

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

WILLIAM MURRAY and JUNE OMURA,

Plaintiffs,

v.

ANDREW WHEELER, in his official capacity
as Administrator of the U.S. Environmental
Protection Agency, the U.S.
ENVIRONMENTAL PROTECTION AGENCY
and R.D. JAMES, in his official capacity as the
Assistant Secretary of the Army (Civil Works)
and the U.S. ARMY CORPS OF ENGINEERS,

Defendants.

No. 1:19-cv-1498-LEK/TWD

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

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The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”) submits this brief as *amicus curiae* in support of Plaintiffs’ challenge to the Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (“Rule”), promulgated by the Environmental Protection Agency and Department of the Army, Corps of Engineers (collectively, “the agencies”).¹

INTEREST OF AMICUS CURIAE

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

Harnessing its academic and regulatory expertise, Policy Integrity has participated in multiple agency and court proceedings regarding the Rule as well as the agencies’ other recent attempts to limit regulatory jurisdiction under the Clean Water Act. For instance, Policy Integrity submitted comments on the proposal underlying the Rule.³ Policy Integrity’s economics director, Peter Howard, Ph.D., co-authored a report with Jeffrey Shrader, Ph.D., a professor at Columbia University’s School of International and Public Affairs, analyzing flaws in the economic analysis

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

² 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>.

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

accompanying that proposal, which Policy Integrity submitted to the record (“Howard & Shrader Report”).⁴ And Policy Integrity has submitted *amicus* briefs in support of plaintiffs challenging the Rule in three other courts. *See* Briefs for Institute for Policy Integrity as Amicus Curiae, *Colorado v. EPA*, No. 20-1238 (10th Cir. filed Aug. 11, 2020); *S.C. Coastal Conservation League v. Wheeler*, No. 20-1687 (D.S.C. filed July 17, 2020); *California v. Wheeler*, No. 20-3005, 2020 WL 3403072 (N.D. Cal. June 19, 2020).

Here, Plaintiffs argue that the agencies unlawfully fail to meaningfully evaluate the Rule’s extensive water-quality impacts. Among other claims, Plaintiffs argue that the economic analysis prepared by the agencies inappropriately diminishes the Rule’s forgone water-conservation benefits through critical economic errors and unfounded assumptions about state regulatory gap-filling. Plaintiffs Br. 29–32; *see also id.* at 10–11 (providing relevant background) Policy Integrity’s expertise in economic analysis and experience with the Rule give it a unique and useful perspective on that claim.

SUMMARY OF ARGUMENT

This brief focuses on the agencies’ economic analysis, which is a key way in which they obscure the Rule’s anticipated harms. Despite their obligation to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a)—and their authority to exercise jurisdiction over waters with “a significant nexus to waters . . . navigable in fact,” *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring) (internal quotation marks omitted)—the agencies do not meaningfully assess the Rule’s impacts on downstream water quality, repeatedly failing to recognize the extensive harm the Rule will cause.

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

Time after time, the economic analysis relies on irrational and ill-informed assumptions, violates regulatory guidance and precedent, and makes claims about water connectivity that are inconsistent with science—all with the effect of making the Rule’s extensive harms seem minor in relation to its alleged cost savings. For example, the agencies fail to project the harms to water quality that the Rule will impose due to rollbacks under the Section 402 (pollutant discharge) and Section 311 (oil-spill prevention) programs, falsely claiming a lack of data. And although the agencies value some impacts from wetlands degradation under Section 404’s dredge/fill program, their analysis is riddled with errors that understate critical harms that the Rule will cause.

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

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

ARGUMENT

In limiting clean-water protection to its narrowest scope in decades, the agencies repeatedly obscure the Rule’s substantial harms both from a scientific and economic perspective. As EPA’s Science Advisory Board concluded, the agencies “do[] not provide a scientific basis” for the Rule or “incorporate best available science” to analyze its impacts. EPA Sci. Advisory Bd.,

Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 1–2 (2020).⁵ And while the agencies’ economic analysis claims to assess the Rule’s impacts, it too is sorely lacking. The errors in that analysis demonstrate that the agencies fail to provide a reasoned explanation for the Rule.

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

As a preliminary matter, the agencies apparently hope to avoid responsibility for their error-filled economic analysis by claiming that they did not rely on it. 85 Fed. Reg. at 22,335. But that attempt falls flat.

The agencies prepared an economic analysis of the Rule pursuant to executive guidance that requires agencies to assess regulatory costs and benefits and adopt a regulation only when the “benefits . . . justify its costs.” Exec. Order No. 12,866, § 1(b)(6), 58 Fed. Reg. 51,735 (Oct. 4, 1993). When agencies analyze costs and benefits, regulatory costs encompass “any disadvantage” from a rule, including harms “to human health or the environment.” *Michigan v. EPA*, 576 U.S. 743, 757 (2015).

Pursuant to this guidance, agencies for decades have assessed, quantified, and monetized regulatory impacts. When promulgating the Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (“Clean Water Rule”), for instance, the agencies monetized many of the rule’s environmental benefits and determined that monetized benefits exceeded total compliance costs by at least tens of millions of dollars annually. EPA & U.S. Dep’t of the Army, Economic Analysis of the EPA-Army Clean Water Rule xi (2015) (“2015 EA”).⁶ Yet for the Rule challenged here, the agencies conclude, to the contrary, that compliance-cost savings

⁵ Available at <https://perma.cc/ETX9-QSPQ>.

⁶ Available at https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf; see also Plaintiffs Br. 10–11.

exceed the monetized benefits of the environmental protections being forgone—this time unreasonably understating the Rule’s forgone benefits and inflating compliance-cost savings. *See infra* Sections II–IV.

When substantial flaws undermine an agency’s economic analysis, like here, courts find the rule arbitrary and capricious. *See, e.g., Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1146–47 (D.C. Cir. 2005). Yet the agencies here claim that the Rule “is not based on the . . . economic analysis,” and cite caselaw suggesting that only if “an agency decides to rely on a cost-benefit analysis” would this doctrine apply. 85 Fed. Reg. at 22,335 (citing *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1039–40 (D.C. Cir. 2012)). But this claim cannot relieve the agencies of responsibility for their erroneous economic analysis, for two reasons.

First, when changing course, an agency is required to “articulate a satisfactory explanation for its action,” and courts set aside the action if an agency failed to consider “an important aspect of the problem.” *State Farm*, 463 U.S. at 43. An important aspect that agencies may not ignore is the harm of a deregulatory rule, *see, e.g., Air All. Hous. v. EPA*, 906 F.3d 1049, 1067–68 (D.C. Cir. 2018), including, like here, when an agency makes policy judgments it considers “reasonable” in interpreting a purportedly “ambiguous” statute. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124–25 (2016). Here, the agencies assert that they have discretion under the Clean Water Act in defining regulatory jurisdiction and that they are exercising their discretion to provide an “implementable approach.” 85. Fed. Reg. at 22,262. Yet they hardly assess the Rule’s impact on “the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and *National Association of Home Builders*—the case that the agencies invoke—does not relieve them of that duty. By failing to adequately assess the Rule’s water-quality harms—as evidenced, in part, by their faulty economic analysis—the agencies do not provide the required justification.

Second, contrary to the claim that the Rule is not based on the economic analysis, 85 Fed. Reg. at 22,335, the agencies' own statements demonstrate that the Rule *is* in fact based at least in part on the economic analysis. For example, in justifying the Rule, the agencies tout their belief that the Rule will "ease administrative burdens," *id.* at 22,269, and result in "net cost savings for all entities affected," *id.* at 22,335, and that "net benefits would increase," *id.* at 22,334. In other litigation challenging the Rule, the agencies have claimed that the Rule is "supported" by the economic analysis and that the analysis helps "thoroughly explain[]" their decisions. Brief for Appellant 15, *Colorado v. Wheeler*, No. 20-1238 (10th Cir. filed July 9, 2020) ("Gov't 10th Cir. Br."). In addition, citing the economic analysis, the agencies claim that the Rule's benefits "far outweigh costs or foregone benefits." *Id.* Instead of "explain[ing] why the costs saved were worth the benefits sacrificed," as agencies must do when emphasizing cost savings, *Mineta*, 340 F.3d at 58, the agencies have put "a thumb on the scale" by omitting key health and welfare harms, rendering the Rule unreasonable, *see Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

For these reasons, the agencies cannot escape the flaws in their economic analysis. And as detailed below, those flaws make clear that the Rule is arbitrary and capricious.

II. The Agencies Irrationally Disregard Most of the Rule's Harms

The economic analysis offers little definitive information about the Rule's impacts outside the Section 404 program. The agencies allege that "data limitations constrain" their "ability to estimate, quantify, and value the potential effects of the final rule on the [Clean Water Act] sections 402 and 311 programs," EPA & Dep't of the Army, Economic Analysis of the Navigable Waters

Protection Rule: Definition of “Waters of the United States” xxii (2020) (“EA”)⁷—and, as a result, accord the impacts under those programs virtually no significance, *see, e.g., id.* at xxi (tallying Rule’s costs and benefits without quantification of impacts under Sections 311 or 402).

But “[r]egulators by nature work under conditions of serious uncertainty,” and “uncertainty alone” cannot serve as “an excuse to ignore . . . a particular regulatory issue.” *Pub. Citizen v. FMCSA*, 374 F.3d 1209, 1221 (D.C. Cir. 2004). Instead, longstanding White House guidance instructs agencies operating under uncertainty to “monetize [impacts] . . . whenever possible”—and, when monetization is not possible, to present relevant “quantitative information” about a rule’s impacts such as the number of “stream miles of [affected] water quality.” Office of Mgmt. & Budget, Circular A-4, Regulatory Analysis 27 (2003) (“Circular A-4”). Accordingly, agencies commonly provide “estimates of the probabilities of environmental damage to soil or water, the possible loss of habitat, or risks to endangered species as well as probabilities of harm to human health and safety.” *See id.* at 40.

The agencies’ analysis of the Clean Water Rule in 2015 provides a strong example of this guidance in practice. When assessing that rule, the agencies “examined a random sample of 188 [recent] jurisdictional determinations,” and through that analysis, projected that the Clean Water Rule would increase federal regulatory protection of all waters by 2.84–4.65%. 2015 EA at 12. This jurisdictional estimate allowed the agencies to monetize many regulatory costs and benefits, including most costs and benefits under the Section 402 and 404 programs. *Id.* at xi. And while the agencies could not monetize benefits (but did monetize compliance costs) under Section 311 due to limits in economic valuation tools, *see id.*, their estimate of the rule’s jurisdictional impacts

⁷ Available at https://www.epa.gov/sites/production/files/2020-01/documents/econ_analysis_-_nwpr.pdf.

allowed them to assess the magnitude of those effects. Based on their assessment, the agencies concluded that monetized benefits—namely, many of the environmental benefits under Sections 402 and 404—exceeded the 2015 rule’s total compliance costs. *Id.* at x–xi. *See also* Plaintiffs Br. 11 (describing analysis).

In contrast to this typical approach, here the agencies continually complain that “data limitations” prevent quantification of the waters losing protection, and as a result, none of the analyses that the agencies present offer any genuine assessment of the harms that the Rule will cause beyond the Section 404 program. For one, the agencies analyze three limited “case study” watersheds, but fail to monetize Section 402 water-quality impacts like they did in the Clean Water Rule. EA at xix tbl. ES-4. Instead, the agencies present tallies of the Rule’s costs and benefits in the case-study regions that simply list most of the Rule’s impacts as “not quantified” or “not monetized,” *id.* at xviii–xix tbl. ES-4. Second, in a purported nationwide analysis, the agencies quantify some impacts under the Section 404 program—but do not quantify nationwide impacts under Sections 311 or 402. *Id.* at xxii–xxiii. And in a qualitative assessment, the agencies briefly recognize that the Rule “may have a negative impact on water quality,” *id.* at 59, and “increase the probability of a[n oil] spill occurring,” *id.* at 83, but they do not assess the severity or downstream harms of these impacts and repeatedly suggest that states may limit these impacts by filling the regulatory gap, *see, e.g., id.* at 62; *see also infra* Section III.A.3 (explaining that the assumption that states will fill gap is unsupported).

Circumscribing their analysis in these ways leaves the agencies unable to make meaningful estimates of the rule’s impacts. But the agencies have an obligation to reasonably assess available information about a rule’s impacts and cannot simply “ignore[]” impacts that are “difficult . . . to quantify.” *Am. Trucking Ass’n, Inc. v. EPA*, 175 F.3d 1027, 1052 (D.C. Cir. 1999), *rev’d on other*

grounds sub nom. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001). The agencies could have fulfilled this obligation by estimating harms relating to the Section 311 and 402 programs using “plausible assumptions,” Circular A-4 at 39—just as they did when analyzing the Clean Water Rule, *see* 2015 EA at v (acknowledging “limited amount of data” but explaining that agencies estimated impacts through “analysis” and plausible “assumptions”). The agencies also could have employed “appropriate statistical techniques” to assess the “probability . . . [of] relevant outcomes.” Circular A-4 at 40. By throwing their hands up instead, the agencies do not provide an adequate explanation for the departure from that prior practice. And in inappropriately failing “to monetize or quantify” impacts under Sections 311 and 402, they effectively and unlawfully place “no value” on these harms. *Ctr. for Biological Diversity*, 538 F.3d at 1200–01.

Indeed, by failing to meaningfully assess the scope of so many of the Rule’s jurisdictional impacts, the agencies do not meaningfully evaluate “how important” these rollbacks are or provide even ballpark estimates of the resulting water-quality harms. *See* Circular A-4 at 2. Nor do they “evaluate the[] significance” of all effects—quantified and unquantified—and assess “which non-quantified effects are most important,” using reasonable assumptions to analyze whether the rule is net beneficial once those impacts are taken into account. *Id.*

There is no clear reason why the agencies could not have estimated the scope of the Rule’s jurisdictional changes like they did for the Clean Water Rule. They even collected much of the underlying data for doing so: For their nationwide Section 404 analysis, the agencies project reductions in permitting and mitigation by analyzing “permit data,” EA at xxii, yet do not clearly explain why they cannot perform a similar analysis for other Clean Water Act provisions. In fact, the agencies estimated the percentage of streams nationwide that are categorically excluded under

the Rule, according to a Freedom of Information Act disclosure,⁸ though now disclaim this analysis. *See* EPA & Dep't of the Army, Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the United States” 41 n.56 (2020)⁹; *see also* Plaintiffs Br. 17 (highlighting agencies’ jurisdictional projections).

In short, the agencies cannot seriously purport to protect the nation’s waters when they do not meaningfully assess how severely the Rule will harm water quality. Their failure to quantify or meaningfully assess the scope of the Rule’s impacts beyond the Section 404 program is arbitrary and capricious.

III. The Agencies Grossly Undervalue the Harms That They Do Quantify, Failing to Recognize the Critical Importance of Wetlands

The limited and circumscribed monetization that the agencies do provide is also fatally flawed as it unreasonably undervalues the Rule’s harms in multiple ways.

The agencies monetize harms only under the Section 404 program, assessing these impacts at two different scales: nationwide, and in three “case studies.” But under both approaches, the agencies arbitrarily minimize the harms of wetlands degradation—and now use those analyses to falsely claim that the Rule’s benefits outweigh its costs even under the “most cautious assumptions,” Gov’t 10th Cir. Br 45. Yet even the agencies’ own analysis shows that this claim is untrue and that the Rule may be net-costly. *See* EA at xxiii, 172 (reporting overlapping ranges of costs and benefits).

When a regulatory measure may cause harms that exceed its benefits, as the agencies’ analysis shows here, the agency should “conduct further analysis” to examine its assumptions and

⁸ Ariel Wittenberg & Kevin Bogardus, “EPA Falsely Claims ‘No Data’ on Waters in WOTUS Rule,” E&E News (Dec. 11, 2018), <https://www.eenews.net/stories/1060109323>.

⁹ Available at https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf.

determine whether “alternative plausible assumptions [are] more appropriate.” Circular A-4 at 42. Yet here the agencies disregard this recommendation and continually short-change their estimates of forgone benefits.

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

The nationwide analysis projects cost savings and forgone benefits from wetlands degradation under four “scenarios,” which apply different assumptions about the degree to which states will regulate waters upon losing federal protection. EA at xxii–xxiii. Under each scenario, the agencies conclude that the Rule’s purported cost savings likely exceed the harms caused. *Id.* at 172.

But to reach that conclusion, the agencies commit at least three crucial errors that substantially underestimate the Rule’s harms. First, the agencies ignore wetlands’ well-recognized interstate benefits. Second, they erroneously devalue the harms that individuals receive from in-state wetlands. And third, the agencies make baseless and irrational assumptions that states will seamlessly fill the regulatory gap left by the Rule, despite extensive indications otherwise.

These errors are significant. Correcting them reveals that the Rule could deprive society of over \$1.6 billion in annual benefits under the Section 404 program, according to an expert economist’s regulatory comments. Jeffrey Mullen, Ph.D., *Final Review of the 2018 EPA Economic Analysis for the Proposed Revised Definition of Waters of the United States* 32 tbl. 2.2 (2019) (“Mullen Report”).¹⁰ When properly analyzed, the Rule’s harms from wetlands degradation thus likely exceed associated cost savings by a wide margin. *Compare id. with* EA at xxii.

¹⁰ Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717> (Exhibit D).

1. The Agencies Ignore the Substantial Interstate Benefits Wetlands Provide

One of the most substantial errors is the agencies' decision to cut off the harms of wetlands degradation at the state border. This decision not only leads to a drastic undercounting of the Rule's harms, but also evinces a fundamental misunderstanding of the value of wetlands services to downstream waters.

To monetize the costs of wetlands degradation, the agencies estimate the wetlands acreage lost in each state due to the Rule and then, using studies that assess people's willingness to pay for wetlands protection, calculate the monetary value of that lost acreage. EA at 207. But the agencies erroneously assume that only individuals residing within the state of the affected wetland are harmed, and that the harm from loss of out-of-state wetlands "is zero." *Id.* This assumption violates sound science, as wetlands benefit a wide range of other water bodies without respect to state boundaries. See EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* 4-1 to 4-45 (2015) ("Connectivity Report"). Specifically, wetlands provide physical, chemical, and biological functions that affect the integrity of downstream waters. *Id.* at 4-1 to 4-2.

Echoing the science, economic studies highlighted in experts' comments conclude that individuals place considerable value on wetlands outside their home state. See, e.g., Catherine L. Kling, Ph.D., *Expert Review of the Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'* 6 (2019) ("Kling Report").¹¹ One study, for example, finds that more than 80% of the benefits of wetlands protection are interstate. John C. Whitehead, Ph.D., *Comments on "Economic Analysis for the Proposed Revised Definition of 'Waters of the United*

¹¹ Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467> (Attachment B).

States’” 10 (2019) (“Whitehead Report”).¹² The agencies’ contrary assumption that the benefits of wetlands protection stop at the state border represents “a complete failure to reasonably reflect upon the information contained in the record.” *Sierra Club v. Dep’t of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018) (internal quotation marks omitted).

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

To be sure, in a three page-appendix, the agencies conduct a “sensitivity analysis” where they acknowledge that wetlands may produce interstate benefits, but only to counties that immediately abut the state where the wetland is located. *Id.* at 226–28. This limit is equally arbitrary. In fact, households as distant as 640 miles from a water body can benefit from its preservation—usually far more than one county into the neighboring state. Kling Report at 6. Thus, the sensitivity analysis continues to greatly undervalue wetlands services. *Compare* EA at 227 tbl. F-1 (reporting forgone benefits of \$67 million under Scenario 3, a 22% increase from primary

¹² Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717> (Exhibit C).

analysis of \$55 million) *with* Whitehead Report at 10 (explaining that proper geographic scope increases forgone benefits roughly five-fold).

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

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

Because the agencies irrationally disregard the interstate benefits of wetlands, they consider only the harms of wetlands degradation to in-state residents. But here, too, they severely undervalue the Rule’s harms.

To monetize harms, the agencies commissioned a study that, through a review of economic literature, calculated a per-acre value for wetlands loss per household. *See* Klaus Moeltner, et al., *Waters of the United States: Upgrading Wetland Valuation Via Benefit Transfer*, 164 *Ecological Econ.* 106,336 (2019) (“Moeltner Study”),¹³ *cited in* EA at 207–10. The agencies then apply that value to monetize the harm of degraded wetlands in each state to that state’s residents. In calculating those state-level values, the agencies commit at least three major errors.

First, the agencies ignore the unique benefits that wetlands provide to local residents. While wetlands have wide-ranging downstream impacts, as detailed above, they can also provide unique benefits at the local level, such as attenuating flooding and serving as a rearing habitat for fish. Connectivity Report at 4-1 to 4-2. Unsurprisingly, therefore, individuals who live close to a wetland value it the most. The agencies’ commissioned study indeed reported that residence in

¹³ The agencies uploaded an unpublished version of this same paper to record, available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0031>. Pincites in this brief are to the published version.

close proximity to a wetland has a significant impact on the valuation of its preservation. EA at 209 (reporting value of “local” and other variables).

Yet the agencies completely ignore these impacts when estimating the harm that in-state residents will suffer. In doing so, they irrationally assume that *no* in-state residents live near any degraded wetland, allowing them to totally disregard the unique local benefits that wetlands provide. EPA & Army Corps of Engineers, The Navigable Waters Protection Rule – Public Comment Summary Document, Topic 11: Economic Analysis and Resource and Programmatic Assessment 80 (2020) (“Response to Comments”).¹⁴ The agencies’ explanation for this exclusion—that “the majority [of] the affected households are likely to be non-local,” *id.*—is insufficient. Even if many individuals do not live near a degraded wetland, the additional valuation from those who do could still be substantial. Again, while there may be some variation in the exact amount, the proper value is “certainly not zero.” *Ctr. for Biological Diversity*, 538 F.3d at 1200.

Second, the agencies improperly minimize the long-term harms of wetlands degradation. Whereas the costs of wetlands mitigation are one-time, the benefits are indefinite. To compare forgone costs and benefits across these different time scales, the agencies convert the annualized willingness-to-pay values for wetlands preservation reported in the underlying studies into cumulative values of lump sum willingness-to-pay. They do this conversion by multiplying by 4.4.¹⁵ In other words, the agencies assume that the aggregate harm suffered over a 20-year period from the loss of a wetland, EA at 123 (providing scope of analysis as “20 years”), is just 4.4 times greater than the harm suffered in one year from that same loss. This is clearly erroneous and vastly undervalues the harm of wetlands degradation.

¹⁴ Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11574>.

¹⁵ 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”).

The common economic process of discounting—which “adjust[s] . . . for differences in timing” by converting future monetary amounts into present value, Circular A-4 at 32—confirms the absurdity of the 4.4 multiplier. Agencies typically use annual discount rates of 3% and 7%. *Id.* at 33. Converting annual to cumulative values using those standard rates reveals that the cumulative value of wetlands degradation is approximately 11–15 times the annual value,¹⁶ far higher than 4.4. In fact, according to our calculations, the agencies’ 4.4 multiplier implies an unheard-of annual discount rate over the 20-year analysis of at least 22%, which is not “ever[] used to support a . . . regulation” and represents “cavalier treatment” of this impact, *see Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1223 (5th Cir. 1991). Indeed, the agencies follow standard discounting practices (using the 3% and 7% rates) when estimating the Rule’s cost savings. *See, e.g.*, EA at 123. By minimizing long-term forgone benefits while appropriately discounting long-term cost savings, the agencies fail “to preserve an apples-to-apples comparison” of these impacts, *Corrosion Proof Fittings*, 947 F.2d at 1218, further tipping the scales.

Third, the agencies reduce the benefits of wetlands for in-state residents through a mathematical trick. The commissioned study found that individuals place a greater value on each acre of wetlands as the total acreage of wetlands increases. *See* Moeltner Study at 9 (reporting “convexity of the [willingness-to-pay] function”). Accordingly, individuals suffer more when wetlands are degraded in areas with greater wetlands acreage versus less acreage. Thus, the “baseline” acreage used in the analysis—that is, the assumed acreage starting point, prior to any degradation—can significantly affect the assessment of forgone benefits. Yet in calculating the harms from wetlands losses per state, the agencies assume an unreasonably low baseline acreage,

¹⁶ 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 about 15 times the annual value. Using a 7% discount rate, the difference is about 11 times.

significantly and arbitrarily diminishing their estimate. Specifically, the agencies assume a per-state baseline acreage of 10,000, EA at 210, even though most states have well beyond 10,000 acres of wetlands. Just in New York, state records show that there are over 2 million wetlands acres.¹⁷ According to one expert, setting the low baseline acreage in the agencies' analysis obscures more than \$1.2 billion in annual harms caused by the Rule. Mullen Report at 32 (reporting \$1.65 billion in forgone benefits with a corrected baseline).

The agencies justify their choice of 10,000 for the baseline by pointing to the fact that it is the median acreage of wetlands in the underlying studies assessed and noting that they wished to “avoid prediction out of sample.” Response to Comments at 81. But experts recommended more realistic baselines that still fall within the sample of baseline values in the literature, such as using the mean acreage (40,000) from the underlying studies, Howard & Shrader Report at 10, or the baseline value in those studies that most closely resembles real-world acreage (220,000), Mullen Report at 19. And as these reports explain, the median 10,000 value that the agencies use provides an “inappropriate[ly] . . . low value,” *id.*, that is unrepresentative of the underlying economic research and “not an appropriate choice,” Howard & Shrader Report at 10. Given its lack of “concurrence [with] reality,” the agencies' reliance on this value is not “reasonable in context.” *See Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 69 (D.C. Cir. 2017), *modified on reh'g*, 883 F.3d 918 (2018).

By arbitrarily reducing the harms that in-state residents suffer from wetlands loss, the agencies “opportunistically frame[] the costs . . . of the rule.” *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

¹⁷ *Status and Trends of Freshwater Wetlands in NYS*, N.Y. Dep't of Envtl. Conservation, <https://www.dec.ny.gov/lands/85861.html>.

3. The Agencies' Assumption that States Will Preserve Waters Losing Federal Protection Is Speculative and Overlooks Key Considerations

The agencies also inappropriately minimize the Rule's harms under Section 404 through unsupported assumptions about state gap-filling. To support their claim that the Rule's benefits outweigh its costs, the agencies repeatedly rely on the suggestion that states will preserve many of the wetlands losing federal protection. *See* EA at xxiii (showing that cost savings outweigh forgone benefits by greater ratio as states are assumed to fill the gap), *id.* at 58–59, 62 (asserting that possible qualitative harms will be mitigated by state gap-filling). But suppositions about state gap-filling fail to account for numerous countervailing considerations, and ignore the findings of the agencies' own analysis.

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

The agencies also ignore concrete evidence as to why those state regulations may not be seamlessly and efficiently issued. That evidence falls into three categories. First, states may have “little incentive” to prohibit “pollution across state lines.” Policy Integrity Comments at 10–11;

¹⁸ Available at <https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses>.

see also EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 495 (2014) (explaining that since “pollution emitted in one State . . . caus[es] harm in other States,” states will typically underregulate pollution when “[l]eft unregulated”). Indeed, a key purpose of the Clean Water Act is to “protect[] downstream States from out-of-state pollution that they cannot themselves regulate,” *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring), and that upstream states are incentivized to under-regulate. The agencies assume away this reality.

Second, state-by-state regulation can be very costly and loses out on the economies of scale of federal regulation. Many states may lack the resources to effectively protect their own waters. For instance, Michigan—one of only two states to administer its own Section 404 program—generates permit fees covering less than 20% of the program’s cost. Attorneys General of New York et al., Comment Letter to Revised Definition of “Waters of the United States” A-12 (Apr. 15, 2019).¹⁹ As fifteen states advised the agencies, filling the regulatory gap would require states to “commit a substantial amount of state money” or “impose extremely high permit application fees,” either of which “would impose a substantial burden.” *Id.*

Third, numerous states have staunchly opposed additional clean-water protections in the recent past. Indeed, thirty-two states sued to enjoin the Clean Water Rule in 2015, 85 Fed. Reg. at 22,258 n.15, arguing that the rule’s modest expansion of federal jurisdiction would “burden the States with substantial unrecoverable costs,” *see States’ Memorandum in Support of Motion for Preliminary Injunction 10, North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Yet despite this demonstrated antipathy to sensible clean-water controls, the agencies now assume that fifteen

¹⁹ Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467>.

of those same states may fill the regulatory gap left by the Rule.²⁰ Compare 85 Fed. Reg. at 22,258 n.15 with EA at 39–41. There is little basis for this assumption.

The agencies’ failure to consider these factors is especially confounding given that the agencies surveyed the literature on environmental federalism and found that state-by-state regulation tends to “yield inefficiently weak regulations” and that decentralization works best when there is “no transboundary pollution,” which is not the case here. EA at 34–35. Yet the agencies ignore most of the relevant considerations identified by their review. Compare Per G. Fredriksson, *Environmental Federalism: Lessons Learned from the Literature* 15 (2018)²¹ (identifying seventeen considerations) with EA at 40–41 (considering only three factors).

In short, the agencies’ claim that states may preserve the waters losing protection under the Rule omits key considerations. Because courts only defer to an agency’s “predictive judgments . . . so long as they are reasonable,” *Burlington N. & Santa Fe Ry. v. STB*, 526 F.3d 770, 781 (D.C. Cir. 2008) (internal quotation marks omitted), the agencies’ inappropriate assumptions about state gap-filling supply another reason why their analysis is insufficient.

B. The Agencies’ Case Study Estimates Are Fundamentally Flawed

The agencies also evaluate the costs and benefits of wetlands degradation through “case studies” of three watersheds, but these case studies suffer from similar errors as the nationwide analysis,²² and again minimize the costs of wetlands degradation.

²⁰ This figure includes both Category 2 states—which may “change state programs” to boost coverage—and Category 3 states, which are “likely” to continue current regulatory programs which “may already regulate beyond” what was required prior to this Rule. EA at 46. But the fact that a Category 3 state may have offered some protection beyond what federal law required prior to this Rule hardly means that the state will completely fill the regulatory gap that this Rule leaves.

²¹ Available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0011>.

²² Just like with the nationwide analysis, the case studies rely on inappropriate assumptions about state gap-filling, *see, e.g.*, EA at xx–xxi, and falsely assume that only residents in-state and in certain neighboring counties are harmed by wetlands degradation, *id.* at 121.

The case studies also have their own unique errors. To conduct the analysis in the case studies, the agencies rely on a single economic paper, written by Dr. John C. Whitehead and Dr. Glenn C. Blomquist.²³ EA at 121. Yet as one of that study’s authors—Dr. Whitehead—advised the agencies in regulatory comments, the agencies misapply the study to devalue wetlands services. Despite this plea, the agencies continue to misapply Dr. Whitehead’s work, again evincing a “failure to reasonably reflect upon the information contained in the record,” *Sierra Club*, 899 F.3d at 293.

For instance, the agencies “biase[d] . . . [forgone] benefits downward” by using the *median* valuation reported in this study, even though Dr. Whitehead explained that the *mean* valuation supplies the “appropriate measure.” Whitehead Report at 14; *see also* Howard & Shrader Report at 10 (median generally “not an appropriate choice”). Because the mean wetlands benefit identified by the Blomquist & Whitehead Study is “at least[] 3.25 times larger than” the study’s “median . . . estimates,” the agencies’ disregard for this valuation—against Dr. Whitehead’s own advice—results in a drastic underestimate of wetlands benefits. Whitehead Report at 13–14.

The agencies also apply an inappropriately narrow timeframe, falsely assuming that individuals suffer the harms of wetlands degradation only in the year in which the degradation occurs. EA at 121 (reporting that agencies derive “annual forgone benefits” by using lumpsum values from the Blomquist & Whitehead Study, without accounting for timing difference). This is mistaken, since individuals suffer from wetlands degradation not just in the year when the wetlands are lost, but also “each year” thereafter. Blomquist & Whitehead Study at 186 n.4. By irrationally assuming that harm from wetlands loss is one-time rather than cumulative, the agencies devalue

²³ 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 & Whitehead Study”).

the reported cost of their case studies by up to 15 times. *See supra* at 20 (calculating long-term forgone benefits using proper discounting). All told, therefore, the agencies devalued social costs in their case studies by about 98%²⁴—falsely presenting the case studies as net beneficial.

Ultimately, the case studies—like the national analysis—betray basic misunderstandings about the benefits of wetlands services and fail to reasonably capture the Rule’s harms.

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

While drastically undercounting the Rule’s forgone benefits, the agencies take the opposite approach to the Rule’s cost savings, inflating these savings by quintupling their per-acre mitigation-cost estimates from the Clean Water Rule without explanation.

When assessing the Clean Water Rule’s impacts in 2015, the agencies used available data to catalogue mitigation costs, *see* 2015 EA at 40–41, projecting that the rule would preserve an additional 3,781 acres of wetlands annually, *id.* at 41, at mitigation costs of \$89–\$249 million, *id.* at xi. Thus, the agencies estimated per-acre mitigation costs of \$24–\$66 thousand. But in the Rule, the agencies greatly increase this valuation without explanation, estimating that the Rule will result in up to 1,486 annual degraded acres with associated mitigation cost savings of \$217–\$486 million. EA at 174–75. On a per-acre basis, this comes out to \$146–\$327 thousand—yielding a high-end estimate nearly five times the Clean Water Rule’s high-end estimate of mitigation costs. This increase is particularly exemplified by the agencies’ estimates for certain states: In Oregon, for instance, the agencies increase their high-end mitigation-cost estimates per linear foot from \$343 in 2015 to a whopping \$84,069 in the Rule—an over 240-fold increase. *Compare id.* at 218 tbl. E-

²⁴ For this calculation, we multiply 3.25 (the devaluation factor from the use of the median valuation) and 15 (the factor from the use of the wrong timeframe) to determine that, through these two errors, the agencies are undervaluing wetlands benefits by over 48 times.

3 *with* 2015 EA at 65. With these across-the-board increases in compliance costs, the agencies falsely report the Rule overall as net beneficial—even without correcting for their other methodological errors.

Yet the agencies offer little explanation or justification for this change, stating simply that they “updated mitigation costs per acre and linear foot for each state.” Response to Comments at 94. This bare-bones account falls well short of the “reasoned explanation” necessary to “disregard[] facts and circumstances that underlay” the Clean Water Rule. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). Because the agencies “failed to identify or explain any changed circumstances, technology, or economic conditions that would justify this dramatic recalculation” of compliance costs, their “new and inflated calculations” lack a reasonable basis. *California v. Bernhardt*, 2020 WL 4001480, at *30 (N.D. Cal. July 15, 2020).

The agencies cannot “inconsistently and opportunistically frame[] the costs and benefits of the rule” in this fashion. *Bus. Roundtable*, 647 F.3d at 1148–49. Since agencies “cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards,” *Ctr. for Biological Diversity*, 538 F.3d at 1198, this lopsided analysis cannot stand.

CONCLUSION

For the forgoing reasons, this Court should grant Plaintiffs’ Motion for Summary

Judgment.

Dated: September 17, 2020

Respectfully submitted,

/s/ Max Sarinsky

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