollutants, including dredged or fill material, may not be discharged from point sources into "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). "Navigable waters" are defined as "the waters of the United States, including the territorial seas." *Id*. § 1362(7). The Act does not further define "waters of the United States," and its regulatory definition is of fundamental importance to achieving the CWA's overarching objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id*. §1251(a). This is because the definition establishes which waters are protected by the Act and therefore subject to pollutant discharge permitting requirements.

3. A definition of "waters of the United States" that accords with the Act and its purposes is vital for plaintiffs to secure the water quality and public health and welfare benefits of the Act within their borders. The Recodification Rule harms the plaintiffs by endangering those protections, puts the plaintiffs at a competitive disadvantage vis-à-vis less protective jurisdictions, and threatens the proprietary interests of the plaintiffs.

4. The 1986 definition re-promulgated by the Recodification Rule predated two Supreme Court decisions regarding the scope of waters of the United States under the Act: *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). Justice Kennedy's concurring opinion in *Rapanos* established the "significant nexus" standard for determining which non-traditionally navigable waters fall within the Act's coverage as "waters of the United States." Under the significant nexus standard, non-traditionally navigable waters—waters that are not navigable-in-fact—such as headwater streams and some wetlands are protected as "waters of the United States" if they significantly affect the integrity of traditional navigable waters. *Id.* at 780.

5. The Agencies' 2015 Clean Water Rule applied the significant nexus standard to specify categories of waters to which the CWA does or does not apply. To do that, the Agencies made extensive factual and scientific findings about whether categories of non-navigable waters significantly affected the integrity of navigable waters.

6. The Recodification Rule repeals the Clean Water Rule and re-promulgates the 1986 definition even though that definition pre-dated *SWANCC*, *Rapanos,* and the significant nexus standard, making the 1986 definition inconsistent with the Supreme Court's caselaw. The Agencies have admitted that "[f]ollowing the Supreme Court's opinions on the definition of 'waters of the United States,' particularly *SWANCC* and *Rapanos*, the 1986 Rule cannot be implemented as promulgated." 84 Fed. Reg. 4,154, 4,198 (Feb. 14, 2019). Consequently, the Agencies have stated that they will implement the 1986 definition of "waters of the United States" based on "applicable guidance documents," including the Agencies' 2008 memorandum regarding the significant nexus standard (2008 *Rapanos* memorandum), as well as other "relevant memoranda and regulatory guidance letters" and "training" and "experience." 82 Fed. Reg. 34,899, 34,902 (July 27, 2017); 83 Fed. Reg. 32,227, 32,227 (July 12, 2018).

7. The 2008 *Rapanos* memorandum and other guidance documents on which the Agencies rely were not issued as rules in a rulemaking that provided an opportunity for public comment under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*. (APA).

8. Because the 2008 *Rapanos* memorandum and other guidance documents were not issued as rules with an opportunity to comment, the Agencies may not incorporate them into the Recodification Rule or rely on them to amend the re-adopted 1986 definition to meet the significant nexus standard.

9. The Agencies also did not explain how they will interpret "waters of the United States" based on their "training" and "experience."

10. The Agencies also did not consider the scientific and factual findings regarding waters that are not navigable-in-fact but significantly affect the integrity of downstream navigable waters, findings that the Agencies made when they adopted the Clean Water Rule. That Clean Water Rule definition of "waters of the United States" incorporated the most current scientific understanding about the connectivity of waters, including advances in water pollution science made in the years between the 2008 *Rapanos* memorandum and the 2015 Clean Water Rule.

11. The Agencies also issued the Recodification Rule without considering the Act's overarching objective to restore and maintain the integrity of the Nation's waters. Further, the Agencies issued the Recodification Rule without considering their prior findings and extensive record establishing that the Clean Water Rule furthers the Act's objective more effectively than the 1986 definition re-adopted in the Recodification Rule.

12. The Recodification Rule is arbitrary, capricious, not in accordance with law, and without observance of procedure required by law under the APA, 5 U.S.C. § 706(2)(A), (D), because:

a) The Agencies failed to consider whether repeal of the Clean Water Rule and re-codification of the 1986 regulations met the Act's sole objective of restoring and maintaining the integrity of the Nation's waters, and failed to consider the factual and scientific findings regarding waters that are not navigable-in-fact but significantly affect the integrity of downstream navigable waters, findings that the Agencies had previously made when they issued the Clean Water Rule;

b) The recodified 1986 definition contravenes controlling legal standards established by the Supreme Court and the Agencies may not incorporate the 2008 *Rapanos* memorandum into the Recodification Rule or rely on the *Rapanos* memorandum to amend the 1986 definition to meet those standards, nor may they rely on other guidance documents or training and experience; and

c) The 2008 *Rapanos* memorandum and other guidance documents were not issued as rules in a rulemaking that provided an opportunity for public comment.

JURISDICTION AND VENUE

13. This action raises federal questions, and the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. The States, District of Columbia, and City of New York seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202, and 5 U.S.C. § 701 *et seq*.

14. Venue is proper within this federal district, pursuant to 28 U.S.C. §§ 1391(b) and 1391(e), because plaintiffs State of New York and City of New York reside within the district and defendants reside or may be found there.

THE PARTIES

15. The States are sovereign states of the United States of America. The District of Columbia is a municipal corporation and is the local government for the territory constituting the permanent seat of the government of the United States. The City of New York is a municipal corporation and political subdivision of the State of New York. The States bring this action in their sovereign and proprietary capacities and as *parens patriae* on behalf of their citizens and residents to protect public health, safety, welfare, their waters and environment, and their economies. The District of Columbia brings this action in its quasi-sovereign (or *parens patriae*)

and proprietary capacities. The City of New York brings this action in its governmental and proprietary capacities.

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

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

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

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

STATUTORY AND REGULATORY FRAMEWORK

The Administrative Procedure Act

20. Federal agencies are required to comply with the APA's rulemaking requirements.

21. Under the APA, a federal agency must publish notice of a proposed rulemaking in the Federal Register and "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c).

22. "[R]ule making" means "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5).

23. Thus, an agency may amend or repeal a rule only by issuing a rule in accordance with the rulemaking requirements of the APA.

24. Guidance issued by an agency is a rule under the APA if it has the force of law, including guidance that changes the law.

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

26. An agency may only issue a rule after "consideration of the relevant matter presented" in public comments. 5 U.S.C. §§ 553(c). Agencies mustconsider all important aspects of the problem which is the subject of the rulemaking.

27. The APA authorizes this Court to "hold unlawful and set aside agency actions, findings and conclusions" it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

28. The APA also authorizes this Court to "hold unlawful and set aside agency" rules adopted "without observation of procedure required by law." 5U.S.C. § 706(2)(D).

The Clean Water Act

29. The Act's "objective . . . is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

30. The Act's central requirement is that pollutants, including dredged and fill materials, may not be discharged from point sources into "navigable waters" without a permit. *Id.* §§ 1311(a), 1342, 1344, 1362(12). "Navigable waters" are defined as "the waters of the United States, including the territorial seas." *Id.* §1362(7). The Act does not define "waters of the United States."

31. CWA permits control pollution at its source, and discharges of pollutants, including dredged and fill materials, into waters of the United States are prohibited unless they are otherwise in compliance with the Act. *See id.* § 1311(a); S. Rep. No. 92-414 at 77 (1972) ("[I]t is essential that discharge of pollutants be controlled at the source."). Enforcement under the Act's permitting programs requires proof that pollutants are discharged to a water of the United States from a point source in violation of a permit's terms (or without a permit).

32. Permits for the discharge of dredged and fill materials into waters of the United States are issued by the Army Corps under Section 404 of the Act, unless a state is authorized by EPA to operate this permit program for discharges within its borders. 33 U.S.C. § 1344(a), (h).

33. Permits for the discharge of other pollutants into waters of the United States are issued by EPA under Section 402 of the Act, unless EPA authorizes a state to operate this permit program for such discharges within its borders. 33 U.S.C. § 1342(a), (b).

34. The Act also establishes minimum pollution controls that are applicable nationwide, creating a uniform "national floor" of protective measures against water pollution. 33 U.S.C. §1370. Under the CWA, states are free to rise above this nationwide floor by implementing their own more stringent controls. *See id.* § 1370(1).

35. Because many of the Nation's waters cross state boundaries, and because downstream states lack regulatory authority to directly control pollution

sources in upstream states, the Act's nationwide controls are crucial for protecting downstream states from pollution originating outside their borders. Without protective nationwide controls, upstream states could impose less stringent standards on point sources in their states. Those less stringent controls would harm the waters of downstream states.

THE 1986 DEFINITION

36. The Agencies have defined the "waters of the United States" through regulation.

37. In 1986, the Army Corps issued regulations defining the "waters of the United States." 33 C.F.R. § 328.3. In 1988, EPA issued essentially the same regulations. 40 C.F.R. § 232.2.

38. That regulatory definition remained essentially unchanged until 2015, when the Agencies promulgated the Clean Water Rule. However, as the Agencies have explained, "[f]ollowing the Supreme Court's opinions on the definition of 'waters of the United States,' particularly *SWANCC* and *Rapanos*, the 1986 [definition could not] be implemented as promulgated, but rather [had to] be implemented taking into account the Court's holdings and agency guidance interpreting those cases." 84 Fed. Reg. at 4,198. (Feb. 14, 2019).

39. In *SWANCC*, the Court held that the use of "isolated" non-navigable intrastate ponds by migratory birds did not make the ponds "navigable waters" subject to the CWA. 531 U.S. at 171-72.

40. After *SWANCC* was decided, the Agencies issued a memorandum providing guidance regarding its application. *Joint Memorandum*, 68 Fed. Reg. 1991, 1995-98 (Appendix A) (Jan. 15, 2003) (2003 *SWANCC* memorandum).

41. In *Rapanos*, Justice Scalia, writing for a plurality of the Court, defined waters covered by the statute to include relatively permanent, standing or continuously flowing bodies of water connected to traditional navigable waters as well as wetlands with a continuous surface connection to traditional navigable waters. 547 U.S. at 739. Justice Kennedy's concurring opinion set forth the "significant nexus" standard: if a wetland or water significantly affects the integrity of other waters "more readily understood as 'navigable,'" it is protected by the Act. *Id.* at 780. The four-justice dissent authored by Justice Stevens found that wetlands adjacent to navigable waters or their tributaries are protected by the Act if either the plurality or the significant nexus standard was satisfied. *Id.* at 810.

42. In 2008, the Agencies issued a memorandum for making significant nexus determinations following *Rapanos*. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2. 2008), accessible at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

43. The 2008 *Rapanos* memorandum significantly modified the 1986 definition of "waters of the United States." For example, the *Rapanos* memorandum required "fact-specific analysis to determine whether [three

categories of waters] have a significant nexus with a traditionally navigable water" when the 1986 regulations did not provide for such analysis. *See id.* at 1.

44. This regulatory regime resulted in many complex case-by-case determinations by the Agencies throughout the country, and led to confusing and inconsistent interpretations by the Agencies and the federal courts as to which waters are "waters of the United States" and therefore within the Act'sprotections.

THE CLEAN WATER RULE

45. To remedy the ambiguity of the 1986 regulatory regime, the Agencies promulgated the Clean Water Rule, which defined "waters of the United States" under the Act based on "the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the Agencies' technical expertise and experience." 80 Fed. Reg. at 37,055. The Clean Water Rule became effective on August 28, 2015. *Id.* at 37,054.

46. When the Agencies promulgated the Clean Water Rule, they addressed "the ambiguity that exists under the [1986] regulations and practice," stating that "[m]any waters are currently subject to case specific jurisdictional analysis to determine whether a 'significant nexus' exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies." 80 Fed. Reg. at 37,056. The Agencies found that the *SWANCC* and *Rapanos* guidance documents "did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations." *Id.*

47. The Clean Water Rule established clear categories of waters within the CWA's jurisdiction as well as categories that are excluded from the Act's coverage, thereby reducing the need for case-specific jurisdictional determinations. 80 Fed. Reg. at 37,057.

48. Unlike the 1986 regulations, the Clean Water Rule employs the "significant nexus" standard established by Justice Kennedy's concurrence in *Rapanos*.

49. The Agencies performed rigorous scientific review in crafting the Clean Water Rule's definition of waters of the United States as those waters that have a "significant nexus" with the integrity of downstream navigable-in-fact waters. *See* 80 Fed. Reg. at 37,057. In particular, they relied on a comprehensive report prepared by EPA's Office of Research and Development, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Connectivity Report),[1] which took into account more than 1200 peer-reviewed publications. The Agencies also relied on EPA's Science Advisory Board's independent review of the Connectivity Report. 80 Fed. Reg. at 37,057.

50. The Agencies found that some waters not specifically listed ascovered by the 1986 regulations have a significant nexus to downstream waters, including headwater stream tributaries and certain waters in riparian areas orfloodplains.

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

51. In applying the significant nexus test, the Clean Water Rule also supplied precise definitions missing from the 1986 regulations for "tributaries" and "adjacent" waters protected by the CWA, and for waters not protected by the Act. It thereby reduced the need for complex case-by-case administrative decisions and judicial review.

52. States, trade associations, environmental organizations, and others challenged the Clean Water Rule in federal district courts and courts of appeals. As a result of that litigation, the Rule has been enjoined in 28 states and remains in effect in 22 others. 84 Fed. Reg. at 56,631.

53. In legal briefs filed in that litigation and in detailed comments on the Agencies' attempts to suspend or repeal the Clean Water Rule, the States, District of Columbia, and City of New York have explained that the Clean Water Rule's definition of the waters of the United States provides necessary water quality protections in compliance with the CWA, the APA, controlling Supreme Court precedent and the Constitution.

THE RECODIFICATION RULE

54. On July 27, 2017, the Agencies proposed the Recodification Rule. *Proposed Rule, Definition of "Waters of the United States" – Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34,899. The Agencies indicated that they would implement the re-promulgated 1986 definition "consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents." *Id. at* 34,900. They also stated that those applicable guidance

documents included the 2003 *SWANCC* memorandum and 2008 *Rapanos* memorandum. *Id.* at 34,902.

55. The Agencies accepted public comments on the proposed Recodification Rule generally but indicated that they were not seeking public comment concerning the pre-2015 definition of "waters of the United States," *id.* at 34,903.

56. The Agencies received over 685,000 comments on the proposed Recodification Rule, including comments opposing the rule submitted by many of the plaintiffs in this case. 83 Fed. Reg. at 32,230. In their initial notice the Agencies stated that "because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations." 82 Fed. Reg. at 34,903.

57. On July 12, 2018, the Agencies published a supplemental notice of proposed rulemaking for the proposed Recodification Rule. 83 Fed. Reg. 32,227. In the supplemental notice, the Agencies stated that they "propose to conclude that regulatory certainty would be best served by repealing the 2015 Rule and recodifying the scope of CWA jurisdiction," and invited comment on "issues that are relevant to consideration of whether to repeal the 2015 Rule." *Id.* at 32,228, 32,231.

58. In the supplemental notice, the Agencies stated that under the Recodification Rule they would "interpret the statutory term 'waters of the United States' to mean the waters covered by those [1986] regulations . . . consistent with

Supreme Court decisions and longstanding practice, as informed by applicable guidance documents, training, and experience." 83 Fed. Reg. at 32,227.

59. The supplemental notice discussed the 2008 *Rapanos* memorandum frequently but did not identify the other guidance documents on which the Agency intended to rely. The notice indicated that many guidance documents were on the Agencies' websites but did not specify which, if any, of those documents would be used to implement the definition of "waters of the United States." *See* 83 Fed. Reg. at 32,239, n.29; *see also* www.usace.army.mil/Missions/Civil-Works/ Regulatory-Program-and-Permits/Related- Resources/CWA-Guidance/; https:// www.epa.gov/wotus-rule/about-waters-united- states.

60. The Agencies did not incorporate into the proposed Recodification Rule the guidance documents that they intend to use to implement the definition of "waters of the United States," nor did they publish the guidance documents as rules or request comment on them as rules.

61. The Agencies did not explain how they would interpret "waters of the United States" based on their "training" and "experience."

62. As with the notice of proposed rulemaking, in the supplemental notice the Agencies did not request public comment on, nor address the impact on the integrity of the Nation's waters from, repealing the definition of the waters of the United States set out in the Clean Water Rule and replacing that definition with the 1986 definition.

63. On October 22, 2019, the Agencies published the final Recodification Rule, which repealed the Clean Water Rule and re-adopted the 1986 definition. 84 Fed. Reg. 56,626 (Oct. 22, 2019). The language of the Recodification Rule defining waters of the United States is identical to the definition set out in the1986 regulations.

64. The Agencies stated that they would apply the recodified 1986 definition "consistent with Supreme Court decisions and informed by the Agencies' guidance and their technical experience implementing the Act pursuant to those pre-existing regulations." *Id.* at 56,660. The Agencies indicated that they would continue to rely on the 2008 *Rapanos* memorandum. *Id.* at 56,642. They also indicated that they would rely on an Army Corps "Instructional Guidebook" that had not been identified in either the initial or supplemental notices of proposed rulemaking. *See id.* at 56,660 & n.56.

65. Under the Agencies' approach for the Recodification Rule, the 2008 *Rapanos* memorandum and other guidance documents will improperly be incorporated into the Recodification Rule and amend the re-promulgated 1986 definition and have the purported force of law.

66. The Agencies gave four reasons for repealing the Clean Water Rule and re-adopting the 1986 definition: the Clean Water Rule exceeded the Agencies' authority under the CWA, including the limits imposed by Justice Kennedy's significant nexus test, failed to give due weight to the rights of states under the Act, "push[ed] the envelope of [the Agencies'] constitutional and statutory authority

absent a clear statement from Congress," and lacked record support with respect to the Rule's distance-based limitations. 84 Fed. Reg. at 56,626.

67. However, the Agencies did not make any findings with respect to those same aspects of the Recodification Rule.

68. The Agencies did not address the factual and scientific findings that they had made in the Clean Water Rule, including their findings regarding categories of waters that are not navigable-in-fact but significantly affect the integrity of downstream navigable waters.

69. The Agencies did not find that, or even consider whether, the repeal of the definition of "waters of the United States" contained in the Clean Water Rule and re-adoption of the 1986 definition would serve the Clean Water Act's objective of restoring and maintaining the integrity of the Nation's waters.

70. On February 15, 2019, before the Agencies issued the final Recodification Rule, the Agencies published a notice of a proposed rule that would replace the Recodification Rule with a revised definition of "waters of the United States." Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 14, 2009). When the Agencies issued the Recodification Rule, they indicated that they did not know whether that revised definition would be finalized. 84 Fed. Reg. at 56,661.

THE RECODIFICATION RULE HARMS PLAINTIFFS

71. The Recodification Rule harms the environmental, economic, and proprietary interests of the States, the District of Columbia, and the City of New York.

72. Plaintiffs are situated along the shores of the Atlantic Ocean, the Pacific Ocean, the Chesapeake Bay and its tributaries, the Great Lakes, or Lake Champlain. The States, District of Columbia, and City of New York are downstream from and/or otherwise hydrologically connected with many of the Nation's waters. The States have authority to control water pollution generated by sources within their borders but are also impacted by water pollution from out-of-state sources over which they lack jurisdiction. Plaintiffs rely on the Act and its uniform nationwide floor of pollution controls as the primary mechanisms for protecting them from the effects of out-of-state pollution.

73. The definition of "waters of the United States" contained in the Clean Water Rule is more protective of waters than the Recodification Rule. Repealing the Clean Water Rule definition and replacing it with the pre-existing regulatory regime results in an "overall reduction in positive jurisdictional determinations" under the Act. U.S. EPA and Dep't of the Army, *Economic Analysis for the Proposed Definition of "Waters of the U.S."—Recodification of Pre-existing Rules* (EPA-HQ-OW-2017-0203-0002) (June 2017) at 2.

74. As the Agencies recognized when they adopted the Clean Water Rule, the 1986 definition, implemented by relying on agency guidance documents,

employed a limited, unclear, and difficult-to-administer definition of protected waters. As a result, the Recodification Rule's resurrection of that same unworkable regulatory regime will impair water quality, thereby harming the integrity of the plaintiffs' waters in contravention of the CWA.

75. With the exception of Michigan and New Jersey to the extent they operate the Section 404 program themselves, the plaintiffs rely on the Army Corps to operate the Act's Section 404 permitting program that regulates dredging and filling of waters within their borders. The less protective definition of "waters of the United States" under the Recodification Rule will result in more dredging and filling of waters within plaintiffs' borders to the detriment of the physical, chemical and biological integrity of those waters.

76. The Recodification Rule also puts the States at an unfair economic disadvantage vis-a-vis other states. To mitigate out-of-state pollution, under the recodified pre-existing regulatory regime the States face having to impose disproportionately strict controls on pollution generated within their borders, thereby raising the costs to the States and the costs of doing business in them.

77. The Recodification Rule impairs the plaintiffs' proprietary interests as well. The States, District of Columbia, and City of New York own, operate, finance, or manage property within their borders, including lands, roads, bridges, universities, office buildings, drinking water systems, sewage and stormwater treatment or conveyance systems, and other infrastructure and improvements. The Recodification Rule results in inadequate and ineffective protection of waters under

the Act and is likely to cause damage to plaintiffs' properties as well as increase costs of operating and managing them.

78. The requested relief, if granted, will redress the injuries toplaintiffs' interests caused by the Recodification Rule.

FIRST CLAIM FOR RELIEF

Administrative Procedure Act
Arbitrary and Capricious and Not in Accordance with Law
Failure to Consider the Statutory Objective and Prior Agency Findings

79. Plaintiffs incorporate by reference in this claim the allegations in all preceding paragraphs of the complaint.

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

81. An agency action is not in accordance with law if the agency fails to consider the statutory requirements and fails to apply controlling Supreme Court precedent.

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

83. When the Agencies promulgated the Recodification Rule, they were required to consider whether it met the Act's objective of restoring and maintaining the integrity of the Nation's waters as set forth in 33 U.S.C. § 1251(a).

84. When the Agencies promulgated the Recodification Rule, they did not consider whether or find that repealing the Clean Water Rule and recodifying the 1986 definition would meet the Act's objective of restoring and maintaining the integrity of the Nation's waters.

85. When an agency repeals a rule, the agency may not ignore or countermand its earlier factual and scientific findings supporting the rule without a reasoned explanation for doing so.

86. When the Agencies repealed the Clean Water Rule and re-promulgated the 1986 definition, they ignored and countermanded without reasoned explanation their prior scientific and factual findings, including their findings regarding categories of waters that significantly affect the integrity of downstream navigable waters, findings that the Agencies made when they issued the Clean Water Rule.

87. For these reasons, the Recodification Rule is arbitrary, capricious, and not in accordance with law and must be set aside.

SECOND CLAIM FOR RELIEF

Administrative Procedure Act
Arbitrary and Capricious and Not in Accordance with Law
Failure to Comply with the Significant Nexus Standard

88. Plaintiffs incorporate by reference in this claim the allegations in all preceding paragraphs of the complaint.

89. The 1986 definition that is re-promulgated by the Recodification Rule does not apply, nor comply with, Supreme Court decisions that were issued after the 1986 definition, including the significant nexus standard for "waters of the United

States" that was articulated in *Rapanos*. As the Agencies have conceded, the 1986 definition "cannot be implemented as promulgated."

90. The Agencies may not rely on the 2008 *Rapanos* memorandum and other guidance documents to ensure that the Recodification Rule complies with the Supreme Court decisions, including the significant nexus standard, because the memorandum and guidance documents were not promulgated as rules.

91. The Agencies did not explain how they would interpret "waters of the United States" based on training and experience.

92. For these reasons, the Recodification Rule is arbitrary, capricious, and not in accordance with law and must be set aside.

THIRD CLAIM FOR RELIEF

Administrative Procedure Act
Without Observance of Procedure Required by Law
Failure to Conduct Notice-and-Comment Rulemaking

93. The plaintiffs incorporate by reference in this claim the allegations in all preceding paragraphs of the complaint.

94. An agency may promulgate, repeal, or amend a rule only by issuing a rule in a rulemaking that provides an opportunity for public comment. 5 U.S.C. §§ 553(b), (c), 551(5).

95. Under the Agencies' approach for the Recodification Rule, the 2008 *Rapanos* memorandum and other guidance documents are incorporated into the Recodification Rule, amend the re-promulgated 1986 definition, and are given the force of law.

96. To incorporate the *Rapanos* memorandum and other guidance documents into the Recodification Rule and rely on them to amend the 1986 definition, the Agencies were required to publish the 2008 *Rapanos* memorandum and other guidance documents as rules and seek comment on them.

97. The opportunity for public comment under the APA must be meaningful, requiring that the agency allow comment on the relevant issues and provide an adequate time for comment.

98. The Agencies did not publish the 2008 *Rapanos* memorandum and other guidance documents in a rulemaking in which there was an opportunity for public comment or for meaningful comment.

99. The Agencies did not allow for meaningful comment on how they would interpret "waters of the United States" based on their training and experience.

100. The Recodification Rule is unlawful and must be set aside because it is without observance of procedure required by law and not in accordance with law. 5 U.S.C. § 706(2)(A), (D).

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that the Court issue a judgment and order:

a) declaring the Recodification Rule unlawful, setting it aside, and vacating it;

b) declaring that the Recodification Rule is arbitrary, capricious, or otherwise not in accordance with law, and without observance of procedure required by law;

c) awarding the plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

d) awarding the plaintiffs such additional and further relief as theCourt may deem just, proper, and necessary.

Dated: New York, New York
December 19, 2019

Respectfully submitted,

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General

By: /s/ Philip Bein
Philip Bein (PB 1742)
Timothy Hoffman (TH1955)
Assistant Attorneys General
Monica Wagner
Deputy Bureau Chief
Environmental Protection Bureau
Office of the Attorney General
28 Liberty Street
New York, NY 10005
(212) 416-8797
Philip.Bein@ag.ny.gov

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General
SARAH E. MORRISON
Supervising Deputy Attorney General

By: /s/ Tatiana K. Gaur
Tatiana K. Gaur*
Deputy Attorney General
Attorneys for Plaintiff
State of California, by and through
Xavier Becerra, Attorney General
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013
(213) 269-6329
Tatiana.Gaur@doj.ca.gov

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General

By: /s/ Matthew I. Levine
Matthew I. Levine (ML2346)
David H. Wrinn
Assistant Attorneys General
Office of the Attorney General
PO Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250
Matthew.Levine@ct.gov
David.Wrinn@ct.gov

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General

By: /s/ Jason E. James
Jason E. James*
Assistant Attorney General
Matthew J. Dunn
Chief, Environmental Enforcement/Asbestos Litigation Division
Office of the Attorney General
Environmental Bureau
69 West Washington, 18th Floor
Chicago, IL 60602
(312) 814-0660
jjames@atg.state.il.us

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General

By: /s/ Jonathan R. Bolton
Jonathan R. Bolton*
Office of the Attorney General
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8800
Fax (207) 287-3145
jonathan.bolton@maine.gov

FOR THE STATE OF MARYLAND

BRIAN FROSH
Attorney General

By: /s/ Joshua M. Segal
Joshua M. Segal*
Special Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6446
jsegal@oag.state.md.us

FOR THE STATE OF MICHIGAN

DANA NESSEL
Attorney General

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

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General

By: /s/ Gwen Farley
Gwen Farley (GP0434)
Deputy Attorney General
Environmental Practice Group
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625
(609)376-2761
Gwen.Farley@law.njoag.gov

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

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

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General

By: /s/ Alison B. Hoffman
Alison B. Hoffman*
Special Assistant Attorney General
Office of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
AHoffman@riag.ri.gov

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

By: /s/ Benjamin D. Battles
Benjamin D. Battles (BB5387)
Solicitor General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-5944
benjamin.battles@vermont.gov

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

By: /s/ Ronald L. Lavigne
Ronald L. Lavigne*
Senior Counsel
Office of the Attorney General
2425 Bristol Court SW, 2nd Fl.
Olympia, WA 98504
(305) 586-6751
ronald.lavigne@ atg.wa.gov

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General

By: /s/ Seth Schofield
Seth Schofield*
Assistant Attorney General
Nora Chorover*
Special Assistant Attorney General
Office of the Attorney General
Energy and Environment Bureau
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2428
Seth.Schofield@state.ma.us
Nora.Chorover@state.ma.us

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General

By: /s/ David C. Grandis
David C. Grandis*
Donald D. Anderson
Deputy Attorney General
Paul Kugelman, Jr.
Senior Assistant Attorney General
Chief, Environmental Section
David C. Grandis*
Senior Assistant Attorney General
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219
(804) 225-2741
dgrandis@oag.state.va.us

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General

By: /s/ Brian Caldwell
Brian Caldwell*
Assistant Attorney General
Public Integrity Section
Office of the Attorney General
for the District of Columbia
441 Fourth Street N.W., Ste # 600-S
Washington, D.C. 20001
(202) 727-6211
brian.caldwell@dc.gov

FOR THE CITY OF NEW YORK

James E. Johnson
Corporation Counsel of the
City of New York

By: /s/ Nathan Taylor (NT9699)
Devon Goodrich (DG0836)
Hilary Meltzer
New York City Law Department
100 Church Street, Rm 6-144
New York, NY 10007
(212) 356-2315
NTaylor@law.nyc.gov

*applying for admission *pro hac vice*