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** Pro hac vice*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, et al.,

Defendants,

and

AMERICAN FARM BUREAU FEDERATION, et al.

Proposed Intervenor-Defendants.

No. 20-cv-03005-RS

BUSINESS INTERVENORS']PROPOSED] OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR STAY

Date: June 18, 2020
Time: 1:30 p.m.
Dept: San Francisco Courthouse, Courtroom 3—17th Floor
Judge: Hon. Richard Seeborg

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Proposed Intervenor-Defendants the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Edison Electric Institute; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association (the "Business Intervenors") submit this proposed opposition to plaintiffs' motion to preliminarily enjoin or stay the Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule"). Intervenors' May 21 motion to intervene and proposed Answer (Dkt. 43, 43-1) is pending and they now submit this "pleading that sets out the . . . defense for which intervention is sought." Fed. R. Civ. P 24(c).

INTRODUCTION AND BACKROUND

The 2020 Rule is a final agency action by the Environmental Protection Agency and U.S. Army Corps of Engineers (the "agencies") promulgating a definition of Waters of the United States ("WOTUS") within the meaning of the Clean Water Act ("CWA"). The fifteen proposed intervenor trade groups represent countless businesses that own and/or use land for a broad variety of business purposes including farming, ranching and other livestock production, forestry, manufacturing, mining of all types, oil and gas production and refining, power generation, road and other infrastructure construction, and home and commercial building. These businesses represent a large portion of the Nation's economic activity, provide tens of millions of jobs, and provide Americans with food, shelter, and essential goods and services. Conducting these businesses often requires determining if property includes waters of the United States that is subject to CWA jurisdiction and hence to CWA permitting requirements and the threat of criminal and civil sanctions if activity occurs in WOTUS without a permit. For that reason, the intervenors and their members are intensely interested in the regulatory definition of WOTUS at issue in this litigation.

As documented in the Declaration of Don Parrish ("Parrish Dec."), and as discussed in Part III, *infra*, the extraordinary relief plaintiffs seek would substantially harm intervenors' members. It would increase the likelihood that their property includes WOTUS, and with that would increase

their permitting and compliance costs and risk of violations and reduce their ability to use their land for productive purposes. It would also make it harder for intervenors' members to determine whether their property contains WOTUS by eliminating the bright jurisdictional lines that the 2020 Rule defines. That would increase the cost of making jurisdictional determinations and make the scope of a law with harsh criminal and civil penalties far less predictable. While complaining, essentially, that their States do not want to do the work that the federal agencies have previously done in regulating water, plaintiffs ignore these harms to the American people and economy. Notably, in prior litigation 31 States (including two plaintiffs here) argued that the agencies had claimed too expansive jurisdiction and demanded the return of their "primary" authority over "land and water resources" that Congress guaranteed to "preserve" and "protect." 33 U.S.C. 1251(b); *see* Opening Br. of State Pet'rs, *Murray Energy Corp. v. EPA*, No. 15-3799 (6th Cir. Nov. 1, 2016), Dkt. 141. The balance of harms here is not close and cannot justify extraordinary injunctive relief.

This Court need not, however, rest denial of a preliminary injunction or stay on the balance of harms, for plaintiffs have not shown a likelihood of success on the merits. The 2020 Rule complies with the CWA and the Administrative Procedure Act ("APA"). After decades of shifting, ever-more expansive regulatory definitions that led to crippling legal uncertainty, numerous litigation losses for the agencies, and a patchwork in which the prior rule applied in less than half of the country, the agencies have finally produced a legally sound rule. The 2020 Rule reflects Congress' intent, faithfully follows statutory text and Supreme Court precedent, and implements the cooperative federalist goals of the CWA. It reasonably responds to a history in which the Supreme Court has consistently criticized the breadth of the agencies' assertions of jurisdiction and in which the prior Administration's attempt to promulgate a rule in 2015 was enjoined by multiple courts as likely unlawful and then struck down by two district courts and remanded to the agencies. Far from showing likelihood of success, plaintiffs' attempt to replace guiding legal principles with their own fuzzy view of the science demonstrates the weakness of their case and the reasonableness of the agencies' effort to provide definitional certainty. Plaintiffs provide no sound reason for a court to substitute its judgment for that of the agencies. Plaintiffs' motion should be denied.

A. The CWA Legal Scheme

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Two permit programs regulate the "discharge of any pollutant," which is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* §§ 1311(a), 1362(12)(A). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The meaning of WOTUS thus determines the agencies' jurisdiction under the CWA.

The agencies issued regulations defining "waters of the United States" shortly after passage of the Act. 39 Fed. Reg. 12,115, 12,115, 12,119 (Apr. 3, 1974); 42 Fed. Reg. 37,122, 37,122, 37,144 (July 19, 1977). As the agencies' interpretation of their authority expanded over the years, the Supreme Court confronted the meaning of WOTUS in a series of decisions beginning with *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). There, the Court held that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable'" and that it is "a permissible interpretation of the Act" to conclude that "a wetland that *actually abuts on* a navigable waterway" is a water of the United States.'" *Id*. at 133, 135 (emphasis added).

Following *Riverside Bayview*, the agencies "adopted increasingly broad interpretations" of WOTUS, asserting jurisdiction over an ever-growing set of features bearing little or no relation to traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality). One of those interpretations—the Migratory Bird Rule—was struck down in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). There, the Supreme Court held that, while *Riverside Bayview* turned on "the significant nexus" between "wetlands and [the] 'navigable waters'" they abut, the Migratory Bird Rule asserted jurisdiction over isolated ponds bearing no connection to navigable waters. *Id*. at 167. That approach impermissibly read the term "navigable" out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA." *Id*. at 172.

More recently, in *Rapanos v. United States*, the Supreme Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water." 547 U.S. 715, 720-21 (2006) (plurality). Justice Scalia, writing for a four-Justice plurality,

held that WOTUS include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 732, 739. Justice Kennedy, concurring in the judgment, expressed support for a "significant nexus" test but categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a "significant nexus." *Id*. at 781 (Kennedy, J., concurring). Such an "ominous reach," Justice Kennedy later observed, would "raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1817 (2016) (Kennedy, J., concurring).

B. The Unlawful 2015 Rule

Although Chief Justice Roberts warned in *Rapanos* that the "clearly limiting terms Congress employed in the Clean Water Act" were "inconsistent" with "the view that [the agencies'] authority was essentially limitless" (547 U.S. at 757–58 (Roberts, C.J., concurring)), the agencies took a "limitless" view of their jurisdiction when they promulgated a new WOTUS Rule in 2015. 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). Despite the CWA's comprehensive programs to address water pollution generally, the primary role it reserves to states, and the narrower focus of the discharge prohibitions, the agencies issued an expansive definition of WOTUS that swept in features remote from navigable waters. For example, the rule covered "all interstate waters," even if they are not "navigable" and "do not connect to [navigable] waters." 80 Fed. Reg. at 37,074, 37,104. And it defined its jurisdiction in a manner that would sweep in distant and ephemeral features, such as minor creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes. 33 C.F.R. 328.3(c)(3); 80 Fed. Reg. at 37,076. Through expansive definitions of tributaries, adjacent waters, and sufficient chemical and biological nexus, and by lumping features together within a watershed, the Rule left hardly any wet area outside federal jurisdiction. To an even greater extent than prior guidance, the all-encompassing 2015 Rule therefore left "property owners . . . at the agency's mercy." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

Lawsuits were filed in district courts and courts of appeals across the country by states and the regulated community challenging the 2015 Rule. During that litigation, the Sixth Circuit stayed the rule nationwide because it was "far from clear" that it could be squared with even the most generous reading of Supreme Court precedent. *In re EPA & Dep't. of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015). After the Sixth Circuit lost jurisdiction (*see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018)), district courts issued preliminary injunctions covering more than half of the country. Ultimately, two courts held the rule unlawful and remanded it to the agencies.

The District Court in North Dakota enjoined the rule in 13 States because the challengers were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051 n.1, 1055 (D.N.D. 2015). It concluded that the 2015 Rule suffered from "fatal defect[s]," including that it was inconsistent with any plausible reading of Supreme Court precedent and arbitrary and capricious. *Id.* at 1055-60. Enjoining the 2015 Rule in another 11 States, the Southern District of Georgia agreed that the rule was "plague[d]" by the "fatal defect" that it reached drains, ditches, and streams "remote from any navigable-in-fact" water. *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. 2018) (quoting *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring)). The Southern District of Texas enjoined the 2015 Rule in another three States. *American Farm Bureau Fed'n* v. *U.S. EPA*, 3:15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87. Accordingly, defects in the rule meant it was inapplicable in 27 States.

Ultimately, the district courts in Texas and Georgia held that the 2015 Rule is unlawful. The Southern District of Texas concluded that the 2015 Rule "is not sustainable on the basis of the administrative record'" and remanded to the agencies. *Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019). The Southern District of Georgia addressed the substance of the 2015 Rule. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). It held that the rule's assertion of jurisdiction over all "interstate waters" impermissibly reads the term "navigable" out of the statute; its definition of "tributary" extends federal jurisdiction beyond that allowed under the CWA; and its categorical assertion of jurisdiction over all waters "adjacent" to all tributaries was an impermissible construction. *Id.* at 1363-68. And it held that "the WOTUS Rule's vast expansion of

jurisdiction over waters and land traditionally within the states' regulatory authority" constituted a "substantial encroachment" into state power that "cannot stand absent a clear statement from Congress. *Id.* at 1370, 1372. The court remanded the 2015 Rule to the agencies because by that time, recognizing the serious problems with the rule, the agencies had begun to reconsider it in new rulemakings.

C. Subsequent Administrative Rulemaking

The reasonableness of the 2020 Rule must be judged against this history in which agency claims of ever broader CWA authority led to multiple agency losses in the Supreme Court, injunctions against enforcement of the expansive 2015 Rule nationally, and then in more than half of the states, by courts that believed the challengers likely to succeed on the merits, followed by a comprehensively-reasoned decision by a district court that the 2015 Rule "extends the Agencies' delegated authority beyond the limits of the CWA, and thus is not a permissible construction of the phrase 'waters of the United States.'" *Georgia*, 418 F. Supp. 3d at 1344.

The agencies followed a reasonable "two-step process" to first address the 2015 Rule's illegality and its confused patchwork application by restoring the status quo ante through promulgation of the Repeal Rule,[1] then to carefully to redefine WOTUS in conformity with the CWA and judicial precedent through the Navigable Waters Protection Rule at issue here.[2]

Far simpler and easier to apply than its predecessors, the key feature of the 2020 Rule is the agencies' streamlined definition of WOTUS as four categories of waters: (1) traditional navigable waters that evidence the physical capacity for commercial navigation, and the territorial seas (together, "TNW"); (2) tributaries to those waters, defined as perennial or intermittent surface water channels that contribute flow to a TNW in a typical year, directly or through another WOTUS; (3) standing bodies of open water (lakes, ponds, impoundments of TNW) that contribute flow to a TNW in a typical year, directly or through another WOTUS, or that are inundated by flooding from a WOTUS in a typical year; and (4) wetlands that directly abut or touch a

[1] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[2] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020).

jurisdictional water, or are flooded from a jurisdictional water in typical year, or are separated from a jurisdictional water only by either a berm, bank, or other natural feature, or by an artificial structure through which there is a direct hydrological surface connection in a typical year (such as a culvert). Notable among 12 defined exclusions from WOTUS are ephemeral features, such as washes, rills, and gullies that flow only in direct response to precipitation; ditches that are not tributaries or constructed in jurisdictional features; diffuse stormwater runoff and sheet flow; irrigated uplands; artificial ponds; water filled depressions or pits incident to mining or construction; and waste treatment systems.

REASONS FOR DENYING PLAINTIFFS' MOTION

I. The Agencies Provided A Reasoned Explanation For The 2020 Rule.

The 2020 Rule does not violate the APA because the agencies provided a reasoned explanation of their new policy and their reasons for departing from past regulations. The agencies replaced previous reliance on a hodge-podge of geographical and nexus tests in favor of categorical rules regarding jurisdictional waters and wetlands. The agencies' explanation for the rule change was thorough, the 2020 Rule gives effect to the main purposes of the CWA of preventing pollution and preserving the states' primary authority over pollution control, the 2020 Rule provides greater regulatory certainty, and the agencies did not ignore prior inconsistent findings. All this more than satisfies the requirement that the agencies satisfactorily explain their rulemaking.

Agency action is invalid if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Under that "narrow" standard of review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Agencies need not rigidly adhere to past policies, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), but "may change their policies over time." *Oregon Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019). They may consider new information, reconsider past information, reinterpret statutory provisions, review prior assumptions, and set new policies based on their current understanding of the facts and the law. *See U.S. v. Eurodif S.A.*, 555 U.S. 305, 315 (2009) ("a court's choice of one

reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation").

When an agency changes direction, it need only provide a "reasoned explanation" for doing so. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Fox*, 556 U.S. at 516. It "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the old one." *Id*. at 515; *see Nat'l Cable & Telecommns. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (court must accept agency's reasonable construction of an ambiguous statute "even if the agency's reading differs from what the court believes is the best statutory interpretation"). To satisfy that "minimal burden," *Conservation Law Found. v. Longwood Venues & Destinations*, 422 F. Supp. 3d 435, 453 n.12 (D. Mass. 2019), the agency must (1) display awareness that it has changed its position; (2) show that the new policy "'is permissible under the statute'"; (3) "'believe[] the new policy is better'"; and (4) provide "'a reasoned explanation'" why it "'disregard[ed] facts and circumstances that underlay or were engendered by the prior policy.'" *Organized Vill. of Kake v. U.S. Dep't of Ag.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting *Fox*, 556 U.S. at 515-16).

The 2020 Rule easily satisfies this test. The only element plaintiffs contest is the last one, claiming that the agencies "have failed to provide the requisite explanation for their drastic policy change." Mot. 9. But plaintiffs do not plausibly show that the agencies failed to provide "good reasons" for the change. *Organized Vill. of Kake*, 795 F.3d at 967. Plaintiffs disagree with the agencies' policy choices, but the court's job on review is not to determine which is the "better" policy. *Fox*, 556 U.S. at 515. So long as the agencies' reasoning is "rational," *Cal. Ass'n of Private Postsecondary Sch. v. DeVos*, 2020 WL 516455, at *16 (D.D.C. Jan. 31, 2020), "reasonable," *Ctr. for Sci. in the Pub. Interest v. Perdue*, 2020 WL 1849695, at *14 (D. Md. April 13, 2020), and has "even that minimal level of analysis," *Encino Motorcars*, 136 S. Ct. at 2125, the agencies' action must be upheld. The agencies here did as much as, and more than, is required.

A. The Agencies' Provided Detailed Reasons For The 2020 Rule.

The agencies provided a "reasoned explanation" for the 2020 Rule. *Encino Motorcars*, 136 S. Ct. at 2125. That explanation spans more than 75 pages of the Federal Register and meticulously sets forth the agencies' interpretation of the CWA's text, structure, and purpose, *e.g.*, 85 Fed. Reg. at 22,252-54, the regulatory history, *e.g.*, *id*. at 22,254-55, the legal precedent bearing on the phrase "waters of the United States," *e.g.*, *id*. at 22,256-59, and the rulemaking process, including a discussion of significant comments regarding the primary subparts of the Rule, *e.g.*, *id*. at 22,259-337. Plaintiffs cherry-pick isolated aspects of this comprehensive regulatory effort for criticism, but this is not a rule backed only by a "terse explanation" or beset by "unexplained inconsistency." *Encino Motorcars*, 136 S. Ct. at 2126; *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 549 (S.D.N.Y. 2019). Nor did the agencies "completely ignore [their] previous finding[s]." *New York*, 414 F. Supp. 3d at 549. To the contrary, they squarely dealt with differences between the 2020 and 2015 Rules throughout their explanation. *E.g.*, 85 Fed. Reg. at 22,271-72.

B. The 2020 Rule Reasonably Balances Competing Policies.

The 2020 Rule balances Congress's "two national goals" in the CWA (85 Fed. Reg. at 22,252): preventing pollution and preserving states' control over their water and land resources. 33 U.S.C. § 1251(a), (b); *see* Executive Order 13778 (directing the agencies to review the 2015 Rule for consistency with "'the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution'"). The agencies explained that the distinction in the statutory text between waters that are subject to pollution abatement by non-federal regulatory means and "navigable waters" that are subject to federal discharge regulation confirms the need to balance these polices. 85 Fed. Reg. at 22,253; *see id.* at 22,254 ("the non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support State and local partnerships to control pollution in the nation's waters *and* a federal regulatory prohibition on the discharge of pollutants to the navigable waters").

In carrying out their mandate to balance these policies, the agencies concluded that the 2015 Rule "failed to adequately consider and accord due weight to the policy of the Congress" preserving States' rights and prerogatives. 85 Fed. Reg. at 22,260. The 2015 Rule could not be reconciled with the "major role for the States in implementing the CWA." *Id*. at 22,252. The policy change reflected in the 2020 Rule is thus in part the result of rebalancing jurisdiction to match Congress' purposes in the CWA. That is a "good reason" for the policy change, as agencies are afforded a "wide berth" in "balancing competing statutory policies." *Nat'l Ass'n of Regulatory Util. Comm'rs v. S.E.C.*, 63 F.3d 1123, 1127 (D.C. Cir. 1995).

Plaintiffs counter that the agencies disregarded the CWA's "primary objective" of protecting water quality. Mot. 14-15. But Plaintiffs' myopic focus on only one of the *two* goals of the CWA misunderstands the agencies' role. *See Rapanos*, 547 U.S. at 755-56 (Scalia, J., plurality) ("clean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions"). Principles of state authority and cooperative federalism are central to the CWA. *See* 85 Fed. Reg. at 22,334 (discussing "environmental federalism" under the statute). The CWA does not authorize the agencies to protect all water or wetlands regardless of state authority. Instead, it divides jurisdiction between the federal and state governments. This framework reserves to states their traditional authority over water resources and land use within their borders. *See FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (state authority to regulate local lands and waters "is perhaps the quintessential state activity").

Indeed, the Supreme Court has rejected the exercise of federal jurisdiction under the CWA when it improperly intrudes on states' "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. In *SWANCC*, the court held that the exercise of federal jurisdiction over isolated ponds was an "encroachment upon a traditional state power" and that Congress did not intend "to readjust the federal-state balance in this manner." *Id*. Instead, the statute *preserved* that balance when it announced its goal of protecting states' "primary responsibilities and rights" in planning the development and use of water and land resources. *Id*.; 33 U.S.C. § 1251(b). Plaintiffs' argument that the CWA is violated by exclusion of categories such as ephemeral streams from federal jurisdiction and restriction of the scope of federal permitting programs (Mot. 15-17) is

therefore a non-starter, for it is well within states' power to address water pollution within their borders and Congress intended states to continue to exercise that power.

The 2020 Rule does not leave states unable to address water pollution. Plaintiffs highlight reductions in *federal* jurisdiction over waters (Mot. 15-17), but *states* retain their traditional authority to regulate water pollution. *See* 85 Fed. Reg. at 22,254. For instance, "States may continue to apply their own State law-based programs to identify and restore impaired waters, although this activity would not be required under the CWA for waters that are not jurisdictional under the final rule." *Id*. at 22,333. As the agencies explained, "the potential long-term effects [of the 2020 Rule] will depend on whether or how States and Tribes choose to modify their existing programs," because "complete State 'gap-filling' could result in a zero-net impact in the long-run." *Id*. Further, the agencies reasoned, a state is able to "more efficiently allocate resources towards environmental protection due to local knowledge of amenities and constituent preferences." *Id*. at 22,234.

C. The 2020 Rule Provides Greater Regulatory Certainty.

The agencies explained that a purpose of the 2020 Rule was to provide regulatory certainty, lacking in the prior policy, by implementing categorical rules. *See* 85 Fed. Reg. at 22,325 (2020 Rule's "categorical bright lines" provide "clarity and predictability for regulators and the regulated community"). For instance, the 2020 Rule codifies twelve exclusions from the definition of WOTUS that "further[] the agencies' goal of providing greater clarity over which waters are and are not regulated under the CWA." *Id*. at 22,317-318. As another example, the 2020 Rule clarifies the jurisdictional nature of ditches, long a topic of confusion "for farmers, ranchers, irrigation districts, municipalities, water supply and stormwater management agencies, and the transportation sector." *Id*. at 22,295. And the agencies discarded the malleable significant nexus analysis for tributaries in favor of "a clear definition of 'tributary' that is easier to implement." *Id*. at 22,291.

The agencies aimed to "eliminate[] the case-specific application of the agencies' previous interpretation of Justice Kennedy's significant nexus test" in favor of "clear categories of jurisdictional waters that adhere to the basic principles articulated in the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions" and that comport with the structure of the CWA. 85 Fed. Reg. at 22,273; *see id*. at 22,270 ("replacing the multi-factored case-specific significant nexus analysis

with categorically jurisdictional and categorically excluded waters" provides "clarifying value for members of the regulated community"). Without doubt, "[r]emoving the source of confusion" is "a 'good reason[] for the new policy.'" *Gonzales-Veliz v. Barr*, 938 F.3d 219, 235 (5th Cir. 2019) (quoting *Fox*, 556 U.S. at 515).

D. Plaintiffs' Attack On The Science Underlying The 2020 Rule Is Unfounded.

Plaintiffs claim that the agencies "pay scant attention to EPA's own Connectivity Report and offer no scientific evidence contradicting their prior findings." Mot. 10-14. That is not true, for the agencies' explanation expressly addressed the Connectivity Report throughout. *E.g.*, 85 Fed. Reg. at 22,257-58, 22,261-22,262, 22,288, 22,290 n.45, 22,314. While the agencies "looked to scientific principles to inform implementation of the final rule," they concluded that "science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA." *Id*. at 22,271; *see id*. at 22,288 (agencies "balanced science, policy, and the law when crafting the proposed rule"). The agencies did not simply disregard "inconvenient factual determinations." Mot. 10. Instead, they analyzed the science and balanced it with the legal limits on their jurisdiction.

What plaintiffs really complain about is that the agencies did not rely on their preferred science. But there is no requirement that the agencies adopt the Connectivity Report in the 2020 Rule. Instead, an agency receives "considerable discretion" for "matters 'requir[ing] a high level of technical expertise'" and "it is not [the court's] role to weigh competing scientific analyses." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-59 (9th Cir. 2009) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989)).

Plaintiffs also assert that the agencies' definition of "typical year" in the 2020 Rule lacks a rational basis. The agencies, however, "articulate[d] a satisfactory explanation" for the definition. *State Farm*, 463 U.S. at 43. They use "typical year" to "help establish the surface water connection between a relatively permanent body of water and traditional navigable waters, and between certain wetlands and other jurisdictional waters, that is sufficient to warrant federal jurisdiction." 85 Fed. Reg. at 22,274. The agencies define "typical year" to mean "when precipitation and other climatic

variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." *Id*.

Plaintiffs label this definition "incomprehensible," saying that a "backward-looking approach" ignores climate change and that the agencies had identified better alternative methodologies for calculating the normal periodic range of precipitation. Mot. 18. But the agencies are entitled to deference in selecting their methodologies. *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076-77 (9th Cir. 2003). The agencies explained that the approach they will use to calculate normal periodic range will be based on weighted values assigned to data from the Global Historic Climatology Network. 85 Fed. Reg. at 22,274. They also recognized that "there may be other accurate and reliable measurements of normal precipitation conditions" and stated that they "will make adjustments" as "scientifically warranted" when other methods are developed and validated. *Id*. With regard to the determination of the relevant geographic area, the agencies considered comments to their proposed rule and determined that "specifying a particular watershed size or Hydrologic Unit Code (HUC) could preclude the use of the best available data sources." *Id*. at 22,275. As for using a "backward-looking" 30-year rolling period to measure a typical year, that period allows the agencies to account for climatic variability and the 30-year time frame "is the most common and recognized timeframe utilized in other government climatic data programs." *Id.* at 22,274. Employing established methodologies and considering the best available data while allowing for development of new methodologies is not arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

E. The Agencies Considered The Effect Of The 2020 Rule On States.

"In explaining its changed position," an agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515). Plaintiffs' assertion (Mot. 19-20) that the agencies failed to consider states' reliance on past rules and guidance that used a "significant nexus" test is incorrect. To start, there is significant overlap between jurisdictional waters under a significant nexus test and the 2020 Rule, so plaintiffs' concern that they will have to entirely restructure their water quality control programs is overstated. Further, the agencies

recognized that the changes resulting from the 2020 Rule would affect states and discussed how states may adapt to the change in federal jurisdiction. *See* 85 Fed. Reg. at 22,270, 22,333-34. And the agencies met with states throughout the rulemaking process to examine any implications for state and local governments. *Id*. at 22,336. The agencies also explained that the 2020 Rule "does not impose any new costs or other requirements, preempt state law, or limit states' policy discretion; rather, it provides more discretion for states as to how best to manage waters under their sole jurisdiction." *Id*. The agencies plainly did not ignore states reliance interests on the significant nexus test, but rather explained that the 2020 Rule preserved states' authority and allowed states to fill in any regulatory gaps if they choose.

II. The 2020 Rule Is Permissible Under The CWA.

Plaintiffs claim that the Rule was not a permissible interpretation of the CWA because the agencies (1) did not adhere to Justice Kennedy's significant nexus test; (2) improperly elevated state responsibility over water pollution; (3) overstated constitutional limitations on their authority; and (4) improperly excluded interstate waters from federal jurisdiction. Each of these claims fail.

A. The Agencies Were Not Required To Strictly Follow Justice Kennedy's Significant Nexus Test From His *Rapanos* Concurrence.

Plaintiffs argue that the Rule adopts an interpretation of the CWA that "was rejected by the majority of the Justices of the Supreme Court in *Rapanos*" because it relies heavily on Justice Scalia's plurality decision. Mot. 21. According to plaintiffs, in the past the agencies have "consistently recognized that the significant nexus standard in Justice Kennedy's concurring opinion was the controlling legal standard for identifying [WOTUS].'" *Id*. at 22.

True, the 2020 Rule departs from the significant nexus analysis in favor of categorical rules that provide more certainty. *E.g.*, 85 Fed. Reg. at 22,273. But the Rule neither wholesale adopts the *Rapanos* plurality decision nor wholesale rejects Justice Kennedy's concurrence. *See id*. at 22,268 ("While the agencies acknowledge that the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently[, …] there are sufficient commonalities between these opinions to help instruct the agencies on where to draw the line between Federal and State waters"); *id*. at 22,291 ("this final rule incorporates important aspects of Justice Kennedy's opinion, together

with those of the plurality, to craft a clear and implementable definition [of "tributary"] that stays within their statutory and constitutional authorities"). For example, the agencies acknowledged that each opinion "excludes some waters and wetlands that the other standard does not," but were guided by the fact that both opinions "agreed in principle that the determination must be made using a basic two-step approach that considers (1) the connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters." *Id*. at 22,267.

The principal flaw in plaintiffs' argument, however, is their underlying belief that the significant nexus test is a controlling legal standard that the agencies are bound to follow. First, an agency is not in all cases prohibited from interpreting a statute in a different manner than a prior interpretation by a court. *See Eurodif*, 555 U.S. at 315; *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer"). Instead, where an agency's different interpretation is consistent with the statute, it is permissible. *Id*. And an agency has the power to change its policy where it offers a reasoned explanation for doing so, as the agencies did here. *Encino Motorcars*, 136 S. Ct. at 2125-26.

Second, Justice Kennedy's opinion in *Rapanos* is not the holding of that case. In *Marks v United States*, the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). The Court described the *Marks* rule as: "When there is no majority opinion, the narrower holding controls." *Panetti v. Quarterman* 551 U.S. 930, 949 (2007). *Marks* does not apply where there is no lowest common denominator that represents the Court's holding. *Nichols v. United States*, 511 U.S. 738, 745 (1994). *Marks* thus established a very narrow rule that where a concurring opinion adopts a narrower variant of the plurality's reasoning, the concurring opinion may be considered the opinion of the Court (and vice versa). *United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (en banc). But beyond this situation, *Marks* has no application and it does not permit a court

to give precedential effect to a concurrence that is simply *different* from—not a broader or narrower version of the reasoning of—the plurality opinion.

The Ninth Circuit has purported to apply *Marks* to *Rapanos* and held that Justice Kennedy's significant nexus test "is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." *N. Calif. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007). But since that decision, the Ninth Circuit reconsidered in *Davis* how it applies *Marks* to determine which, if any, opinion of a fragmented Supreme Court decision is controlling. Under *Davis*, where the court "can identify no rationale common to a majority of the Justices, we are bound only by the result." 825 F.3d at 1016. That includes the situation where "'the plurality and concurring opinions do not share common reasoning whereby one analysis is the logical subset of the other.'" *Id*. (quoting *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013)). Under *Davis*, neither the plurality nor Justice Kennedy's concurrence are controlling because neither is a logical subset of the other: the plurality did not accept the concurrence's significant nexus test and Justice Kennedy did not accept the plurality's required connection of a water or wetland to a navigable water. *See United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011); *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006).[3]

The Sixth Circuit used similar reasoning when it explained that the search for the "narrowest opinion" that "relies on the least doctrinally far-reaching common ground" "breaks down" in *Rapanos* because neither the plurality nor the concurrence is a "logical subset" of the other. *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). The court observed that "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's views." *Id*. at 210. Thus, "*Rapanos* is not easily reconciled with *Marks*." *Id*. Under *Davis* and *Cundiff*, where neither the plurality nor the concurrence is a logical subset of the other, neither is controlling. As such, the question of whether the agencies'

[3] The Ninth Circuit re-visited *Healdsburg* in light of *Davis* in *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017), *vacated sub nom. Robertson v. United States*, 139 S. Ct. 1543 (2019). While the *Robertson* court ultimately concluded that *Healdsburg* was not "clearly irreconcilable with *Davis*" (*id*. at 1292), the decision was vacated by the Supreme Court because petitioner died while his petition for certiorari was pending. 139 S. Ct. 1543.

interpretation of the CWA was impermissible for failure to apply Justice Kennedy's significant nexus test is easily answered: the agencies could be under no such obligation.

Regardless of whether the plurality opinion is controlling, the agencies were entitled to find it more persuasive than the concurrence of a single Justice based on a phrase, significant nexus, that appears nowhere in the statute. And *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), supports the conclusion that the Justices believe the plurality to be the best source in *Rapanos* for guidance about the meaning of the CWA. There, in a fragmented decision, four Justices wrote opinions and all of them cited the *Rapanos* plurality's discussion of point sources under the CWA. *Id*. at 1468-78; *id*. at 1478-79 (Kavanaugh, J., concurring); *id*. at 1479-82 (Thomas, J., dissenting); *id*. at 1482-92 (Alito, J., dissenting). While each opinion applied the plurality's reasoning differently, there can be no question that the Court believes the plurality is the source from which to draw guidance about the meaning of the statute.

Still, as the agencies recognized, 85 Fed. Reg. at 22,291, there is some agreement between the plurality and Justice Kennedy on important issues. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) (court may look for common ground in plurality and concurring opinions). The plurality and Justice Kennedy agreed that "the word 'navigable' in 'navigable waters' [must] be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring); *see id*. at 731 (plurality). They also agreed that the CWA reaches some waters and wetlands that are not navigable-in-fact but that have a substantial connection to navigable waters, though they disagreed whether the sufficient connection is "a continuous surface connection," requiring a "relatively permanent standing or continuously flowing bod[y] of water" (547 U.S. at 739, 742 (plurality)), or a "nexus" that is "significant" enough to "affect the chemical, physical, and biological integrity" of the navigable water (*id*. at 784-85 (Kennedy, J.)).

Despite this difference in characterizing the necessary connection, both Justice Kennedy and the plurality agreed that, applying their tests, "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less waters or "wetlands [that] lie alongside [such] a ditch or drain." 547 U.S. at 781 (Kennedy, J.); *see id*. at 778-81 (identifying "volume of flow" and

"proximity" as relevant factors and ruling out jurisdiction over features with a "remote," "insubstantial," or "speculative" effect on navigable waters) (Kennedy, J.); *id*. at 733-34 (jurisdiction reaches "continuously present, fixed bodies of water"; "intermittent or ephemeral flow" of the sort found in "drainage ditches," "storm sewers and culverts," and "dry arroyos" is insufficient) (plurality); *id*. at 742 (wetlands with "an intermittent, physically remote hydrologic connection" to jurisdictional waters lack a "significant nexus") (plurality). Under a common-denominator approach, those are the controlling holdings of *Rapanos*. *See Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016). Thus, if the agencies were bound by *Rapanos*, those are the holdings that bind them, and the 2020 Rule is consistent with them.

Finally, plaintiffs mistakenly seek support in Justice Stevens's *Rapanos* dissent for their argument that the agencies were required to employ Justice Kennedy's significant nexus test. Mot. 22. In *Marks*, the Supreme Court explained that in a fragmented decision, "the holding of the Court may be viewed as that position *taken by those Members who concurred in the judgment* on the narrowest grounds." 430 U.S. at 193 (internal quotations omitted). A dissenting opinion by definition does not concur in the court's "judgment." Plaintiffs are therefore wrong to rely on the *Rapanos* dissent.

B. The 2020 Rule Properly Relies On The CWA's Purpose Of Preserving State Authority Over Waters Within Their Borders.

Plaintiffs contend that "[t]here is nothing in the Act to suggest that, as the Agencies assert, Congress intended to balance water quality with state sovereignty by limiting the scope of [WOTUS]." Mot. 24. Instead, plaintiffs argue, "Congress intended to give states a primary role in protecting the quality of the 'waters of the United States' in their states." *Id*. But plaintiffs concede that a fundamental purpose of the CWA is to protect states' authority over water and land use within their borders. *See* 33 U.S.C. § 1251(b); 85 Fed. Reg. at 22,254, 22,262. That authority is a core aspect of state sovereignty, *FERC*, 456 U.S. at 767 n.30, and undue intrusion into that sovereignty by federal rule runs headlong into states' Tenth Amendment protection. *See Hodel v. Va. Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 286-87 (1981).

Congress's recognition of state authority is built into the CWA. First, Congress enacted the foundational principle preserving those rights in 33 U.S.C. § 1251(b). Second, Congress enacted a system of federal financial support and assistance to state and local government programs designed to curb pollution in the "nation's waters" and authorized direct federal regulation of a subset of the "nation's waters" it identified as "navigable waters." 85 Fed. Reg. at 22,253. Recognition of state authority is not an imagined limit on the scope of federal jurisdiction, but rather an inherent part of the CWA's structure. The fact that the CWA contains specific grants of authority to states in the operation of permitting programs (Mot. 24-25) does not alter the constitutional limitations on federal jurisdiction over waters nor the need to recognize state authority.

Plaintiffs far overstate the matter when they say that the 2020 Rule "eviscerat[es] the federal baseline of water pollution controls." Mot. 26. There remains a strong federal regulatory baseline, and the fact the federal regulatory sweep may not go as far as plaintiffs prefer does not prevent any state from implementing its own programs and protecting water within its borders. In the end, plaintiffs are just a (minority) subset of states that want broader federal controls than the 2020 Rule provides. That does not mean the agencies' decision to rely on the CWA's recognition of state authority as a guiding principle was an irrational interpretation of the statute. *See The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (en banc).

C. The Agencies Properly Accounted For Constitutional Limitations On Their Authority.

The agencies sought in the 2020 Rule "to avoid interpretations of the CWA that push the envelope of their constitutional . . . authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority." 85 Fed. Reg. at 22,260. Plaintiffs argue that the agencies improperly took these constitutional concerns into account because Justice Kennedy's significant nexus test avoids Commerce Clause and other constitutional problems. Mot. 27. But the agencies were not required to adopt that test. *Supra*, Part II.A. Further, plaintiffs cite no authority for the proposition that agencies *must* regulate to the limit of their constitutional authority. Doing so without "a clear indication that Congress intended that result" is especially dangerous "where the administrative interpretation alters the federal-state

framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. Agencies legitimately may choose to regulate within the core area of federal power, and indeed may not press the boundaries of federal constitutional authority unless Congress so authorizes, which the CWA does not. The 2020 Rule complies with these principles.

Relying on Justice Kennedy's *Rapanos* concurrence, plaintiffs dismiss this concern because "*SWANCC* concerned abandoned intrastate ponds and mudflats that were isolated and lacked a 'significant nexus' to other waters protected by the Act, and in any case did not decide any constitutional questions." Mot. 27. But *SWANCC* interpreted agency authority using the constitutional avoidance principle, and that ruling applies here: there is no clear statutory statement that Congress intended the agencies to push the envelope of the federal commerce clause power (*SWANCC*, 531 U.S. at 174), and it cannot be irrational for the agencies to stop short of that outer limit in the absence of a clear directive. *See* 85 Fed. Reg. at 22,256, 22,260.

D. The 2020 Rule Properly Excludes From Jurisdiction Interstate Waters That Are Not Otherwise WOTUS.

Even more than the migratory bird rule struck down in *SWANCC*, the agencies' pre-2020 claim of authority over interstate waters, which plaintiffs defend (Mot. 28-29), illustrates how unmoored the WOTUS definition had become from sound legal principles. The migratory bird rule at least rested on the agencies' view—rejected in *SWANCC*—that their CWA jurisdiction reached the outer edges of interstate *commerce*. But the agencies' assertion of jurisdiction over "interstate" waters ditched the need for any "commerce" connection—or any nexus at all to navigable water—and rested solely on the fact that water crossed a state border. This was no minor infraction, for as assertedly core jurisdictional waters, interstate waters also swept into federal jurisdiction adjacent, close-by, or remotely connected waters or wetlands. *Georgia*, 418 F. Supp. 3d at 1359-60.

Many interstate waters will qualify as jurisdictional under the 2020 Rule as navigable waters or tributaries, so plaintiffs are incorrect to fear "uncontrolled pollution flowing from upstream states." Mot. 28. But as the agencies have at last recognized (85 Fed. Reg. at 22,283-86), they have no legal basis to assert jurisdiction over *all* water that crosses or straddles state lines. To the contrary, apart from grandfathering earlier-established water quality standards in interstate rivers

and lakes (Mot. 28), Congress in the CWA deliberately removed the word "interstate" from the statute's jurisdictional provision. *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), and Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), *with* 33 U.S.C. § 1362(7) ("navigable"). That change, the agencies recognize, was "an express rejection" by Congress of "retaining 'interstate waters' as a separate and distinct category of [WOTUS]," and must be given "'real and substantial effect.'" 85 Fed. Reg. at 22,283-84 (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). As the court held in *Georgia*, extending "jurisdiction over all interstate waters . . . reads out the 'central requirement' that 'the word "navigable" . . . be given some importance'" and so "is not a permissible construction of the CWA." 18 F. Supp. 3d at 1359.

None of the Supreme Court decisions plaintiffs cite (Mot. 29) holds that CWA jurisdiction includes interstate waters as a distinct category. The *Milwaukee* cases involve Lake Michigan (*Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981)); *Int'l Paper v. Ouellette*, 479 U.S. 481 (1987), Lake Champlain; and *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the Illinois River. Each addresses permits for discharges to actually navigable interstate waters. They stand only for the proposition that the Act addresses pollution in interstate *navigable* waters—which mirrors frequent references in the CWA's legislative history to "interstate navigable waters." *E.g.*, S. Rep. No. 92-414, at 2, 4 (1971); 118 Cong. Rec. 10240 (1972). Plaintiffs fail to show that they are likely to prevail on the merits of their argument that interstate waters *must* be included within WOTUS; to the contrary, the agencies correctly determined that such jurisdiction is unauthorized by the CWA.

III. The Balance Of Harms Precludes Issuance Of A Preliminary Injunction.

The plaintiffs do not meet their burden to show that the balance of harms tilts in their favor. *See Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (vacating preliminary injunction where defendants' interest outweighed plaintiffs' nonetheless "serious" economic, scientific, and recreational interests). The crux of plaintiffs' argument is that they are unwilling or unable to expend resources to regulate discharges into waters within their borders that are no longer WOTUS. That argument overlooks states' proper role in protecting their own waters—a role

Congress recognized and preserved in the CWA—and the harm a preliminary injunction would inflict on regulated parties, which plaintiffs simply ignore.

First, plaintiffs conflate narrower federal jurisdiction with no water quality controls and immediate impairment. *E.g.*, Mot. 32 ("pollutants will discharge into New Mexico waters without limit"). That argument assumes third parties will immediately pollute features that are no longer federally covered, without restraint and in quantities that immediately impair downstream features. That assertion is neither supported, nor probable. For example, the agencies explain, "[i]f a pollutant is conveyed through an ephemeral stream to a jurisdictional water, an NPDES permit may likely still be required." *Resource and Programmatic Assessment for the Navigable Waters Protection Rule* 79 (Jan. 23, 2020) ("RPA"). And as the plaintiff States' affidavits establish, they already have robust regimes in place to protect their waters.[4]

States stepping up to protect their waters is consistent with the CWA. While Congress charged the federal agencies with authority over the permitting programs for discharges into WOTUS, Congress equally stated its "policy" to preserve the "primary responsibilities and rights of States" to address pollution and regulate land and water use. *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)). And the Section 404 and 402 permit programs are by no means the sole mechanism to protect our Nation's waters, but part of multiple programs that together are designed to do so. CWA Section 303 requires each state to set water quality standards for waters within its borders. 33 U.S.C. § 1313(c)(1), (2)(A). If a body of water within a state does not achieve water quality standards, the state must identify it and establish a "total maximum daily load" ("TMDL") for pollutants causing the impairment (*id.*, § 1313(d)(1)(C)), as well as engage in "a continuing planning process" to achieve water quality standards. *Id.*, § 1313(e)(1). While under the 2020 Rule it may no longer be *mandatory* for states to set TDMLs for some ephemeral or remote features,

[4] *See*, *e.g.*, Dkt. 30-14, ¶ 4 ("Maryland has comprehensive state laws in place to protect and restore its wetlands and waterways."); Dkt. 30-7, ¶ 11 ("New Jersey's wetlands statutes and regulations provide robust protection to the resources within the State."); Dkt. 30-10, ¶ 31 ("California has strong state water quality protections."); Dkt. 30-11, ¶ 10 ("Massachusetts's jurisdiction over wetlands and waterways in the Commonwealth is broad.").

states may continue to set standards and develop TDMLs for those waters under state or local programs. And states now will be able to target resources to the features they consider most important. *See* 85 Fed. Reg. at 22,334. Although a minority of states (currently, 13) constrain their authority to regulate waters beyond federal requirements, many more regulate waters *beyond* the federal definition. RPA 45.[5] And any state may choose to do so. While plaintiffs may prefer not to expend resources to protect their waters, "nothing in the [2020 Rule] affects the[ir] ability" to "apply and enforce independent authorities over aquatic resources." RPA 92.[6]

Plaintiffs imagine risks posed by upstream states. Mot. 33; Dkt. 63, at 3. But that assertion requires three unsubstantiated leaps: (1) other States will allow third parties to pollute ephemeral or remote features that are no longer WOTUS, (2) pollution from ephemeral features and features remote from navigable waters will reach downstream plaintiff states, and (3) it will do so in quantities that impair plaintiffs' waters. Those assertions are unproven, and also improbable. They ignore the fact that federal jurisdiction continues to protect against discharges into WOTUS. They ignore that other states' democratically-elected representatives have an obligation to their own citizens to protect water resources. And they ignore other devices available to protect against this very risk. For example, states can, and do, enter Congressionally-approved interstate compacts to address water quality issues. *E.g.*, Great Lakes Basin Compact, 82 Stat. 414 (1968); New England Interstate Water Pollution Control Compact, 61 Stat. 682 (1947); Ohio River Valley Water Sanitation Compact, 54 Stat. 752 (1940); Tri-State Compact, 49 Stat. 932 (1935). States also develop joint legislative commissions to cooperatively address water quality issues of mutual concern.[7] And, barring agreement, states can address interstate pollution disputes through federal

[5] 47 states already take responsibility for implementing Section 402 permit programs, many states administer their own discharge permits, and 38 states have implemented dredge and fill regulatory mechanisms for state waters. RPA 48. Several states have passed additional conservation and restoration programs, and most states protect wetlands. RPA 49. Nearly all states, therefore, have mechanisms that they can adapt to fill any perceived gaps in federal authority.

[6] The CWA also establishes programs that offer federal assistance to states, including the Section 106 Grant Program and Section 319 Nonpoint Source Management Program that the 2020 Rule will not affect. 85 Fed. Reg. 22334.

[7] As one example, take plaintiffs' assertion that the 2020 Rule will undermine Maryland's efforts to restore water quality in the Chesapeake Bay. Mot. 33. But multistate efforts are already in place to protect the Bay. *See Chesapeake Bay Comm'n*, https://www.chesbay.us/mission.

common law original actions, including the usual array of preliminary relief. *E.g.*, *Illinois*, 406 U.S. at 98-99. In enacting the CWA, Congress was certainly aware that water flows downstream. But Congress still stated a policy that states would continue to be the "primary" protectors of their water—which would necessarily require use of the tools for interstate agreement and dispute resolution identified above.

Second, while pointing to speculative harms that the plaintiff states could address by their own actions, plaintiffs ignore the real harm a preliminary injunction or stay would cause to farmers, ranchers and other livestock producers, forestry, home and infrastructure builders, miners, manufacturers, and other industries nationwide. That oversight is jarring because plaintiffs seek to increase regulatory burdens on businesses, represented by intervenors here, who have for years pointed out the burdens that over-expansive WOTUS jurisdiction imposes on their members. *See* Parrish Dec. ¶¶ 7-18 (describing the vigorous opposition of intervenors' members against an overly broad definition of WOTUS, and their efforts to achieve a clear, reasonable, and lawful standard).

Bloated federal jurisdiction has serious economic effects for those subject to federal permitting. The costs of obtaining a permit "are significant" and the process "arduous, expensive, and long." *Hawkes*, 136 S. Ct. at 1812, 1815. "Over $1.7 billion is spent each year by the private and public sectors obtaining wetland permits." *Rapanos*, 547 U.S. at 721 (plurality). For some businesses, these costs are uneconomic, forcing them to abandon projects or take land out of productive use. Parrish Dec. ¶¶ 26, 53; *see also id.* ¶ 29 (members of intervenor National Stone, Sand, and Gravel Association would struggle to provide aggregate needed for essential public works and may abandon some reserves under the 2015 Rule); *id.* ¶ 30 (describing land improvement projects that a Delaware farmer had to abandon under the 2015 Rule).

There would also be uncertainty costs from enjoining the clear jurisdictional lines laid out in the 2020 Rule. Clarity regarding which waters are jurisdictional is critical to the vitality of the businesses that operate under these regulations. Landowners or operators who make a mistake face severe criminal and civil penalties, in some cases forcing them to settle to avoid millions of dollars in liability and loss of a family farm. Parrish Dec. ¶ 33. If the definition of WOTUS is unpredictable, landowners' ability to use their property productively is severely compromised. If farmers cannot

tell what parts of their land can be put to use and which must be kept free of farming equipment, dirt and gravel, seed, and fertilizer, they may have to take land entirely out of production, or expend resources on a consultant. *Id.* ¶ 50. Manufacturers and builders may have to delay or abandon construction and other projects. *Id.* ¶¶ 28-29. Similar concerns cut across nearly every industry in the country, and adjustments to members' operations may cost jobs and impair production of affordable food, shelter, and goods on which Americans depend. *Id.* Many businesses hit the hardest are family operations that lack resources for costly jurisdictional determinations. *Id.* ¶ 53. Making matters worse, costly federal permits must be planned for and sought years in advance. Uncertainty over what standard will apply, and when, hamstrings business operations and planning. *Id.* ¶ 56.

Regulated parties suffered these harms under the 2015 Rule and patchwork regulatory regime that followed, as well as under the agencies' prior guidance that also based jurisdiction on the unpredictable substantial nexus test. The 2020 Rule solves the problem. It replaces vague and overbroad jurisdiction with brighter-line standards. Intervenors' members no longer face the risk that plowing and seeding or building over a puddle is a federal violation, or that filling a long-dry wash may result in jail. Parrish Dec. ¶¶ 21-24, 31-32, 34-35. Enjoining the 2020 Rule would cast the Nation's businesses back into the regulatory purgatory that the 2020 Rule corrects. These serious harms—documented by the intervenors over years of litigation (*Id.* ¶¶ 13-15) and rule comments (*id.* ¶14, n.2)—far outweigh plaintiffs' preference not to regulate their own water features.

CONCLUSION

For the foregoing reasons, Business Intervenors respectfully request that the Court deny plaintiffs' motion for a preliminary injunction or stay.

Dated this 1st day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Northern District of California on all parties registered for CM/ECF in the above-captioned matter.

Dated at Los Angeles, California, this 1st day of June, 2020.

s/ C. Mitchell Hendy