

1 Adam J. Schwartz, Cal. Bar No. 251831  
2 Adam J. Schwartz, Attorney at Law  
3 5670 Wilshire Blvd., Suite 1800  
4 Los Angeles, CA 90036  
5 Tel: (323) 455-4016  
6 Fax: (212) 995-4592  
7 Email: adam@ajschwartzlaw.com

8 Counsel for *Amicus Curiae*  
9 Institute for Policy Integrity

Richard L. Revesz\*, N.Y. Bar # 2044725  
Bethany A. Davis Noll\*, EDNY Bar # BD1816  
Max Sarinsky\*, N.Y. Bar # 5387576  
Jason A. Schwartz\*, Va. Bar # 73398

Institute for Policy Integrity  
139 MacDougal Street, Third Floor  
New York, New York 10012

\* *Pro hac vice* application pending

10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 STATE OF CALIFORNIA BY AND THROUGH  
13 ATTORNEY GENERAL XAVIER BECERRA  
14 AND CALIFORNIA STATE WATER  
15 RESOURCES CONTROL BOARD, STATE OF  
16 NEW YORK, STATE OF CONNECTICUT,  
17 STATE OF ILLINOIS, STATE OF MAINE, STATE  
18 OF MARYLAND, STATE OF MICHIGAN,  
19 STATE OF NEW JERSEY, STATE OF NEW  
20 MEXICO, STATE OF NORTH CAROLINA EX  
21 REL. ATTORNEY GENERAL JOSHUA H. STEIN,  
22 STATE OF OREGON, STATE OF RHODE  
23 ISLAND, STATE OF VERMONT, STATE OF  
24 WASHINGTON, STATE OF WISCONSIN,  
25 COMMONWEALTHS OF MASSACHUSETTS  
26 AND VIRGINIA, THE NORTH CAROLINA  
27 DEPARTMENT OF ENVIRONMENTAL  
28 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. 3:20-cv-03005-RS

**BRIEF OF THE INSTITUTE FOR POLICY  
INTEGRITY AT NEW YORK  
UNIVERSITY SCHOOL OF LAW AS  
AMICUS CURIAE IN SUPPORT OF  
PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION**

Hearing: June 18, 2020, 1:30 p.m.

Judge: Hon. Richard Seeborg

**TABLE OF CONTENTS**

1  
2  
3 INTEREST OF AMICUS CURIAE ..... 1  
4  
5 SUMMARY OF ARGUMENT ..... 2  
6  
7 ARGUMENT ..... 3  
8  
9 I. The Agencies Cannot Evade Responsibility for Assessing the Rule’s Harms ..... 4  
10  
11 II. The Agencies Irrationally Disregard Most of the Rule’s Harms ..... 6  
12  
13 III. The Agencies Grossly Undervalue the Harms that They Do Quantify, Failing to  
14 Recognize the Critical Importance of Wetlands ..... 10  
15  
16 A. The Nationwide Analysis Irrationally Undervalues the Harms of Wetlands  
17 Degradation Through at Least Three Major Errors ..... 10  
18  
19 1. The Agencies Ignore the Substantial Interstate Benefits that Wetlands  
20 Provide ..... 11  
21  
22 2. The Agencies Grossly Underestimate Wetlands’ In-State Benefits ..... 14  
23  
24 3. The Agencies’ Assumption that States Will Preserve Waters Losing  
25 Federal Protection Is Speculative and Overlooks Key Considerations ..... 18  
26  
27 B. The Case Studies Are Fundamentally Flawed ..... 21  
28  
29 IV. In Stark Contrast to Their Treatment of Forgone Benefits, the Agencies Substantially  
30 Overestimate Compliance-Cost Savings ..... 23  
31  
32 CONCLUSION ..... 25  
33  
34  
35  
36  
37  
38

1 **TABLE OF AUTHORITIES**

2 **Cases** **Page(s)**

3 *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005) ..... 5

4 *Air All. Hous. v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018)..... 4, 5

5 *Am. Petroleum Inst. v. EPA*, 862 F.3d 50 (D.C. Cir. 2017), *modified on reh’g*,

6 883 F.3d 918 (2018)..... 18

7 *Am. Trucking Ass’ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *rev’d on other grounds sub nom.*

8 *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) ..... 8

9 *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229 (9th Cir. 2001) ..... 19

10 *Burlington N. & Santa Fe Ry. v. STB*, 526 F.3d 770 (D.C. Cir. 2008)..... 21

11 *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011)..... 18, 24

12 *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) ..... 16

13 *Ctr. for Biological Diversity v. NHTSA.*, 538 F.3d 1172 (9th Cir. 2008)..... passim

14 *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) ..... 5

15 *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014)..... 19

16 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)..... 24

17 *Michigan v. EPA*, 135 S. Ct. 2699 (2015) ..... 4

18 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)..... 3, 5

19 *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012)..... 5

20 *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)..... 13

21 *Pub. Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004)..... 6

22 *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39 (2d Cir. 2003)..... 3, 6

23 *Puget Soundkeeper All. v. Wheeler*, No. C15-1342, 2018 WL 6169196 (W.D. Wa. Nov. 26, 2018).. 2

24 *Rapanos v. United States*, 547 U.S. 715 (2006)..... 2, 19

25

26

27

28

**TABLE OF AUTHORITIES (cont.)**

<b>Cases (cont.)</b>	<b>Page(s)</b>
<i>S.C. Coastal Conservation League v. Pruitt</i> , 318 F. Supp. 3d 959 (D.S.C. 2018) .....	2
<i>Sierra Club v. Dep’t of the Interior</i> , 899 F.3d 260 (4th Cir. 2018) .....	13, 21
<i>Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers</i> , 531 U.S. 159 (2001).....	2
 <b>Statutes and Regulations</b>	
33 U.S.C. § 1251(a) .....	passim
Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) .....	1-2
Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020) .....	passim
 <b>Other Authorities</b>	
Ariel Wittenberg & Kevin Bogardus, “ <i>EPA Falsely Claims ‘No Data’ on Waters in WOTUS Rule</i> ,” E&E News (Dec. 11, 2018), <a href="https://www.eenews.net/stories/1060109323">https://www.eenews.net/stories/1060109323</a> .....	9
Attorneys General of New York et al., Comment Letter to Revised Definition of “Waters of the United States” (Apr. 15, 2019), <i>available at</i> <a href="https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467">https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467</a> .....	19-20
Brief for Institute for Policy Integrity as Amicus Curiae Supporting Plaintiffs, <i>New York v. Pruitt</i> , No. 18-1030 (S.D.N.Y. filed May 11, 2018), <i>available at</i> <a href="https://policyintegrity.org/documents/Policy_Integrity_Amicus_Brief_-_Clean_Water_Rule_051118.pdf">https://policyintegrity.org/documents/Policy_Integrity_Amicus_Brief_- _Clean_Water_Rule_051118.pdf</a> .....	2
Catherine L. Kling, Ph.D., <i>Expert Review of the Economic Analysis for the Proposed Revised Definition of “Waters of the United States”</i> (2019), <i>available at</i> <a href="https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467">https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467</a> .....	12, 13, 14
Elena Besedin & Klaus Moeltner, Memo. Regarding Notes on Inclusion of Source Studies and Data Preparation for Wetlands Meta-Data (2018), <i>available at</i> <a href="https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15642">https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15642</a> .....	17-18
EPA & Army Corps of Engineers, The Navigable Waters Protection Rule – Public Comment Summary Document, Topic 11: Economic Analysis and Resource and Programmatic Assessment (2020), <i>available at</i> <a href="https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11574">https://www.regulations.gov/document?D=EPA- HQ-OW-2018-0149-11574</a> .....	15, 17, 24

**TABLE OF AUTHORITIES (cont.)**

<b>Other Authorities (cont.)</b>	<b>Page(s)</b>
EPA & Dep’t of the Army, Economic Analysis of the Navigable Waters Protection Rule: Definition of “Waters of the United States” (2020), <i>available at</i> <a href="https://www.epa.gov/sites/production/files/2020-01/documents/econ_analysis_-_nwpr.pdf">https://www.epa.gov/sites/production/files/2020-01/documents/econ_analysis_-_nwpr.pdf</a> .....	passim
EPA & Dep’t of the Army, Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the United States” (2020), <i>available at</i> <a href="https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf">https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf</a> .....	9
EPA & U.S. Dep’t of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015), <i>available at</i> <a href="https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf">https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf</a> .....	4, 7, 8, 23, 24
EPA Sci. Advisory Bd., Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act (2020), <i>available at</i> <a href="https://perma.cc/ETX9-QSPQ">https://perma.cc/ETX9-QSPQ</a> .....	3-4
EPA, <i>Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence</i> (2015), <i>available at</i> <a href="https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414">https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414</a> .....	12, 15
EPA, <i>Guidelines for Preparing Economic Analyses</i> (2010), <i>available at</i> <a href="https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses">https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses</a> .....	19
Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) .....	4
Glenn C. Blomquist & John C. Whitehead, <i>Resource Quality Information and Validity of Willingness to Pay in Contingent Valuation</i> , 20 Res. & Energy Econ. 179 (1998).....	21, 22
Inst. for Pol’y Integrity, Comments on Proposed Rule (Apr. 15, 2019), <i>available at</i> <a href="https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-6898">https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-6898</a> .....	1, 19, 24
Jeffrey Mullen, Ph.D., <i>Final Review of the 2018 EPA Economic Analysis for the Proposed Revised Definition of Waters of the United States</i> (2019), <i>available at</i> <a href="https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717">https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717</a> (Exhibit D) .....	11, 17, 18
John C. Whitehead, Ph.D., <i>Comments on “Economic Analysis for the Proposed Revised Definition of ‘Waters of the United States’”</i> (2019), <i>available at</i> <a href="https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717">https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717</a> .....	12, 14, 21, 22
Klaus Moeltner, et al., <i>Waters of the United States: Upgrading Wetland Valuation Via Benefit Transfer</i> , 164 Ecological Econ. 106,336 (2019).....	14, 16, 17

1 **TABLE OF AUTHORITIES (cont.)**

2 **Other Authorities (cont.)** **Page(s)**

3 Office of Mgmt. & Budget, Circular A-4, Regulatory Analysis (2003)..... passim

4 Per G. Fredriksson, *Environmental Federalism: Lessons Learned from the Literature* (2018), available

5 at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0011> ..... 20

6 Peter Howard & Jeffrey Shrader, An Evaluation of the Revised Definition of “Waters of the United

7 States” (Apr. 11, 2019), available at [https://www.regulations.gov/document?D=EPA-HQ-OW-](https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5272)

8 [2018-0149-5272](https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5272) ..... 1, 13, 17, 21

9 States’ Memorandum in Support of Motion for Preliminary Injunction, *North Dakota v. EPA*, 127 F.

10 Supp. 3d 1047 (D.N.D. 2015) (No. 3:15-cv-00059)..... 20

1 The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”)  
2 submits this brief as *amicus curiae* in support of Plaintiffs’ motion for a preliminary injunction  
3 enjoining the Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed.  
4 Reg. 22,250 (Apr. 21, 2020) (“Rule”), promulgated by the Environmental Protection Agency and  
5 Department of the Army, Corps of Engineers (collectively, “the agencies”).<sup>1</sup>

#### 6 INTEREST OF AMICUS CURIAE

7 Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government  
8 decisionmaking through advocacy and scholarship in administrative law, economics, and  
9 environmental policy. Policy Integrity’s staff of economists and lawyers has produced extensive  
10 scholarship on the use of economic analysis in regulatory decisionmaking. Its director, Professor  
11 Richard L. Revesz, has published over 80 articles and books on environmental and administrative law,  
12 including numerous works on environmental federalism.<sup>2</sup>

13 Harnessing its academic and regulatory expertise, Policy Integrity has participated in multiple  
14 agency and court proceedings regarding the agencies’ recent attempts to limit their regulatory  
15 jurisdiction under the Clean Water Act. Policy Integrity submitted comments on the proposal  
16 underlying the Rule.<sup>3</sup> Policy Integrity’s economics director, Peter Howard, Ph.D., co-authored a report  
17 with Jeffrey Shrader, Ph.D., a professor at Columbia University’s School of International and Public  
18 Affairs, analyzing flaws in the economic analysis accompanying that proposal, which Policy Integrity  
19 submitted to the record (“Howard & Shrader Report”).<sup>4</sup> Policy Integrity submitted comments on the  
20 agencies’ earlier proposal to repeal the Clean Water Rule: Definition of “Waters of the United States,”  
21  
22

---

23 <sup>1</sup> This brief does not purport to represent the views, if any, of New York University School of  
24 Law. Policy Integrity states that no party’s counsel authored this brief in whole or in part, and no  
25 person contributed money intended to fund the preparation or submission of this brief.

26 <sup>2</sup> A full list of publications can be found in Prof. Revesz’s online faculty profile,  
<https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20228>.

27 <sup>3</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-6898>  
28 (“Policy Integrity Comments”).

<sup>4</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5272>.

1 80 Fed. Reg. 37,054 (June 29, 2015) (“Clean Water Rule”).<sup>5</sup> And Policy Integrity submitted an *amicus*  
2 brief supporting a challenge to the suspension of the Clean Water Rule. In that brief, Policy Integrity  
3 argued that the agencies failed to rationally analyze the harms of the suspension, ignoring considerable  
4 forgone benefits. *See* Brief for Institute for Policy Integrity as Amicus Curiae Supporting Plaintiffs at  
5 3–4, *New York v. Pruitt*, No. 18-1030 (S.D.N.Y. filed May 11, 2018).<sup>6</sup>

6 In this case, Plaintiffs contend that the agencies unlawfully fail to meaningfully evaluate the  
7 Rule’s extensive impacts. Because the agencies’ economic analysis is their most focused assessment  
8 of those impacts, Policy Integrity’s expertise in economic analysis and experience with the agencies’  
9 various rulemakings give it a unique and useful perspective on that claim.

#### 10 SUMMARY OF ARGUMENT

11 This brief focuses on the agencies’ economic analysis for the Rule, which is a key way in which  
12 the agencies obscure the Rule’s anticipated harms. Despite their obligation to “restore and maintain  
13 the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a)—and  
14 their authority to exercise jurisdiction over waters with “a ‘significant nexus’ to waters . . . navigable  
15 in fact,” *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring) (quoting *Solid*  
16 *Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 (2001))—the  
17 agencies do not meaningfully assess the Rule’s impacts on downstream water quality, repeatedly  
18 failing to recognize the extensive harm that the Rule will cause.

19 Time after time, the economic analysis relies on irrational and ill-informed assumptions,  
20 violates regulatory guidance and precedent, and makes claims about water connectivity that are  
21 inconsistent with basic science—all with the effect of minimizing the Rule’s extensive harms and  
22 making them seem minor in relation to its alleged cost savings. For one, the agencies fail to project

---

24 <sup>5</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-10362>.

25 <sup>6</sup> Available at [https://policyintegrity.org/documents/Policy\\_Integrity\\_Amicus\\_Brief\\_-\\_](https://policyintegrity.org/documents/Policy_Integrity_Amicus_Brief_-_Clean_Water_Rule_051118.pdf)  
26 [Clean\\_Water\\_Rule\\_051118.pdf](https://policyintegrity.org/documents/Policy_Integrity_Amicus_Brief_-_Clean_Water_Rule_051118.pdf). That suspension was struck down in two separate courts for failure  
27 to comply with notice-and-comment requirements. *Puget Soundkeeper All. v. Wheeler*, No. C15-1342,  
2018 WL 6169196 (W.D. Wa. Nov. 26, 2018); *S.C. Coastal Conservation League v. Pruitt*, 318 F.  
28 Supp. 3d 959 (D.S.C. 2018).



1 the harms to water quality that the Rule will impose due to rollbacks under the Section 402 (pollutant  
2 discharge) and Section 311 (oil-spill prevention) programs, falsely claiming a lack of data despite  
3 extensive analysis by the agencies about similar impacts in prior rulemakings. And although the  
4 agencies do value impacts from wetlands degradation under Section 404’s dredge/fill program, their  
5 analysis is riddled with errors that understate critical harms. For instance, the agencies base their  
6 wetlands valuation on an implausible assumption that wetlands benefit in-state residents only, ignoring  
7 extensive scientific and economic evidence that wetlands have wide-ranging interstate and  
8 downstream benefits. The agencies also understate the Rule’s harms by underestimating in-state  
9 benefits and improperly and irrationally assuming that states will preserve the waters losing federal  
10 protection—disregarding their own commissioned analysis of the conditions that produce state  
11 regulation. Distinguished economists flagged these errors to the agencies, but their advice went  
12 unheeded. The agencies even disregard an economist’s plea that the agencies not misuse his work.

13 All told, the agencies likely neglect roughly 90% of the Rule’s wetlands-related costs—more  
14 than \$1 billion annually—according to expert analyses, leading the agencies to falsely claim that the  
15 Rule’s purported cost savings justify these harms. By doing so, the agencies fail to rationally “explain  
16 why the costs saved were worth the benefits sacrificed.” *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58  
17 (2d Cir. 2003). This is particularly egregious because, as detailed below, the agencies’ cost-savings  
18 estimates for the Rule are substantially inflated from prior analyses.

19 By disregarding many of the Rule’s impacts on the “chemical, physical, and biological  
20 integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the agencies “fail[] to consider an important  
21 aspect” of the Clean Water Act’s jurisdictional analysis, *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*  
22 *Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), rendering the Rule arbitrary and capricious.

## 23 ARGUMENT

24 In limiting clean-water protection to its narrowest scope in decades, the agencies repeatedly  
25 obscure the Rule’s substantial harms. From a scientific perspective, as EPA’s own Science Advisory  
26 Board concluded, the agencies “do[] not provide a scientific basis” for the Rule or “incorporate best  
27 available science” to analyze its impacts. EPA Sci. Advisory Bd., Commentary on the Proposed Rule

1 Defining the Scope of Waters Federally Regulated Under the Clean Water Act 1–2 (2020).<sup>7</sup> And from  
2 a social-welfare perspective, while the agencies’ economic analysis offers an attempt to assess the  
3 Rule’s impacts, it too is sorely lacking. The errors in that analysis demonstrate that the agencies fail  
4 to provide a reasoned explanation for the Rule.

5 **I. The Agencies Cannot Evade Responsibility for Assessing the Rule’s Harms**

6 As a preliminary matter, the agencies hope to avoid responsibility for their error-filled  
7 economic analysis by claiming that they did not rely on it. But that attempt falls flat.

8 The agencies prepared an economic analysis of the Rule pursuant to executive guidance that  
9 requires agencies to assess the costs and benefits of regulatory actions and “propose or adopt” a  
10 regulation only when the “benefits . . . justify its costs.” Exec. Order No. 12,866, § 1(b)(6), 58 Fed.  
11 Reg. 51,735 (Oct. 4, 1993). Regulatory costs under this approach encompass “any disadvantage” from  
12 a rule, “including, for instance, harms that regulation might do to human health or the environment.”  
13 *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). And courts generally require agencies to address such  
14 costs when issuing a deregulatory rule such as the one at issue in this case. *See Air All. Hous. v. EPA*,  
15 906 F.3d 1049, 1067–68 (D.C. Cir. 2018) (vacating suspension of Clean Air Act rule for failing to  
16 adequately address harms).

17 Pursuant to this guidance, agencies for decades have assessed and quantified regulatory  
18 impacts to promote transparency and rational decisionmaking. EPA, for example, regularly uses  
19 economics to translate a rule’s expected health and public-welfare impacts into monetary values.  
20 When promulgating the Clean Water Rule, the agencies monetized many of the rule’s environmental  
21 benefits and determined that monetized benefits exceeded total compliance costs by at least tens of  
22 millions of dollars per year. EPA & U.S. Dep’t of the Army, *Economic Analysis of the EPA-Army*  
23 *Clean Water Rule xi* (2015) (“2015 EA”).<sup>8</sup> Yet for this Rule, the agencies’ economic analysis is  
24

---

25  
26 <sup>7</sup> Available at <https://perma.cc/ETX9-QSPQ>.

27 <sup>8</sup> Available at [https://www.epa.gov/sites/production/files/2015-06/documents/508-  
28 final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-20-15.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf).

1 hopelessly flawed as they continually understate the Rule’s forgone benefits while inflating  
2 compliance-cost savings. *See infra* Sections II–IV.

3         When substantial flaws undermine an agency’s economic analysis, like here, courts find the  
4 rule arbitrary and capricious. *See, e.g., Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d  
5 1136, 1146–47 (D.C. Cir. 2005). Yet the agencies apparently hope to skirt responsibility for their  
6 errors by claiming that the Rule “is not based on the . . . economic analysis.” 85 Fed. Reg. at 22,332.  
7 To that end, they cite caselaw suggesting that only if “an agency decides to rely on a cost-benefit  
8 analysis” would a serious flaw undermining that analysis render the rule unreasonable. *Id.* at 22,335  
9 (citing *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1039–40 (D.C. Cir. 2012)). But this claim  
10 does not relieve the agencies of responsibility for their erroneous economic analysis, for two reasons.

11         First, when changing course, an agency is required to “articulate a satisfactory explanation for  
12 its action,” and courts will set aside the action if an agency failed to consider “an important aspect of  
13 the problem.” *State Farm*, 463 U.S. at 43. An important aspect that agencies normally may not ignore  
14 is the harm of a deregulatory rule, *see, e.g., Air All.*, 906 F.3d at 1067—including when, like here, an  
15 agency makes policy judgments it considers “reasonable” when interpreting an “ambiguous” statute.  
16 *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124–25 (2016) (explaining that agency “must  
17 give adequate reasons for its decisions” in such circumstances). Here, a critical aspect in assessing the  
18 scope of regulatory jurisdiction under the Clean Water Act is the Rule’s impact on water quality and  
19 whether the rulemaking serves the statute’s purpose of restoring and maintaining “the chemical,  
20 physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a). *National Association  
21 of Home Builders*—the case that the agencies invoke—does not relieve the agencies of that duty. And  
22 by failing to adequately assess the Rule’s downstream water-quality harms—as evidenced, in part, by  
23 their faulty economic analysis—the agencies do not provide the required justification.

24         Second, the agencies’ own statements demonstrate the falseness of their claim that they do not  
25 rely on the economic analysis. In justifying the Rule, the agencies tout their belief that the Rule will  
26 “ease administrative burdens,” 85 Fed. Reg. at 22,269, that the Rule will result in “net cost savings for  
27 all entities affected,” *id.* at 22,335, and that “net benefits would increase,” *id.* at 22,334. It is black-

1 letter law that when emphasizing “economic costs,” agencies must “explain why the costs saved were  
2 worth the benefits sacrificed.” *Mineta*, 340 F.3d at 58. Yet the agencies instead have put “a thumb on  
3 the scale” by omitting key health and welfare costs, rendering the Rule unreasonable. *See Ctr. for*  
4 *Biological Diversity v. NHTSA.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

5 Thus, the agencies cannot escape the flaws in their economic analysis. And as we detail below,  
6 those flaws make clear that the Rule is arbitrary and capricious.

## 7 **II. The Agencies Irrationally Disregard Most of the Rule’s Harms**

8 The economic analysis offers little definitive information about the Rule’s impacts outside the  
9 Section 404 program, and is just as notable for what it omits. The agencies allege that “data limitations  
10 constrain” their “ability to estimate, quantify, and value the potential effects of the final rule on the  
11 [Clean Water Act] sections 402 and 311 programs,” EPA & Dep’t of the Army, Economic Analysis  
12 of the Navigable Waters Protection Rule: Definition of “Waters of the United States” xxii (2020)  
13 (“EA”)<sup>9</sup>—and, as a result, they accord these impacts virtually no significance, *see, e.g., id.* at xxi  
14 (tallying Rule’s costs and benefits without quantification of impacts under Sections 311 or 402).

15 But “[r]egulators by nature work under conditions of serious uncertainty,” and “uncertainty  
16 alone” cannot serve as “an excuse to ignore . . . a particular regulatory issue.” *Pub. Citizen v. FMCSA*,  
17 374 F.3d 1209, 1221 (D.C. Cir. 2004). Instead, with uncertainty, longstanding White House guidance  
18 instructs agencies to “monetize . . . whenever possible”—and, when monetization is not possible, to  
19 present relevant “quantitative information” on regulatory impacts such as the number of “stream miles  
20 of [affected] water quality.” Office of Mgmt. & Budget, Circular A-4, Regulatory Analysis 27 (2003)  
21 (“Circular A-4”). In these circumstances, agencies, including EPA, commonly provide “estimates of  
22  
23  
24  
25

---

26 <sup>9</sup> Available at [https://www.epa.gov/sites/production/files/2020-01/documents/econ\\_analysis\\_nwpr.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/econ_analysis_nwpr.pdf).  
27

1 the probabilities of environmental damage to soil or water, the possible loss of habitat, or risks to  
2 endangered species as well as probabilities of harm to human health and safety.” *See id.* at 40.

3 The agencies’ analysis of the Clean Water Rule in 2015 provides a strong example of this  
4 guidance in practice. When assessing the Clean Water Rule, the agencies “examined a random sample  
5 of 188 [recent] jurisdictional determinations” to assess how those determinations would change under  
6 the rule. 2015 EA at 9. Through that analysis, the agencies projected that the Clean Water Rule would  
7 increase federal regulatory protection of all waters by 2.84–4.65%. *Id.* at 12. This jurisdictional  
8 estimate allowed the agencies to monetize many regulatory costs and benefits, including most costs  
9 and benefits under the Section 402 and 404 programs. *Id.* at xi. And while the agencies could not  
10 monetize benefits (but did monetize compliance costs) under Section 311 due to limits in economic  
11 valuation tools, *see id.*, their quantitative estimate of the rule’s jurisdictional impacts provided key  
12 information to assess the magnitude of those effects. Based on their complete assessment of the Clean  
13 Water Rule’s compliance costs informed by their jurisdictional analysis, the agencies were able to  
14 conclude that the benefits that they were able to monetize—namely, many of the environmental  
15 benefits under Sections 402 and 404—exceeded the rule’s total compliance costs. *Id.* at x–xi.

16 In contrast to the sensible and informative approach the agencies took in the past, here the  
17 agencies continually complain that “data limitations” prevent quantifying the waters losing protection  
18 under Sections 311 and 402. *See EA* at xiv, xxii, 16, 19, 48, 52, 60, 97, 99, 120, 127, 164, 171. As a  
19 result, neither of the quantitative analyses that the agencies present offer any genuine assessment of  
20 the harms that the Rule will cause beyond the Section 404 program. For example, the agencies analyze  
21 three limited “case study” watersheds, but, in the case study with impacts under the Section 402  
22 program, they fail to monetize those impacts like they did in the Clean Water Rule. *Id.* at xix tbl. ES-  
23 4. Moreover, in a constrained nationwide analysis, the agencies quantify some impacts under the  
24 Section 404 program only—but do not quantify nationwide jurisdictional impacts under Sections 311  
25 or 402 as they did in 2015. *Id.* at xxii–xxiii. And in a qualitative assessment, the agencies briefly  
26 recognize that the Rule “may have a negative impact on water quality,” *id.* at 59, and “may increase  
27 the probability of a[n oil] spill occurring,” *id.* at 83, but do not assess the severity or downstream harms

1 of these impacts and repeatedly suggest that states may limit these impacts by filling the regulatory  
2 gap left by the Rule, *see, e.g., id.* at 62; *see also infra* section III.A.3 (explaining why the assumption  
3 that states will fill the gap is unreasonable).

4 But the fact that the Rule’s “precise consequences” under these programs may not be “certain”  
5 does not excuse the agencies from their obligation to carefully assess these effects. Circular A-4 at 38.  
6 Indeed, agencies have an obligation to reasonably assess available information about a rule’s impacts  
7 and cannot simply “ignore[.]” impacts that are “difficult . . . to quantify.” *Am. Trucking Ass’ns, Inc. v.*  
8 *EPA*, 175 F.3d 1027, 1052 (D.C. Cir. 1999), *rev’d on other grounds sub nom. Whitman v. Am.*  
9 *Trucking Ass’ns*, 531 U.S. 457 (2001). The agencies could have fulfilled this obligation by estimating  
10 harms relating to the Section 311 and 402 programs using “plausible assumptions,” Circular A-4 at  
11 39—just as they did when analyzing the Clean Water Rule, *see* 2015 EA at v (acknowledging “limited  
12 amount of data” and “uncertainty” but explaining that agencies estimated rule’s impacts through  
13 “analysis” and plausible “assumptions”). Rather than throw their hands up this time, the agencies  
14 should again have employed “appropriate statistical techniques” to assess the “probability . . . [of]  
15 relevant outcomes,” Circular A-4 at 40—like they did in the past. In failing to do so, the agencies do  
16 not provide an adequate explanation for the departure from that prior practice. And in inappropriately  
17 failing “to monetize or quantify” impacts under Sections 311 and 402, they effectively place “no  
18 value” on these harms, which—as the Court of Appeals for the Ninth Circuit has explained—is  
19 arbitrary and capricious when demonstrated statistical valuation techniques are available. *Ctr. for*  
20 *Biological Diversity*, 538 F.3d at 1200–01.

21 Indeed, there is no clear reason why the agencies could not have estimated the scope of the  
22 Rule’s jurisdictional changes through analysis of a sample of waters around the nation, like they did  
23 for the Clean Water Rule. The agencies even collected much of the underlying data for doing so,  
24 making their failure especially puzzling. For their nationwide analysis under Section 404, the agencies  
25 project reductions in permitting and mitigation by analyzing “permit data . . . to identify aquatic  
26 resources and permits potentially affected.” EA at xxii. The agencies do not clearly explain why they  
27 are able to assess the Rule’s jurisdictional impacts under Section 404 but not under other Clean Water

1 Act provisions. In fact, the agencies estimated the percentage of streams nationwide that are ephemeral  
2 and thus categorically excluded under the Rule, according to a Freedom of Information Act  
3 disclosure,<sup>10</sup> yet now disclaim this analysis. *See* EPA & Dep’t of the Army, Resource and  
4 Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the  
5 United States” 41 n.56 (2020).<sup>11</sup>

6 Because they fail to meaningfully assess the scope of so many of the Rule’s jurisdictional  
7 impacts, the agencies do not meaningfully evaluate “how important” these rollbacks are or provide  
8 even ballpark estimates of the resulting water-quality harms. *See* Circular A-4 at 2. This too violates  
9 regulatory guidance, as agencies should “evaluate the[] significance” of all effects—quantified and  
10 unquantified—and assess “which non-quantified effects are most important,” using reasonable  
11 assumptions to analyze whether the rule is net beneficial once those impacts are taken into account.  
12 Circular A-4 at 2. But the agencies hardly do that here. Instead, they present an inconclusive qualitative  
13 assessment, *see* EA at 53–94, present tallies of the Rule’s costs and benefits in the case-study regions  
14 that simply list most of the Rule’s impacts as “not quantified” or “not monetized,” *id.* at xviii–xix tbl.  
15 ES-4, and report the Rule as net beneficial nationwide without carefully assessing the national effects  
16 on the Section 311 and 402 programs, 85 Fed. Reg. at 22,334.

17 The agencies’ failure to evaluate these impacts on water quality is inconsistent with their  
18 obligation under the Clean Water Act to “restore and maintain the chemical, physical, and biological  
19 integrity of the Nation’s waters,” 33 U.S.C. § 1251(a). After all, the agencies cannot seriously purport  
20 to protect the nation’s waters when they do not meaningfully assess how severely the Rule will harm  
21 water quality. The agencies’ failure to quantify or meaningfully assess the scope of the Rule’s impacts  
22 resulting from jurisdictional rollbacks under Sections 311 and 402 is arbitrary and capricious.

---

25 <sup>10</sup> Ariel Wittenberg & Kevin Bogardus, “EPA Falsely Claims ‘No Data’ on Waters in WOTUS  
26 Rule,” E&E News (Dec. 11, 2018), <https://www.eenews.net/stories/1060109323>.

27 <sup>11</sup> Available at [https://www.epa.gov/sites/production/files/2020-01/documents/rpa\\_-\\_nwpr\\_.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf).

1           **III. The Agencies Grossly Undervalue the Harms that They Do Quantify, Failing to**  
2           **Recognize the Critical Importance of Wetlands**

3           The limited and circumscribed monetization that the agencies do provide is also fatally flawed  
4 as it unreasonably undervalues the Rule’s harms in multiple ways. As explained above, the agencies  
5 monetize harms only under the Section 404 program. The agencies assess these impacts at two  
6 different scales: nationwide, and in three “case studies.” But under both approaches, the agencies  
7 arbitrarily minimize the harms of wetlands degradation under the Section 404 program.

8           **A. The Nationwide Analysis Irrationally Undervalues the Harms of Wetlands**  
9           **Degradation Through at Least Three Major Errors**

10          The nationwide analysis irrationally disregards most of the harms to wetlands under the Section  
11 404 program and incorrectly concludes that this aspect of the Rule is cost-benefit justified.

12          The nationwide analysis projects cost savings and forgone benefits from wetlands degradation  
13 under four “scenarios,” which apply different assumptions about the degree to which states will  
14 regulate waters losing federal protection under the Rule. EA at xxii–xxiii. Under each scenario, the  
15 agencies conclude that the Rule’s purported cost savings likely exceed the harms. Under Scenario 3—  
16 which assumes the most state gap-filling and, accordingly, the lowest monetary estimates of harms—  
17 the agencies find that degradation of wetlands will result in just \$55 million in average annual harms,  
18 while producing annual cost savings of \$109–\$215 million. *Id.* But the agencies report considerable  
19 uncertainty in their estimates and recognize that the Rule may be net-costly under all scenarios. *See*  
20 *id.* at xxiii (reporting overlapping ranges of costs and benefits). In fact, under Scenario 0—the scenario  
21 that, as detailed below, properly assumes no state gap-filling—the agencies report \$29–\$555 million  
22 in forgone benefits, with cost savings estimates of \$245–\$513 million, meaning that the “high  
23 estimates of forgone benefits are greater than cost estimates.” *Id.* at xxii–xxiii.

24          In such circumstances, when there is uncertainty about whether a regulatory measure is  
25 beneficial or harmful, and when an agency’s conclusions “depend heavily on certain assumptions,”  
26 the agency should “conduct further analysis” using “alternative plausible assumptions.” Circular A-4  
27 at 42. Here, however, the agencies disregard this recommendation and continually short-change their



1 estimates of forgone benefits. Specifically, the agencies commit at least three crucial errors that  
2 substantially underestimate the Rule’s harms and give the false impression that the Rule is likely net  
3 beneficial. First, the agencies arbitrarily limit their analysis to the impacts of wetlands inside a state,  
4 ignoring wetlands’ well-recognized interstate benefits. Second, the agencies erroneously devalue the  
5 harms that individuals receive from in-state wetlands. And third, the agencies make baseless and  
6 irrational assumptions that states will fill the regulatory gap left by the Rule, despite extensive  
7 indications otherwise.<sup>12</sup>

8         These errors are significant. Correcting them reveals that the Rule could deprive society of  
9 over \$1.6 billion in annual benefits under the Section 404 program, according to an expert economist’s  
10 regulatory comments, and not the \$173 million that the agencies project under one scenario. Jeffrey  
11 Mullen, Ph.D., *Final Review of the 2018 EPA Economic Analysis for the Proposed Revised Definition*  
12 *of Waters of the United States* 32 tbl. 2.2 (2019) (“Mullen Report”) (providing mean estimate of  
13 forgone benefits as \$1,648 million).<sup>13</sup> When properly analyzed, the Rule’s social harms from wetlands  
14 degradation thus likely exceed associated cost savings by a wide margin. *Compare id. with EA* at xxii  
15 (reporting much lower cost savings).

#### 16     **1. The Agencies Ignore the Substantial Interstate Benefits that Wetlands Provide**

17         One of the most substantial errors is the agencies’ decision to cut off the harms of wetlands  
18 degradation at the state border. This not only drastically undercounts the Rule’s harms, but also evinces  
19 a fundamental misunderstanding of the value of wetlands services to downstream waters.

---

23         <sup>12</sup> This section details flaws in the values that the agencies quantify. But the agencies omit  
24 other forgone benefits. For instance, while “[p]rojects may shift away from areas containing waters  
25 that require 404 permits to areas with waters that would not be jurisdictional,” EA at 71, the agencies  
26 do not quantify this effect. The agencies also limit their analysis to impacts on compensatory  
mitigation, *id.* at 165, disregarding reductions in on-site prevention. The agencies inappropriately  
conclude that cost savings exceed forgone benefits without accounting for these impacts.

27         <sup>13</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717>  
(Exhibit D). Mullen’s estimates are in 2017\$, whereas the EA presents estimates in 2018\$.

1 To monetize the costs of wetlands degradation, the agencies estimate the wetlands acreage lost  
2 in each state due to the Rule and then, using studies that assess people’s willingness to pay for wetlands  
3 protection, calculate the monetary value of that lost acreage. EA at 207. But the agencies erroneously  
4 assume that only individuals residing within the state of the affected wetland are harmed and find that  
5 the harm from loss of out-of-state wetlands “is zero.” *Id.*

6 This assumption violates sound science and economics. As the agencies recognized in the  
7 Clean Water Rule in 2015, wetlands benefit a wide range of other water bodies without respect to state  
8 boundaries. *See* EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and*  
9 *Synthesis of the Scientific Evidence* 4-1 to 4-45 (2015) (“Connectivity Report”).<sup>14</sup> For instance,  
10 wetlands provide physical, chemical, and biological functions that affect the integrity of downstream  
11 waters, reducing flooding from rivers and streams, providing nutrients that help those waters thrive,  
12 and serving as a habitat for fish and amphibians that inhabit those waters. *Id.* at 4-1 to 4-2. These  
13 benefits do not stop at the state line.

14 Echoing this science, numerous economic studies highlighted in experts’ comments conclude  
15 that individuals place considerable value on wetlands outside their home state. *See, e.g.,* Catherine L.  
16 Kling, Ph.D., *Expert Review of the Economic Analysis for the Proposed Revised Definition of “Waters*  
17 *of the United States”* 6 (2019) (“Kling Report”).<sup>15</sup> One study, for example, finds that more than 80%  
18 of the benefits of wetlands protection are interstate. John C. Whitehead, Ph.D., *Comments on*  
19 *“Economic Analysis for the Proposed Revised Definition of ‘Waters of the United States’”* 10 (2019)  
20 (“Whitehead Report”).<sup>16</sup> The agencies’ contrary assumption that the benefits of wetlands protection  
21 stop at the state border represents “a complete failure to reasonably reflect upon the information  
22  
23

---

24  
25 <sup>14</sup> Available at <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

26 <sup>15</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467>  
(Attachment B).

27 <sup>16</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717>  
(Exhibit C).

1 contained in the record.” *Sierra Club v. Dep’t of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018)  
2 (internal quotation marks omitted).

3 The agencies’ assumption that wetlands provide no interstate benefits is particularly  
4 nonsensical given their recognition that wetlands provide benefits across vast intrastate distances. For  
5 example, when assessing Texas, the agencies assume that households in Brownsville benefit from  
6 wetlands near El Paso, and vice versa, despite the fact that these cities are hundreds of miles apart. *See*  
7 EA at 222 tbl. E-5 (calculating harms from wetlands degradation for all in-state residents). This  
8 decision makes sense: Brownsville and El Paso are both on the Rio Grande, so cleaner wetlands  
9 upstream benefit those that rely on the river for drinking water and irrigation. But the Rio Grande also  
10 extends into New Mexico and Colorado, yet the agencies implausibly assume that similar water-  
11 quality impacts in those states—including impacts much closer to Texas than the distance between El  
12 Paso and Brownsville—impose no harm on Texas residents. This presumption that Texans do not also  
13 benefit from upstream waters in those states is an “[u]nexplained inconsistency” that cannot stand. *See*  
14 *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

15 The agencies’ justification for this approach is also illogical. Specifically, the agencies explain  
16 that most of the relevant economic literature on wetlands valuation was “conducted at the state level.”  
17 EA at 207. But the fact that some studies looked at valuation of in-state wetlands hardly means that  
18 wetlands provide zero interstate benefits. In fact, numerous relevant studies assessed multi-state  
19 regions, and those studies “make clear that people are willing to pay for wetlands across regional  
20 distances.” Howard & Shrader Report at 11. One study, for instance, “found that residents of Oregon,  
21 Washington, and Nevada all reported positive willingness to pay values to protect wetlands in . . .  
22 California.” Kling Report at 6. Indeed, the agencies briefly admit that “wetland benefits cross[] state  
23 boundaries,” EA at 226, yet their analysis assumes the exact opposite.

24 To be sure, in a three page-appendix, the agencies conduct a “sensitivity analysis” where they  
25 acknowledge that wetlands may produce some interstate benefits, but only to counties that  
26 immediately abut the state where the wetland is located. *Id.* at 226–28. But limiting the analysis to  
27 those counties is no less arbitrary than cutting off benefits at the state line. In fact, households as distant

1 as 640 miles from a water body derive benefit from its preservation—usually far more than one county  
2 into the neighboring state. Kling Report at 6. For instance, the agencies would count California’s  
3 southeastern counties as benefiting from protection of wetlands near the Colorado River in  
4 neighboring Arizona, yet deriving zero benefit from similar protections in other upstream states like  
5 Utah and Colorado. Unsurprisingly, therefore, the agencies’ sensitivity analysis continues to greatly  
6 undervalue wetlands services. *Compare* EA at 227 tbl. F-1 (reporting forgone benefits of \$67 million  
7 under Scenario 3, a 22% increase from primary analysis of \$55 million) *with* Whitehead Report at 10  
8 (explaining that proper geographic scope increases forgone benefits roughly five-fold).

9       Ultimately, while there may be “a range of values” for wetlands’ interstate benefits—including  
10 those more than one county beyond the state border—the value is “certainly not zero.” *Ctr. for*  
11 *Biological Diversity*, 538 F.3d at 1200. The agencies err by assuming otherwise, arbitrarily minimizing  
12 the Rule’s harms while dismissing science on the critical services wetlands provide.

## 13       **2. The Agencies Grossly Underestimate Wetlands’ In-State Benefits**

14       Because the agencies irrationally disregard the interstate benefits that wetlands provide, they  
15 consider only the harms of wetlands degradation to in-state residents. But here, too, the agencies  
16 severely undervalue the Rule’s harms, in at least three significant ways.

17       To conduct the nationwide analysis, the agencies commissioned a study that, through a review  
18 of the underlying economic literature, calculated a per-acre value for wetlands loss per household. *See*  
19 Klaus Moeltner, et al., *Waters of the United States: Upgrading Wetland Valuation Via Benefit*  
20 *Transfer*, 164 *Ecological Econ.* 106,336 (2019) (“Moeltner Study”),<sup>17</sup> *cited in* EA at 207–10. The  
21 agencies then apply that value to monetize the harm of degraded wetlands in each state to that state’s  
22 residents. In calculating those state-level values, the agencies commit at least three egregious errors.

---

25  
26       <sup>17</sup> The agencies uploaded an unpublished version of this same paper to record, available at  
27 <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0031>. Pincites in this brief are  
28 to the published version.

1 First, the agencies ignore the unique benefits that wetlands provide to local residents. While  
2 wetlands have wide-ranging impacts on distant downstream waters, as detailed above, they can also  
3 provide unique benefits at the local level, such as attenuating flooding and serving as a rearing habitat  
4 for fish. Connectivity Report at 4-1 to 4-2. Unsurprisingly, therefore, individuals who live close to a  
5 particular wetland value that wetland the most. The agencies' commissioned study indeed reported  
6 that residence in close proximity to a wetland is the factor that has the most significant impact on one's  
7 valuation. EA at 209 (reporting value of "local" and other variables).

8 Yet the agencies completely ignore these impacts when estimating the harm that in-state  
9 residents will suffer from wetlands degradation. In doing so, the agencies irrationally assume that *no*  
10 in-state residents live near any degraded wetland, allowing them to totally and unjustifiably disregard  
11 the unique local benefits that wetlands provide in their valuation. EPA & Army Corps of Engineers,  
12 The Navigable Waters Protection Rule – Public Comment Summary Document, Topic 11: Economic  
13 Analysis and Resource and Programmatic Assessment 80 (2020) ("Response to Comments").<sup>18</sup> The  
14 agencies' explanation for this exclusion—that "the majority [of] the affected households are likely to  
15 be non-local," *id.*—is illogical. Even granting that most individuals will not live near a degraded  
16 wetland, the additional valuation from local residents could still be substantial. Again, while there may  
17 be some variation in the exact local benefit, the proper valuation is "certainly not zero." *Ctr. for*  
18 *Biological Diversity*, 538 F.3d at 1200.

19 Second, the agencies improperly minimize the long-term harms of wetlands degradation.  
20 Whereas the costs of wetlands mitigation are one-time, the benefits are indefinite. To compare forgone  
21 costs and benefits across these different time scales, the agencies convert the annualized willingness-  
22 to-pay values for wetlands preservation reported in the underlying economic studies into cumulative  
23 values representing lump sum willingness-to-pay. They do this conversion by multiplying the  
24  
25  
26

---

27 <sup>18</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11574>.

1 annualized willingness-to-pay values by 4.4.<sup>19</sup> In other words, the agencies assume that the harm  
2 suffered over 20 years from the loss of a wetland, EA at 123 (providing scope of analysis as “20  
3 years”), is just 4.4 times greater than the harm suffered in one year from the loss of that same wetland.  
4 This is clearly erroneous and vastly undervalues the harm of wetlands degradation.

5         The common economic process of discounting—which “adjust[s] . . . for differences in timing”  
6 by converting future monetary amounts into present value, Circular A-4 at 32—confirms the absurdity  
7 of the agencies’ use of a 4.4 multiplier. Agencies typically use annual discount rates of 3% and 7%.  
8 *Id.* at 33. Here, standard analysis would involve adding annual values from the annualized studies over  
9 the 20-year range of the analysis and then discounting future values at 3% and 7%. Converting annual  
10 to cumulative values using this standard process reveals that the cumulative value of wetlands  
11 degradation is approximately 11–15 times the annual value,<sup>20</sup> far higher than 4.4. In fact, the agencies’  
12 4.4 multiplier implies an unheard-of annual discount rate of nearly 23%,<sup>21</sup> which is not “ever[] used  
13 to support a . . . regulation” and represents “cavalier treatment” of this impact, *Corrosion Proof*  
14 *Fittings v. EPA*, 947 F.2d 1201, 1223 (5th Cir. 1991) (discussing agency’s use of another economic  
15 value); *see also id.* at 1218 (explaining that agency cannot “discount costs or benefits . . .  
16 unreasonabl[y]”). Indeed, the agencies follow standard discounting practices when estimating the  
17 Rule’s cost savings. EA at 123 (noting use of “three percent and seven percent discount rates” for case  
18 studies). By minimizing long-term forgone benefits while appropriately discounting long-term cost  
19 savings, the agencies fail “to preserve an apples-to-apples comparison” of these impacts, *Corrosion*  
20 *Proof Fittings*, 947 F.2d at 1218, further tipping the scales to make the Rule appear net-beneficial.

---

23  
24  
25  
26  
27  
28  
<sup>19</sup> See Moeltner Study at 8 (reporting “lumpsum” variable); EA at 210 (explaining that agencies activated “lumpsum” variable when converting to a “one-time annual value”).

<sup>20</sup> To arrive at this calculation, as noted above, we simply add a set value over 20 years, discounting future years at 3% and 7%. Using a 3% discount rate, the cumulative value is approximately 15 times the annual value. Using a 7% discount rate, the difference is about 11 times.

<sup>21</sup> When discounting over an indefinite period, the cumulative value multiplier is the inverse of the discount rate. Because  $1/0.227=4.4$ , this means that the agencies imply a discount rate of 22.7%.

1 Third, the agencies reduce the benefits of wetlands for in-state residents through a  
2 mathematical trick. The commissioned study found that individuals place a greater value on each acre  
3 of wetlands as the total acreage of wetlands increases. *See* Moeltner Study at 9 (reporting “convexity  
4 of the [willingness-to-pay] function”). Accordingly, individuals suffer more when wetlands are  
5 degraded in areas with greater wetlands acreage versus less acreage, since people in areas with larger  
6 wetlands place a greater per-acre value on wetlands. Thus, the “baseline” acreage used in the  
7 analysis—that is, the assumed acreage starting point, prior to any degradation—can significantly affect  
8 the assessment of forgone benefits. Yet in calculating the harms from wetlands losses per state, the  
9 agencies assume an unreasonably low baseline acreage, significantly and arbitrarily diminishing their  
10 estimate. Specifically, the agencies assume a per-state baseline acreage of 10,000. EA at 210. This is  
11 a gross underestimate: Most states have well beyond 10,000 acres of wetlands. Alaska, in fact, alone  
12 has 175 million acres. Howard & Shrader Report at 10; *see also* Mullen Report at 19 (reporting  
13 “average of 2.4 million acres across all states”).

14 The agencies cannot justify a baseline so divorced from real-world conditions. The agencies  
15 explain that they set the baseline at 10,000 because that is the median acreage of wetlands in the  
16 underlying studies assessed, and they wished to “avoid prediction out of sample.” Response to  
17 Comments at 81. But expert reports submitted to the agencies recommended more realistic baselines  
18 that still fall within the sample of baseline values reported in the agencies’ commissioned study, such  
19 as using the mean acreage (40,000) from the underlying studies, Howard & Shrader Report at 10, or  
20 the baseline value in those studies that most closely resembles real-world acreage (220,000), Mullen  
21 Report at 19. And as these reports explain, the median value that the agencies use provides an  
22 “inappropriate[ly] . . . low value,” *id.*, that is unrepresentative of the underlying economic research  
23 and “not an appropriate choice,” Howard & Shrader Report at 10. In fact, this median value comes  
24 from a study that evaluated “[h]ypothetical, non-specified wetlands” in one slice of Ohio that provides  
25 no basis for a national analysis. Elena Besedin & Klaus Moeltner, Memo. Regarding Notes on  
26  
27  
28

1 Inclusion of Source Studies and Data Preparation for Wetlands Meta-Data 6 (2018).<sup>22</sup> Given its lack  
2 of “concurrence [with] reality,” the agencies’ reliance on this value to set the baseline for their  
3 nationwide analysis is not “reasonable in context.” *See Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 69  
4 (D.C. Cir. 2017), *modified on reh’g*, 883 F.3d 918 (2018).

5 The significance of the agencies’ selection of an inappropriately low baseline should not be  
6 understated: According to one expert’s analysis, setting this low baseline obscures more than \$1.2  
7 billion in annual harms caused by the Rule. Mullen Report at 32 (reporting \$1.65 billion in forgone  
8 benefits for a scenario with a corrected baseline, versus \$420 million under the agencies’ improper  
9 baseline). By arbitrarily reducing the harms that in-state residents suffer from wetlands loss, the  
10 agencies “opportunistically frame[] the costs . . . of the rule.” *Bus. Roundtable v. SEC*, 647 F.3d 1144,  
11 1148–49 (D.C. Cir. 2011).

### 12 **3. The Agencies’ Assumption that States Will Preserve Waters Losing Federal Protection** 13 **Is Speculative and Overlooks Key Considerations**

14 The agencies also inappropriately minimize the Rule’s harms under Section 404 through  
15 unsupported assumptions about state gap-filling.

16 The agencies suggest that many of the Rule’s otherwise expected harms may not actually come  
17 to pass because states will preserve many of the wetlands losing federal protection. The agencies  
18 present multiple “scenarios” in which the Rule’s costs incrementally decrease—both in gross terms  
19 and relative to projected cost savings—as more states are assumed to fill the void. EA at xxiii. They  
20 explain that “high estimates of forgone benefits are greater than cost estimates under both low and  
21 high cost assumptions” in a scenario with no state gap-filling, whereas “high estimates of forgone  
22 benefits . . . are greater than the lower bound of estimated cost savings” under scenarios with gap-  
23 filling. *Id.* But suppositions about state gap-filling are fanciful, fail to account for numerous  
24 countervailing considerations, and ignore the findings of the agencies’ own analysis.

---

25  
26  
27 <sup>22</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15642>.



1 Agencies cannot rely on “speculation . . . not supported by the record,” *Ariz. Cattle Growers’*  
2 *Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001)—an important principle enshrined  
3 in EPA’s own guidelines. Specifically, EPA guidelines provide that a cost-benefit analysis may  
4 account for rules that are “currently under consideration,” but should not speculate about future  
5 rulemakings that are neither “imminent” nor can be “anticipated with a high degree of certainty.” EPA,  
6 *Guidelines for Preparing Economic Analyses* 5-2, 5-13 (2010).<sup>23</sup> As EPA recently explained to justify  
7 a different rule, this “normal practice . . . to only . . . [account for] final regulatory actions” ensures  
8 that speculative predictions do not cloud the analysis. 84 Fed. Reg. 56,058, 56,079 (Oct. 18, 2019).  
9 Yet here, the agencies inappropriately speculate that certain states may “choose to change [their]  
10 programs” in response to the Rule. EA at 39.

11 The agencies also ignore concrete evidence that it is unlikely that those state regulations will  
12 be issued. That evidence falls into three categories. First, states are unlikely to fill the regulatory gap  
13 because they have “little incentive” to prohibit “pollution across state lines.” Policy Integrity  
14 Comments at 10–11; *see also EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 495 (2014)  
15 (explaining that since “pollution emitted in one State . . . caus[es] harm in other States,” states will  
16 typically underregulate pollution when “[l]eft unregulated”). Indeed, a key purpose of the Clean Water  
17 Act is to “protect[] downstream States from out-of-state pollution that they cannot themselves  
18 regulate,” *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring), and that upstream states are  
19 incentivized to under-regulate. The agencies completely assume away this reality.

20 Second, states are unlikely to fill the gap because state-by-state regulation can be very costly  
21 and loses out on the economies of scale of federal regulation. Many states may lack the resources to  
22 effectively protect their own waters. For example, Michigan—one of only two states to administer its  
23 own Section 404 program—generates permit fees covering less than 20% of the program’s cost.  
24 Attorneys General of New York et al., Comment Letter to Revised Definition of “Waters of the United

---

26 <sup>23</sup> Available at [https://www.epa.gov/environmental-economics/guidelines-preparing-](https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses)  
27 [economic-analyses](https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses).

1 States” A-12 (Apr. 15, 2019).<sup>24</sup> As fifteen state attorneys general advised the agencies, filling the  
2 regulatory gap would require states to “commit a substantial amount of state money” or “impose  
3 extremely high permit application fees to recover those costs from the regulated community,” either  
4 of which “would impose a substantial burden.” *Id.*

5 Third, numerous states are unlikely to regulate more than required by the Rule because they  
6 have staunchly opposed additional clean-water protections in the recent past. Indeed, thirty-two states  
7 sued to enjoin the Clean Water Rule in 2015, 85 Fed. Reg. at 22,258 n.15, arguing that the rule’s  
8 modest expansion of federal jurisdiction would “burden the States with substantial unrecoverable  
9 costs,” *see* States’ Memorandum in Support of Motion for Preliminary Injunction at 10, *North*  
10 *Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (No. 3:15-cv-00059). Yet despite this  
11 demonstrated antipathy to sensible clean-water controls, the agencies now assume that fifteen of those  
12 same states may completely fill the regulatory gap left by the Rule.<sup>25</sup> *Compare* 85 Fed. Reg. at 22,258  
13 n.15 *with* EA at 39–41. There is little basis for this assumption.

14 The agencies’ failure to consider these three factors is especially confounding given that the  
15 agencies surveyed the literature on environmental federalism and found that state-by-state regulation  
16 tends to “yield inefficiently weak regulations” by encouraging free-riding and that decentralization  
17 works best when there is “no transboundary pollution,” which is not the case here. EA at 34–35. In  
18 the Rule, the agencies cast aside their own findings, ignoring most of the relevant considerations  
19 identified by their review. *Compare* Per G. Fredriksson, *Environmental Federalism: Lessons Learned*  
20 *from the Literature* 15 (2018)<sup>26</sup> (identifying seventeen considerations) *with* EA at 40–41 (considering  
21 only three factors).

---

22  
23 <sup>24</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467>.

24 <sup>25</sup> This figure includes both Category 2 states—which the agencies speculate may “change  
25 state programs” to boost coverage—and Category 3 states, which are “likely” to continue current  
26 regulatory programs which “may already regulate beyond” what was required prior to this Rule. EA  
27 at 46. But the fact that a Category 3 state may have offered some protection beyond what federal law  
28 required prior to this Rule hardly means that the state will completely fill the regulatory gap that this  
Rule leaves.

<sup>26</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0011>.

1 In short, the agencies' claim that states will preserve the waters losing protection under the  
2 Rule lacks a reasonable basis. But courts only defer to an agency's "predictive judgments . . . so long  
3 as they are reasonable." *Burlington N. & Santa Fe Ry. v. STB*, 526 F.3d 770, 781 (D.C. Cir. 2008)  
4 (internal quotation marks omitted). The agencies' decision to minimize their estimation of forgone  
5 benefits on the grounds that the Rule's harmful effects will be mitigated by new state controls therefore  
6 does not fulfill their obligations to evaluate the Rule's impacts.

### 7 **B. The Case Studies Are Fundamentally Flawed**

8 The agencies also evaluate the costs and benefits of wetlands degradation through "case  
9 studies" of three watersheds, but these case studies suffer from similar errors as the nationwide  
10 analysis,<sup>27</sup> such that the agencies again arbitrarily minimize the costs of wetlands degradation.

11 The case studies also have their own unique errors. To conduct the analysis in the case studies,  
12 the agencies rely on a single economic paper, written by Dr. John C. Whitehead and Dr. Glenn C.  
13 Blomquist in 1998.<sup>28</sup> EA at 121. Yet as one of that study's authors—Dr. Whitehead—advised the  
14 agencies in regulatory comments, the agencies misapply the study to devalue wetlands services.  
15 Despite this plea, the agencies continue to misapply Dr. Whitehead's work, again evincing "a complete  
16 failure to reasonably reflect upon the information contained in the record," *Sierra Club*, 899 F.3d at  
17 293.

18 For instance, the agencies "biase[d] the aggregate benefits downward" by using the *median*  
19 valuation reported in Dr. Whitehead's study, even though Dr. Whitehead explained that the *mean*  
20 valuation supplies "the most conceptually appropriate measure." Whitehead Report at 14; *see also*  
21 Howard & Shrader Report at 10 (explaining that the median is generally "not an appropriate choice").  
22 Because the mean wetlands benefit identified by the Blomquist & Whitehead Study is "at least[] 3.25

---

24 <sup>27</sup> Just like with the nationwide analysis, the case studies rely on inappropriate assumptions  
25 about state gap-filling, *see, e.g.*, EA at xx–xxi, and falsely assume that only residents in-state and in  
26 certain neighboring counties are harmed by wetlands degradation, *id.* at 121.

27 <sup>28</sup> Glenn C. Blomquist & John C. Whitehead, *Resource Quality Information and Validity of*  
*Willingness to Pay in Contingent Valuation*, 20 Res. & Energy Econ. 179 (1998) ("Blomquist &  
28 Whitehead Study").

1 times larger than” the study’s “median . . . estimates,” the agencies’ disregard for this valuation—  
2 against the sound advice of Dr. Whitehead himself—results in a drastic underestimate of wetlands  
3 benefits. Whitehead Report at 13–14.

4 The agencies also apply an inappropriately narrow timeframe, falsely assuming that  
5 individuals suffer the harms of wetlands degradation only in the year in which the degradation takes  
6 place. EA at 121 (reporting that agencies derive “annual forgone benefits” by using lumpsum values  
7 from the Blomquist & Whitehead Study, without accounting for timing difference). This is mistaken.  
8 As the Blomquist & Whitehead Study reported, individuals suffer from wetlands degradation not just  
9 in the year when the wetlands were lost, but also “each year” thereafter. Blomquist & Whitehead at  
10 186 n.4. This makes sense, since, as discussed above, the downstream benefits that wetlands provide  
11 do not stop when the calendar turns. By irrationally assuming that harm from wetlands loss is one-  
12 time rather than cumulative, the agencies devalue the reported cost of their case studies by up to 15  
13 times. *See supra* at 16 (calculating long-term forgone benefits using proper discounting). And since  
14 this error compounds with the error that Dr. Whitehead identified, this means that the agencies  
15 devalued social costs in their case studies by about 98%<sup>29</sup>—falsely presenting the case studies as net  
16 beneficial.

17 Ultimately, the case studies—like the national analysis—betray basic misunderstandings about  
18 the benefits of wetlands services and fail to reasonably capture the Rule’s harms. These analyses fall  
19 well short of the agencies’ obligation to assess the Rule’s effects on “the chemical, physical, and  
20 biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a).

---

21  
22  
23  
24  
25  
26 <sup>29</sup> For this calculation, we multiply 3.25 (the devaluation factor from the use of the median  
27 valuation) and 15 (the factor from the use of the wrong timeframe) to determine that, through these  
28 two errors, the agencies are undervaluing wetlands benefits by over 48 times.

1           **IV. In Stark Contrast to Their Treatment of Forgone Benefits, the Agencies Substantially**  
2           **Overestimate Compliance-Cost Savings**

3           While drastically undercounting the Rule’s forgone benefits, the agencies take the opposite  
4 approach to the Rule’s cost savings, inflating these savings with little explanation. The agencies’  
5 cursory and inconsistent assessment of the Rule’s compliance-cost savings—which they tout as a  
6 regulatory benefit, 85 Fed. Reg. at 22,269 (stating that the Rule will “ease administrative burdens”)—  
7 further renders the Rule arbitrary and capricious.

8           The agencies quintupled their per-acre mitigation-cost estimates from the Clean Water Rule,  
9 without explaining the sudden reversal. When assessing the Clean Water Rule’s impacts in 2015, the  
10 agencies used available agency data to catalogue mitigation costs, *see* 2015 EA at 40–41, projecting  
11 that the rule would preserve an additional 3,781 new acres of wetlands annually, *id.* at 41, at mitigation  
12 costs of \$89–\$249 million, *id.* at xi. Thus, the agencies estimated per-acre mitigation costs of \$24–\$66  
13 thousand.

14           But in the Rule, the agencies dramatically increase this valuation without explanation. Under  
15 Scenario 0, the agencies estimate that the Rule will result in 1,486 annual degraded acres<sup>30</sup> with  
16 mitigation cost savings of \$217–\$486 million. EA at 174–75. On a per acre basis, this comes out to  
17 \$146–\$327 thousand—yielding a high-end estimate nearly five times the Clean Water Rule’s high-  
18 end estimate of mitigation costs. This change alone makes the Rule appear net beneficial—even  
19 without correcting for the agencies’ other methodological errors.

20           This increase is reflected in the agencies’ estimates for nearly every state, and is particularly  
21 pronounced in certain states. In Washington, for instance, the agencies estimate high-end mitigation  
22 costs at \$1.148 million per wetlands acre—a vast increase of \$800,000 over their 2015 estimates.  
23 *Compare id.* at 218 tbl. E-3 *with* 2015 EA at 65. And in Oregon, the agencies increase their high-end

---

24  
25           <sup>30</sup> The lower estimate of total affected acres stems largely from the agencies’ unjustified  
26 decision to abandon the agencies’ finding from the Clean Water Rule that, on average, permits require  
27 two acres of mitigation for every one acre of affected wetlands; instead, the agencies now assume just  
28 a 1:1 ratio. *Compare* 2015 EA at 40 *with* EA at 115.

1 mitigation-cost estimates per linear foot from \$343 in 2015 to a whopping \$84,069 in the Rule—an  
2 over 240-fold increase. *Compare* EA at 218 tbl. E-3 *with* 2015 EA at 65. As a result, Oregon accounts  
3 for almost 9% of estimated cost savings despite having only 1% of affected wetlands and only 0.1%  
4 of affected streams. *Compare* EA at 218 tbl. E-3 *with id.* at 214 tbl. E-1.

5 And yet, the agencies offer little explanation or justification for this change, stating generically  
6 and without further explanation that they “updated mitigation costs per acre and linear foot for each  
7 state . . . , which is why the mitigation cost values are different than the ones used in the 2015 analysis.”  
8 Response to Comments at 94. This minimal explanation falls well short of the “reasoned explanation”  
9 necessary to “disregard[] facts and circumstances that underlay” the Clean Water Rule. *FCC v. Fox*  
10 *Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).<sup>31</sup>

11 The agencies cannot “inconsistently and opportunistically frame[] the costs and benefits of the  
12 rule” in this fashion. *Bus. Roundtable*, 647 F.3d at 1148–49. As noted above, administrative agencies  
13 “cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more  
14 stringent standards,” *Ctr. for Biological Diversity*, 538 F.3d at 1198, which the agencies plainly violate  
15 through their lopsided analysis.

---

26  
27 <sup>31</sup> If anything, mitigation costs have likely decreased over time due to the expansion of  
28 mitigation banks and other market approaches to Sec. 404 compliance. Policy Integrity Comments at  
31–32.

1 **CONCLUSION**

2 For the forgoing reasons, this Court should grant Plaintiffs’ motion for a preliminary  
3 injunction.<sup>32</sup>

4 Dated: New York, NY  
5 May 21, 2020

Respectfully submitted,

6 /s/ Richard L. Revesz

7 Richard L. Revesz\*, N.Y. Bar # 2044725  
8 Bethany A. Davis Noll\*, EDNY Bar # BD1816  
9 Max Sarinsky\*, N.Y. Bar # 5387576  
10 Jason A. Schwartz\*, Va. Bar # 73398  
11 Institute for Policy Integrity  
12 139 MacDougal Street, Third Floor  
13 New York, New York 10012

14 Adam J. Schwartz, Cal. Bar No. 251831  
15 Adam J. Schwartz, Attorney at Law  
16 5670 Wilshire Blvd., Suite 1800  
17 Los Angeles, CA 90036

18 \* *Pro hac vice* application pending  
19 *Counsel for Amicus Curiae*  
20 *Institute for Policy Integrity*

21  
22  
23  
24  
25  
26 <sup>32</sup> Policy Integrity gratefully acknowledges Sam Smith and Felix Zhang, students in New York  
27 University School of Law’s Advanced Regulatory Policy Clinic, for assisting in the preparation of this  
28 brief.