May 1, 2020

ATTORNEY GENERAL RAOUL FILES LAWSUIT OPPOSING FEDERAL EFFORTS TO WEAKEN THE CLEAN WATER ACT

Chicago — Attorney General Kwame Raoul today joined a multistate coalition to file a lawsuit challenging the federal government's final rule redefining the "waters of the United States" under the Clean Water Act. The rule allows the Environmental Protection Agency (EPA) to narrow the definition of "waters of the United States" and weaken water quality protections under the Clean Water Act.

The new rule removes protections for all ephemeral streams, many wetlands and other waters that were previously covered under the act. In the lawsuit, Raoul and the coalition argue that the EPA's rule directly conflicts with the Clean Water Act, Supreme Court precedent and the EPA's own scientific findings.

"The residents of Illinois rely on our state's rivers, lakes and streams for safe water for drinking, agriculture and recreation," Raoul said. "I am committed to protecting our vital natural water sources, and I will continue to fight federal attempts to gut regulations that protect our residents from pollution."

The definition for "waters of the United States" within the Clean Water Act is critical to maintaining a strong federal foundation for water pollution control and water quality protection that preserves the integrity of the nation's waters. While the Clean Water Act has resulted in dramatic improvements to water quality in the United States, its overriding objective has not yet been obtained. Many of the nation's waters remain polluted.

The new rollback rule fails to provide clarity or sufficient protections by excluding the headwaters of rivers and creeks as well as other non-traditionally navigable waters from the scope of protected waters. The EPA's narrow definition of "waters of the United States" eliminates federal protections for many waterways, including waters that Illinois relies on for drinking water, wildlife habitat, agriculture and recreation.

In the lawsuit, Raoul and the coalition highlight that excluding these waters directly harms environmentally-friendly states by increasing the risk of pollution from less-protective jurisdictions, incentivizing polluters to relocate to states with less stringent water quality protections and disrupting state regulatory programs. Additionally, the rollback rule removes protections for certain wetlands, potentially imperiling many wetlands upstream from Illinois that store water during storms. Without these wetlands, more stormwater flows into Illinois and the risk of severe flooding increases, such as the historic flood that occurred last spring resulting in 34 Illinois counties being declared disaster areas.

The coalition asserts that the 2020 rule is unlawful under the federal Administrative Procedure Act because it:

- Contradicts the Clean Water Act's objective of maintaining and restoring the integrity of the nation's waters and the EPA's own scientific findings.
- Arbitrarily and capriciously reduces and eliminates protections for ephemeral streams, tributaries, adjacent waters, wetlands and other important water resources that significantly affect downstream waters.
- Fails to comply with controlling Supreme Court precedent established in Rapanos v. United States.
- Lacks a reasoned explanation or rational basis for changing long-standing policy and practice.

Joining Raoul in filing the lawsuit are the attorneys general of California, Connecticut, the District of Columbia, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington and Wisconsin; the California State Water Resources Control Board; the North Carolina Department of Environmental Quality; and the city of New York.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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,

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.

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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

INTRODUCTION

1. Plaintiffs, the States of California, New York, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington and Wisconsin, the Commonwealths of Massachusetts and Virginia, the North Carolina Department of Environmental Quality, the District of Columbia, and the City of New York (collectively, "States and Cities"), bring this action 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). The States and Cities seek judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA) of a rule entitled "The Navigable Waters Protection Rule: Definition of 'Waters of the United States'" (2020 Rule), promulgated by the Agencies on April 21, 2020. 85 Fed. Reg. 22,250 (Apr. 21, 2020).

2. The 2020 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).

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

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

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

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

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

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

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

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

10. A definition of "waters of the United States" that accords with the significant

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

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

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

JURISDICTION AND VENUE

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

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

INTRADISTRICT ASSIGNMENT

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

PARTIES

16. The Plaintiff States of California, New York, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington and Wisconsin, the Commonwealths of Massachusetts and Virginia (collectively, States) are sovereign states of the United States of America. Plaintiff North Carolina Department of Environmental Quality is the State of North Carolina's executive agency with jurisdiction to implement water quality laws. The Plaintiff 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 District of Columbia is defined as a state under the Act. 33 U.S.C. § 1362(3). The Plaintiff City of New York is a municipal corporation and political subdivision of the State of New York. The States and the District of Columbia 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 City of New York brings this action in its governmental and proprietary capacities.

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

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

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

20. 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

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

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

23. 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." *Id.* § 553(b), (c).

24. 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.

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

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

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

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

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

The Clean Water Act

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

31. The Act's central requirement is that pollutants, including dredged and fill materials, may not be discharged 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).

32. The Act's coverage of waters is broad because "Congress recognized" that "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution."

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

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

34. The CWA establishes two main categories of permits. 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 EPA authorizes a state to operate this permit program for such discharges within its borders. 33 U.S.C. § 1344(a), (h). The scope of the Section 404 permit program is governed by the definition of "waters of the United States."

35. Permits for the discharge of other pollutants into waters of the United States, also referred to as National Pollutant Discharge Elimination System (NPDES) permits, 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). The scope of the Section 402 permit program, too, is governed by the definition of "waters of the United States."

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

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

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

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

40. The Act also establishes nationwide minimum pollution controls that are applicable to the "waters of the United States," creating a uniform "national floor" of protective measures against water pollution. *See* 33 U.S.C. §1370(1). 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 a protective

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

Agency Regulations and Guidance Defining "Waters of the United States"

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

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

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

[1] *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos 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

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

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

46. The 2015 Rule defined the waters protected by 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 definition covered waters having a "significant nexus" with the integrity of downstream navigable-in-fact waters—the standard endorsed by a majority of the Supreme Court Justices in *Rapanos*. *See* 80 Fed. Reg. at 37,057.

47. In promulgating the 2015 Rule, the Agencies performed rigorous scientific review and made extensive factual findings about categories of waters significantly affecting the integrity of downstream navigable waters. For example, the Agencies 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'' (2015 Connectivity Report), which took into account more than 1200 peer-reviewed publications.[2] The 2015 Connectivity Report analyzed the vast body of scientific evidence about how upstream non-navigable waters and wetlands affect the integrity of downstream navigable waters. In addition to that report itself, the Agencies also relied on EPA's Science Advisory Board's independent review of the Connectivity Report when they promulgated the 2015 Rule. 80 Fed. Reg. at 37,057.

[2] U.S. EPA, *Connectivity of Streams and Wetland to Downstream Waters: A Review and 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

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

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

The 2020 Rule

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

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

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

[3] The "territorial seas" are defined by the Act. 33 U.S.C. § 1362(8). Waters that are, 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).

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

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

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

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

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

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

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

The 2020 Rule's Deficiencies

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

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

[4] USACE Internal Communication, September 4-5, 2017, "Breakdown of Flow Regimes in NHD Streams Nationwide," *available at* http://www.eenews.net/stories/1060109323

[5] *Id.*

[6] *Id.*

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

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

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

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

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

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

and biological connections between upstream and downstream waters and drew several "major conclusions," including the following:

- All tributary streams, including perennial, intermittent, and *ephemeral* streams, are physically, chemically, and biologically connected to downstream rivers. (Connectivity Report at ES-2) (emphasis added).

- Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality. (Connectivity Report at ES-2 to -3).

- Wetlands and open waters in non-floodplain landscape settings provide numerous functions that benefit downstream water integrity. (Connectivity Report at ES-3 to -4).

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

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

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

> The proposed [2020 Rule] is not fully consistent with established EPA recognized science, may not fully meet the key objectives of the CWA — "to restore the chemical, physical and biological integrity' of the Nation's waters," and is subject 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.

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

[7] The SAB's comments on the 2020 Rule were finalized after the Agencies issued on January 23, 2020 a pre-publication version of the 2020 Rule. *SAB Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act* (Feb. 27, 2020), *available at:* 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

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

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

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

71. Further, the 2020 Rule is arbitrary and capricious because the Agencies have failed to take into account and consider the States' and Cities' reliance on the Agencies' long-standing policy and practice set forth in the *Rapanos* Guidance, the 2015 Rule and the 2019 Rule. These rules and guidance interpreted "waters of the United States" in accordance with the significant nexus standard. Under the Agencies' prior policy and practice, federal protections under the Act

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consistency with the objective of restoring and maintaining 'the chemical, physical and biological integrity' of these waters." *Id.*, p. 2.

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

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

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

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

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

prescribe no methodology for doing so.

THE 2020 RULE HARMS THE STATES AND CITIES

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

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

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

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

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

observation date," to assess a "normal" range between the 30th and 70th percentiles; alternative 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.

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

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

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

[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.

[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-2018-0149.

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

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

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

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

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

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

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

87. The 2020 Rule impairs the States' and Cities' proprietary interests as well. Many States own or hold in trust the fish and other animals within their borders. The additional discharges of dredge and fill materials into wetlands and other waters caused by the 2020 Rule will destroy habitat provided by these waters, reducing wildlife populations. The States and Cities also 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. By allowing the increased pollution of waters and the filling of wetlands—and the resulting loss of wetland functions such as pollution filtration and floodwater storage—the 2020 Rule threatens damage to the States and Cities' properties and increases the costs of operating and managing them.

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

FIRST CAUSE OF ACTION
Violation of the Administrative Procedure Act, 5 U.S.C. § 706
Arbitrary and Capricious and Not in Accordance with Law
Impermissible Interpretation of "Waters of the United States"

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

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

91. Agency action is not in accordance with law if the agency fails to interpret and implement the statutory language consistently with the statute's text, structure, and purpose and with controlling Supreme Court precedent.

92. The 2020 Rule is based on the plurality opinion in *Rapanos* even though a majority of the Justices in *Rapanos* found that the plurality's interpretation of "waters of the United States" was inconsistent with the CWA's text and purpose. *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in the judgment); *id.* at 800 (Stevens, J., dissenting).

93. The 2020 Rule is an illegal and impermissible interpretation and application of "waters of the United States" under the CWA because it excludes from the Act's jurisdiction waters that the Agencies are required to protect under the Act.

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

SECOND CAUSE OF ACTION
Violation of the Administrative Procedure Act, 5 U.S.C. § 706
Arbitrary and Capricious and Not in Accordance with Law
Disregard of Scientific Evidence, Prior Agency Factual Findings and Policy and Practice

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

96. When an agency promulgates a rule, the agency may not ignore or countermand its earlier factual findings without a reasoned explanation for doing so.

97. When an agency promulgates a rule that modifies its long-standing policy or practice, it must articulate a reasoned explanation for doing so.

98. An agency modifying or abandoning its long-standing policy or position must consider and take into account the reliance interests that are impacted by the change.

99. When the Agencies promulgated the 2020 Rule, they ignored and countermanded without reasoned explanation their prior factual findings, including the 2015 Connectivity Report, regarding categories of waters that significantly affect the chemical, physical and biological integrity of downstream navigable waters. Those findings demonstrate that the newly excluded waters have a significant impact on the quality and integrity of navigable waters.

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

101. The Agencies also failed to consider and take into account the serious reliance interests engendered by the Agencies' prior long-standing policy and position regarding the scope of the "waters of the United States" definition.

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

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

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

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

105. 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.

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

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

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

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

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

REQUEST FOR RELIEF

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

1. declaring that the 2020 Rule is arbitrary, capricious, and not in accordance with law;
2. declaring the 2020 Rule unlawful, setting it aside, and vacating it;
3. awarding the States and Cities 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
4. awarding the States and Cities such additional and further relief as the Court may deem just, proper, and necessary.

Dated: May 1, 2020

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**Application for admission pro hac vice forthcoming*