IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, *et al.*, *Plaintiffs*, v. ANDREW R. WHEELER, *et al.*, *Defendants*, AMERICAN FARM BUREAU FEDERATION, *et al.*, *Intervenor-Defendants*.	Case No. 2:20-cv-01687-DCN

INTERVENOR-DEFENDANTS' REPLY
IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The final agency action by the Environmental Protection Agency and the U.S. Army Corps of Engineers (together, the "agencies") promulgating a definition of "waters of the United States" ("WOTUS") should be upheld. The Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule"), was a valid exercise of the agencies' authority. The agencies recognized that the 2015 Rule manifested an unreasonably expansive scope of federal jurisdiction and required case-by-case jurisdictional determinations that were extremely costly and failed to provide certainty to the regulated community. The agencies enacted the 2020 Rule to better accommodate the twin congressional purposes underlying the Clean Water Act ("CWA")—protection of the integrity of navigable waters and preservation of state authority over land and water use—in a manner that observed constitutional boundaries and provided regulatory predictability through the adoption of categorical rules.

A central focus of Plaintiffs' challenge is on the agencies' decision to incorporate into the 2020 Rule aspects of Justice Scalia's plurality decision in *Rapanos v. United States*, 547 U.S. 715 (2006). But Justice Scalia's opinion is only one of the sources relied on by the agencies in promulgating the Rule. And it is beyond dispute that the agencies retain the authority to reasonably interpret ambiguous statutory provisions, as the Supreme Court explained in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). The 2020 Rule is a reasonable and measured interpretation of the scope of federal jurisdiction under the CWA in the light of, among other things, statutory language, structure, and purpose and Supreme Court precedent.

Contrary to Plaintiffs' argument, there is no binding holding from *Rapanos* rejecting the plurality's view. To prevail on that point, Plaintiffs need to combine the four-Justice dissent in *Rapanos* with Justice Kennedy's concurrence to reach the required majority. But that effort fails,

for fundamental principles have long established that a dissenting opinion cannot be used to form the basis of a legal holding because the dissenters did not join in the judgment so their views can have no precedential weight. Thus, no binding holding in *Rapanos* foreclosed the agencies from relying on elements of the plurality decision.

Plaintiffs also charge that the 2020 Rule violates the APA because it is arbitrary and capricious. But the agencies complied with their obligation to provide a reasoned explanation for their policy change. Plaintiffs' APA argument boils down to their dissatisfaction that the agencies did not wholesale adopt the scientific basis for the 2015 Rule in the 2020 Rule. They were not required to do so. Nor were they required to affirmatively disprove the scientific basis for the 2015 Rule because the 2020 Rule is predicated on a legal policy change regarding the permissible scope of federal jurisdiction, not a rejection of past science or alteration of federal jurisdiction as a scientific matter. Plaintiffs' repeated attempt to fault the 2020 Rule as scientifically unsound thus falls flat.

ARGUMENT

I. THE 2020 RULE IS CONSISTENT WITH THE CWA.

A. The agencies were not precluded from incorporating elements of the *Rapanos* plurality into the 2020 Rule.

Plaintiffs' argument that the 2020 Rule is invalid because it incorporates the reasoning of Justice Scalia's *Rapanos* plurality opinion misunderstands well-settled doctrine regarding the precedential effect of the Supreme Court's fragmented decisions. In particular, Plaintiffs incorrectly assert that the agencies are prohibited from relying on the *Rapanos* plurality because five Justices—Justice Kennedy and the four dissenters—rejected that opinion's reasoning. But Plaintiffs cannot fashion such a binding holding from *Rapanos* relying on the views of dissenting Justices.

As we explained in our opening brief (at 30), the agencies are free to reasonably interpret ambiguous statutory language regardless of any prior judicial interpretation. *See Brand X*, 545 U.S. at 982. For *Rapanos* to limit the agencies' discretion, the decision must have resulted a precedential holding that WOTUS unambiguously must, or must not, mean certain things. Applying the rules used to interpret judgments, the precedential holding of *Rapanos* is that WOTUS unambiguously (1) includes some waters and wetlands not navigable-in-fact but which bear a substantial connection to navigable waters and (2) cannot include drains, ditches, streams remote from navigable-in-fact water and carrying only a small volume of water toward navigable-in-fact water, or waters or wetlands that are alongside a drain or ditch. Dkt. 68-1 at 33. Additionally, the agencies may not interpret WOTUS in a manner that permits environmental concerns to override the statutory text or that fails to give effect to the word "navigable" in the CWA. *Id.*

Plaintiffs do not question our argument that neither Justice Scalia's *Rapanos* plurality nor Justice Kennedy's *Rapanos* concurrence is a logical subset of the other under *Marks v. United States*, 430 U.S. 188 (1977). *See* Dkt. 68-1 at 31-32. In fact, they agree that there are "irreconcilable" differences between the two opinions. Dkt. 73 at 35. Therefore, Justice Kennedy's concurrence cannot be the precedential holding of *Rapanos*, and the agencies were not required to adopt Justice Kennedy's significant nexus test in the 2020 Rule. *See United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013) (explaining "logical subset" rule of *Marks* analysis); *United States v. Cundiff*, 555 F.3d 200, 209-10 (6th Cir. 2009) (holding that neither the *Rapanos* plurality nor concurrence is a logical subset of the other under *Marks*); *A.T. Massey Coal Co., Inc. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002) (applying logical subset rule of *Marks* and explaining that there is no *Marks* holding "unless 'the narrowest opinion represents a common

denominator of the Court's reasoning and embod[ies] a position implicitly approved by at least five Justices who support the judgment'").

1. No binding holding of Rapanos forecloses reliance on Justice Scalia's plurality opinion.

Plaintiffs erroneously contend that *Rapanos* "conclusively rejected the plurality's interpretation." Dkt. 73 at 37. In doing so they misapply the established rules to determine the precedential effect of a fragmented decision. In *Marks*, the Supreme Court explained 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. at 193 (emphasis added). The plain language of the *Marks* rule precludes Plaintiffs' attempt to craft a precedential holding from *Rapanos* that rejects the plurality opinion, because such a holding would rest on the opinion of the four dissenters and only the positions taken by Justices "who concurred in the judgments" can be considered. And Plaintiffs' attempt to do so also flies in the face of Justice Kennedy's square rejection of the dissent's position because "the dissent reads a central requirement out [of the CWA]—namely, the requirement that the word "navigable" in "navigable waters" be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring).

Plaintiffs respond that *Marks* "does not counsel that courts may only consider concurrences in the judgment when identifying the holding in a fragmented Supreme Court opinion," but that is *precisely* what *Marks* says. Dkt. 73 at 38. The Supreme Court later reiterated that *Marks* derives a holding from "the narrowest grounds of decision among the Justices whose votes *were necessary to the judgment*." *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (emphasis added). "[T]here is no Supreme Court decision embracing" the viewpoint that a

dissent can be combined with a concurrence to create a *Marks* holding. *United States v. Duvall*, 740 F.3d 604, 623 (D.C. Cir. 2013) (Williams, J., concurring in denial of *en banc* consideration).

Faithful to this rule, the Fourth Circuit has recognized that *Marks* requires consideration of the opinions of the "'Justices concurring in the judgment on the 'narrowest grounds.'" *United States v. Spivey*, 956 F.3d 212, 214 (4th Cir. 2020). In *United States v. Halstead*, 634 F.3d 270 (4th Cir. 2011), the Fourth Circuit applied *Marks* to determine the holding of the Supreme Court's splintered decision in *United States v. Santos*, 553 U.S. 507 (2008). The court explained that "[t]he holding of *Santos* must be distilled by looking to the holdings of the component opinions," and analyzed the plurality and concurrence without regard to the dissents. *Halstead*, 634 F.3d at 278-79.

Other courts also have recognized that *Marks* does not permit consideration of dissenters' views. For instance, the D.C. Circuit, sitting *en banc*, explained that because *Marks* permits consideration of the views of only those Justices who concurred in the judgment, "we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority." *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (*en banc*). Similarly, the Sixth Circuit held that *Marks* "instructs lower courts … to ignore dissents." *Cundiff*, 555 F.3d at 208; *see also e.g.*, *EMW Women's Surgical Center v. Friedlander*, slip op. at 14 (No. 18-6161) (6th Cir. Oct. 16, 2020); *United States v. Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017) ("under the standard announced in *Marks*, when we interpret *Rapanos* we are to find our standard in the narrowest opinion joining in the judgment. So the dissent that did not support the judgment is out for this purpose"), *vacated on other grounds sub nom. Robertson v. United States*, 139 S. Ct. 1543 (2019); *Milkiewicz v. Baxter Healthcare Corp.*, 963 F. Supp. 1150, 1156 (M.D. Fla. 1996) (the

court "cannot consider [dissenters'] view in determining the 'position taken by those Members who concurred in the judgments on the narrowest grounds'").

This approach stands to reason. "Although dissents may be scholarly and persuasive to some, they are not binding law to any." *Okpalobi v. Foster*, 244 F.3d 405, 415 n.15 (5th Cir. 2001); *see Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) ("a dissenting Supreme Court opinion is not binding precedent"). Because the Justices' "views in dissent, of course, are not binding authority," *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 878 (4th Cir. 1999), it does not make sense to combine dissenting views with a concurrence to create binding authority. *See United States v. Brooks*, 2009 WL 3644122, at *12 (E.D.N.Y. 2009) ("a dissent, even from the Supreme Court … 'has absolutely no precedential value'").

Dissenting opinions "cannot form part of the *ratio decidendi* of a case [because] they are not reasons for the order made by the court." A.M. Honore, *Ratio Decidendi*: *Judge and Court*, 71 Law Q. Rev. 196, 198 (1955). "The Supreme Court, like all appellate courts, makes binding precedent solely by giving reasons for its judgments. Dissents do not contain reasons for the Court's judgments; they provide reasons their authors oppose the Court's judgment." *In re Jones*, 534 B.R. 149, 158 (Bankr. E.D. Ky. 2015). Therefore, "any intimation that the views of dissenting Justices can be cobbled together with those of a concurring Justice to create a binding holding must be rejected. That is not the law in this or virtually any court following common-law principles of judgments." *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020).

As specifically applied to *Rapanos*, the Eleventh Circuit held that "[w]e simply cannot avoid the command of *Marks*," which "does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented," so "it would be

inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (emphasis in original); *see also id*. ("pursuant to *Marks*, we are left to determine which of the positions taken by the *Rapanos* Justices *concurring in the judgment* is the 'narrowest,' i.e, the least 'far-reaching'") (emphasis in original); *United States v. Freedman Farms, Inc.*, 786 F. Supp. 2d 1016, 1021 (E.D.N.C. 2011) (agreeing with Eleventh Circuit that "it would be 'inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day'").

Strong policy considerations support this rule that courts should not assign weight to dissenting opinions to contrive a precedential holding from a Supreme Court decision otherwise lacking one under the *Marks* analysis. When a decision of the Court does not yield a binding legal holding, "the process of continued percolation through independent lower court reasoning yields important value." *Duvall*, 740 F.3d at 622 (Williams, J., concurring in denial of *en banc* consideration).

Plaintiffs disparage our reliance on the D.C. Circuit's *en banc* decision in *King* because *King* did not interpret *Rapanos* and the decision *King* did interpret, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), "lacked an 'obvious' majority view" that could be determined by combining a concurrence with a dissent. Dkt. 73 at 39. *King*, however, applied the Supreme Court's plain instruction that only the opinions of Justices supporting the decision may be considered. Under the test as set forth by the Supreme Court, it does not matter whether it is "immediately obvious" that the views of the dissenters and concurring Justices "could be combined to form a five-Justice majority." *Johnson*, 467 F.3d at 65. Plaintiffs also ignore that *King* has been relied upon by other circuit and district courts to

interpret *Rapanos*. *See Cundiff*, 555 F.3d at 208; *Robison*, 505 F.3d at 1221; *Freedman Farms*, 786 F. Supp. 2d at 1021.

Plaintiffs are incorrect as a matter of precedent and sound judicial policy that the *Rapanos* concurrence and dissent can be combined to create a binding holding that precluded the agencies from incorporating the reasoning of the *Rapanos* plurality into the 2020 Rule.

2. The decisions Plaintiffs rely on are inapposite.

Plaintiffs cite *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), for the proposition that "[t]he Supreme Court has counseled that the *Marks* test ought not to be taken literally." Dkt. 73 at 38. But as Judge Williams observed, the Supreme Court has never held that *Marks* permits a lower court to consider dissents in determining the *Marks* holding of a case. *Duvall*, 740 F.3d at 623 (Williams, J., concurring in denial of *en banc* consideration). Further, the Court in *Grutter* did not abandon *Marks*. Far from it, the Court started its analysis with *Marks* and explained that "[a]s the divergent opinions of the lower courts demonstrate … 'this test is more easily stated than applied to the various opinions *supporting the result* in [*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)].'" 539 U.S. at 325 (emphasis added). Because the application of *Marks* to *Bakke* "'has so obviously baffled and divided the lower courts that have considered it,'" the Court did not rely on a *Marks* analysis but rather conducted an independent inquiry into the law to arrive at its decision. *Id*. The Court did not hold that lower courts (or administrative agencies) were free to ignore the *Marks* analysis, nor did it suggest that courts applying a *Marks* analysis could consider anything other than the opinions "supporting the result" in the decision at issue.

Plaintiffs also cite decisions in which they claim the Supreme Court relied on the views expressed by dissenters to determine a rule of law. Dkt. 73 at 38. Only one of those cases, *Nichols v. United States*, 511 U.S. 738 (1994), discussed *Marks*. In *Nichols*, the Court did not repudiate the *Marks* analysis but rather explained that because the test had "baffled and divided"

the lower courts applying the test to the splintered decision in *Baldasar v. Illinois*, 446 U.S. 222 (1980), that confusion was "itself a reason for reexamining that decision." 511 U.S. at 745-46. The Supreme Court, of course, may choose to reexamine its prior decisions; lower courts and agencies may not. As in *Grutter*, the Court in *Nichols* did not question the need for lower courts to apply the *Marks* test as it is written.

The Supreme Court continues to acknowledge the *Marks* rule without questioning it. *E.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403-04 (2020) (plurality); *Hughes v. United States*, 138 S. Ct. 1765, 1771-72 (2018). For that reason, the First Circuit's statement in *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006), that the Court "has moved away from the *Marks* formula" as a rule to be applied by lower courts to determine the precedential holding of a fragmented decision is incorrect and inconsistent with subsequent Supreme Court authority. *See* Dkt. 73 at 39.

Nichols and *Grutter* underscore an important point about the *Marks* test. While the test should be applied by lower courts (and agencies) to determine the binding holding of a splintered Supreme Court decision, the Supreme Court is not necessarily bound to apply *Marks* in the same manner because it has the unique authority to "reexamine" its own decisions. In fact, the Supreme Court may rely on the results of lower courts applying *Marks* to establish that reexamination is needed, as in *Nichols* and *Grutter*. None of that, however, authorizes lower courts to depart from the plain meaning of *Marks* that only the opinions of the Justices who concurred in the result are to be considered as part of the analysis. Thus, lower courts still and properly apply *Marks* as it is written. *E.g.*, *United States v. Ewing*, 2020 WL 5869470, at *2 (10th Cir. 2020); *Whole Woman's Health*, 972 F.3d at 653; *Spivey*, 956 F.3d at 214; *Whole*

Woman's Health Alliance, All-Options, Inc. v. Glazer, 2020 WL 5994460, at *27-28 (S.D. Ind. 2020).

The case applying *Marks* to *Rapanos* that Plaintiffs principally rely upon, the First Circuit's decision in *Johnson*, is an outlier and has been recognized as such. *See Tennessee Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, 2013 WL 12304022, at *5 (N.D. Ala. 2013) (observing that the Eleventh Circuit "soundly rejected" *Johnson*'s application of *Marks* to *Rapanos*). Because *Johnson* is not tethered to the "plain language of *Marks* itself," *Freedman Farms*, 786 F. Supp. 2d at 1021, it provides no reason to depart from the far more prevalent view that *Marks* commands that dissents may form no part of a decision's holding is binding.

Plaintiffs unsuccessfully attempt to rehabilitate their reliance on *Vasquez v. Hillery*, 474 U.S. 254 (1986), and *Moses H. Cone Memorial Hospital v. Mercury Construction Companies*, 460 U.S. 1 (1983). Dkt. 73 at 39-40. Neither case stands for the proposition that a lower court conducting a *Marks* analysis can consider dissents. As the D.C. Circuit explained in *King*, *Vasquez* involved "a different situation than the one that the *Marks* methodology addresses, where there is no explicit majority agreement *on all the analytically necessary* portions of a Supreme Court opinion." 950 F.3d at 784 (emphasis added). That is because in the decision *Vasquez* examined, *Rose v. Mitchell*, 443 U.S. 545 (1979), five Justices expressly concurred in the operative legal point. *Vasquez*, 474 U.S. at 261 n.4. In *Rapanos*, none of the dissenters concurred in any part of the Court's decision—they only dissented. And the Court in *Moses H. Cone* counted the Justices to make sure that a majority did not support a change in the *Colorado River* abstention test; it did not use the views of dissenting Justices to fashion a new rule of law, as Plaintiffs seek to do here. Dkt. 68-1 at 35.

Because the *Rapanos* concurrence and dissent cannot be combined to create a binding holding under *Marks*, the agencies were not precluded from incorporating the *Rapanos* plurality's reasoning into the 2020 Rule. Accordingly, Plaintiffs' argument that "[n]othing in *Brand X* allows an agency to adopt statutory constructions that have already been held impermissible" (Dkt. 73 at 42) is irrelevant.

B. Plaintiffs' remaining arguments do not show that the 2020 Rule is an unreasonable interpretation of the CWA.

Largely ignoring the relevant law, Plaintiffs repeat four additional arguments that they claim show the 2020 Rule is an impermissible interpretation of the CWA: (1) the statutory text requires the broadest possible interpretation of WOTUS; (2) the 2020 Rule places too much emphasis on States' rights; (3) WOTUS is not a subset of "Nation's waters"; and (4) the Rule must protect all streams and wetlands that have a significant impact on navigable waters. Dkt. 73 at 43-49.

In making those arguments, Plaintiffs continue to disregard the agencies' authority to promulgate a reasonable interpretation of ambiguous statutory language, *see Brand X*, 545 U.S. at 982—notably, Plaintiffs never contend that "WOTUS" is unambiguous. Plaintiffs simply ask this Court to substitute their policy preferences for the agencies' choices. But the fact that Plaintiffs wish the agencies gave a different interpretation to ambiguous statutory language does not establish that the agencies' interpretation was unreasonable.

1. The 2020 Rule is consistent with the CWA's water quality purpose.

Although Plaintiffs claim they "insist only that the Agencies do as Congress instructed to protect water quality," Dkt. 73 at 44, their real complaint is that the 2020 Rule does not protect water quality in the way they want. They do not offer any statutorily required threshold for water quality protection or otherwise explain why the 2020 Rule was an unreasonable—as opposed to

their disfavored—interpretation of ambiguous statutory language. Plaintiffs' position that the agencies were required to retain the 2015 Rule, and that it was unreasonable for the agencies to adopt a narrower interpretation of federal jurisdiction, is especially dubious in light of the fact that two district courts held that the more expansive 2015 Rule is unlawful. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1363-68 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019).

In arguing in favor of expansive federal jurisdiction, Plaintiffs continue to dodge the holding of *SWANCC* that the CWA does not manifest a clear intent to extend federal regulation to the very limits of the agencies' constitutional authority. 531 U.S. at 172-73. They assert that "the issue is that the legislative history shows clear Congressional intent against the drastic restrictions imposed by the [2020 Rule]." Dkt. 73 at 44 n.70. But the Court in *SWANCC* examined that same history and determined that it did not authorize the broadest possible intrusion into traditional state power over land and water use, which Plaintiffs now advocate.

2. The agencies properly read CWA Sections 101(a) and 101(b) together.

Plaintiffs exalt the statutory objective of Section 101(a) to the exclusion of the CWA's twin objective of protecting state rights and responsibilities over land and water use set forth in Section 101(b). Dkt. 73 at 45-46. Plaintiffs further ignore Intervenors' explanation of the nature of the federal-state relationship in the CWA, which features non-regulatory federal support for states in controlling pollution and "waters" and federal regulatory responsibility over "navigable waters." Dkt. 68-1 at 38; *see* 85 Fed. Reg. 22,253-54. As the agencies explained in the Rule, "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" that is combined with "a federal regulatory prohibition on the discharge of pollutants to the navigable waters." 85 Fed. Reg. 22,254. Plaintiffs' dissatisfaction

notwithstanding, this is a perfectly reasonable construction of the CWA that gives meaning to the goals and objectives set forth in both statutory provisions.

Rather than address this statutory language and structure, Plaintiffs simply repeat their view that the "only" objective of the CWA is to protect water quality and that Section 101(b) merely "delegates specific *functions* to states in implementing the Act's programs." Dkt. 73 at 45. But they do not explain why it was unreasonable to treat the policy Congress set forth in Section 101(b) as equally important as the policy it set forth in Section 101(a). Nor can they, because both policies are reflected throughout the other provisions of the CWA that balance federal regulation of navigable waters with the states' traditional authority over land and water. Dkt. 68-1 at 38.

As a matter of basic statutory interpretation, it is reasonable to read Sections 101(a) and 101(b) together—indeed such a reading is required. *See United States v. Mills*, 850 F.3d 693, 698 (4th Cir. 2017) ("adjacent statutory subsections that refer to the same subject should be read harmoniously"). In Section 101(a), Congress explained that the CWA's "objective … is to restore and maintain the chemical, physical and biological integrity of the Nation's waters" and it enumerated seven national goals or policies to achieve that objective. 33 U.S.C. § 1251(a). Congress did not specify how those goals or policies were to be realized in that provision. But Congress did immediately state in the next section its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of EPA] in the exercise of his authority under this chapter." *Id.*, § 1251(b). Reading the two provisions together, as the agencies must, the Section 101(a) objective of maintaining the integrity of waters must be accomplished while

implementing the Section 101(b) policy of preserving and protecting states' rights and responsibilities.

Without citation to any authority, Plaintiffs claim that "if anything, Congress amended the Act in 1977 to show how its policy in section 101(b) would be satisfied—by having states administer certain Clean Water functions." Dkt. 73 at 45. The *Rapanos* plurality properly rejected that reading of Section 101(b), reasoning that the delineation of the states' roles in program administration in the 1977 amendments did not define the parameters of states' rights set forth five years earlier. Dkt 68-1 at 39; *see Rapanos*, 547 U.S. at 737 (plurality). No plausible analysis suggests that Congress's statement in 1972 of broad continuing state authority was narrowed by provisions passed years later that simply defined some specific roles for states within the CWA scheme.

Plaintiff's crabbed reading of Section 101(b) also cannot be reconciled with *SWANCC*. Section 101(b) was central to *SWANCC*'s holding that Congress did not intend to "readjust the federal-state balance" by "significant[ly] imping[ing] [on] the States' traditional and primary power over land and water use." 531 U.S. at 174. Plaintiffs' narrow reading of the preservation of state authority in Section 101(b) is irreconcilable with the Supreme Court's holding that Congress did not seek to change the balance of federal-state authority over land and water use.

Plaintiffs also argue that the 2020 Rule is "haphazard" with regard to state power because it gives "some states an expansive role and others little to none." Dkt. 73 at 46. The basis for that claim is that some states, like Nevada, have more ephemeral streams that are outside federal jurisdiction than others, like Montana. *Id.* But the fact that some states or areas of the country may have more ephemeral streams than others has nothing to do with the reasonableness of the 2020 Rule. That is solely a function of state-specific characteristics, and some states are always

going to have more waters subject to federal jurisdiction than others. Recognition, preservation, and protection of state responsibilities and rights in Section 101(b) does not mean that all states will be responsible for the same volume of water, nor could it. What the 2020 Rule does accomplish, however, is equal treatment of waters based on their characteristics through the Rule's implementation of categorical regulations. That is not unreasonable.

Plaintiffs' myopic focus on Section 101(a) to the exclusion of Section 101(b) misunderstands the statutory structure; it certainly does not establish that the agencies' interpretation of Section 101(b), which is fully consistent with *SWANCC* and the *Rapanos* plurality, is unreasonable.

3. "Navigable waters" has a different meaning than "Nation's waters."

Plaintiffs repeat their assertion that "WOTUS" is not a subset of "Nation's waters." Dkt. 73 at 46-47. As before, Plaintiffs do not identify any principle of statutory construction to support that position, *see* Dkt. 68-1 at 40, instead offering the irrelevant conclusion that "[t]here is no interpretive canon that counsels attributing different meanings to *synonymous* words." Dkt. 73 at 46 (emphasis in original). Once again, Plaintiffs do not offer any explanation why Congress would use two different terms—"Nation's waters" and "navigable waters"—at different points in the CWA but ascribe the same meaning to them. *See* 85 Fed. Reg. 22,253 ("Fundamental principles of statutory interpretation support the agencies' recognition of a distinction between the 'nation's waters' and 'navigable waters.'"); *id*., 22,254 ("If Congress had intended the terms to be synonymous, it would have used identical terminology").

Ignoring this point, Plaintiffs cite snippets from legislative history that Congress intended to prevent discharge of pollutions into the "Nation's waters." Dkt. 73 at 47. But this begs the question why in Section 101(a) Congress specifically described the national goal of eliminating "the discharge of pollutants into the navigable waters" but it defined "navigable waters" as

"WOTUS" and not as the "Nation's waters." Normal rules of statutory construction require the Court to give effect to Congress's decision to use different terms by ascribing to them different meanings. *See* Dkt. 68-1 at 40-41. At the very least, it was not unreasonable for the agencies to follow that interpretative canon. *See* 85 Fed. Reg. 22,253-54.

4. The 2020 Rule does not ignore the relationship between streams and wetlands and navigable waters.

The 2020 Rule does not ignore "the scientific reality" that streams and wetlands can "have a significant impact on navigable water quality." Dkt. 73 at 48. Instead, the 2020 Rule acknowledges that impact and incorporates "a gradient of connectivity" that "recognizes variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological connections." 85 Fed. Reg. 22,271 n.33 (emphasis omitted). Needless to say, not every stream or wetland impact on navigable waters is equally significant. It was reasonable for the agencies to determine that they must draw the line somewhere because claiming federal regulatory jurisdiction in every instance where there is any possible impact would upset the federal-state balance at the core of the CWA's design by intruding too far into traditional state authority over land and water use and turning the federal agencies, in effect, into local land use regulators. *See SWANCC*, 531 U.S. at 174; 85 Fed. Reg. 22,271.

Plaintiffs quote the Fourth Circuit's decision in *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278. 294 (4th Cir. 2011), for the proposition that the CWA requires "a flexible ecological inquiry into the relationship between the wetlands at issue and traditional navigable waters." Dkt. 73 at 50. But that quote is from the Fourth Circuit's description of Justice Kennedy's significant nexus test from *Rapanos*. *Id*. ("As Justice Kennedy explained, the significant nexus test is a flexible ecological inquiry into the relationship between the wetlands at issue and traditional navigable waters"). The Fourth Circuit applied that test in *Precon* because

"[t]he parties [t]here agree[d] that Justice Kennedy's 'significant nexus' test governs and provides the formula for determining whether the Corps has jurisdiction over the Site Wetlands." *Id*. at 288. The Fourth Circuit "therefore d[id] not address the issue of whether the plurality's 'continuous surface connection' test provides an alternate ground upon which CWA jurisdiction can be established." *Id.* As already discussed, the agencies were not bound to adopt Justice Kennedy's *Rapanos* concurrence, and nothing in *Precon* required that they do so, or requires that this Court treat the quoted statement of a standard agreed by the *Precon* parties as an immutable characteristic of the CWA.

Plaintiffs also assert that there is a "unanimous chain of precedent after *Rapanos* recognizing that waters satisfying Justice Kennedy's 'significant nexus' articulation of the standard are 'waters of the United States.'" Dkt. 73 at 50. That argument misses the point that the agencies were not required to adopt that test in the 2020 Rule. *See* Dkt. 68-1 at 31-33. Plaintiffs also cite to other appellate decisions applying *Marks* to *Rapanos* and determining that the *Rapanos* concurrence was at least part of a precedential holding from that decision. Dkt. 73 at 51 (collecting cases). But we previously explained that the correct application of *Marks* to *Rapanos* does not yield that result because neither the *Rapanos* plurality nor concurrence were logical subsets of the other, Dkt. 68-1 at 31-33, a point with which Plaintiffs agree, Dkt. 73 at 35 ("The difference between Justice Scalia's opinion and Justice Kennedy's are irreconcilable"). Plaintiffs do not explain why this application of *Marks* is wrong. Instead, they cite to cases from other circuits claiming that there is a "consensus view of *Rapanos*" even though they acknowledge that the decisions of the sister circuits reached inconsistent results in applying *Marks* to *Rapanos*. *Id*.

Most important, Plaintiffs offer no explanation why the reasoning of any of those cases was correct or should trump Intervenors' analysis. As we have explained, only where the

plurality and concurrence in *Rapanos* were in agreement that a feature is or is not a WOTUS is that agreement as to the scope of WOTUS binding on the agencies. The 2020 Rule faithfully reflects that scope; otherwise nothing in the concurrence endorsed only by a single Justice commands adherence from the agencies.

II. THE 2020 RULE DOES NOT VIOLATE THE APA.

Agencies are allowed to reconsider their past policies and change regulatory direction so long as they provide a "reasoned explanation" for doing so. Dkt. 68-1 at 12; *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)). An agency does not need to demonstrate that "the reasons for the new policy are *better* than the reasons for the old one." *Fox*, 556 U.S. at 515. Instead, it need only (1) display awareness that it is changing its position; (2) show there are "good reasons" for its change; and (3) take into account that "long-standing polices" may have engendered reliance interests. *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 298 (4th Cir. 2018). The 2020 Rule satisfies these criteria. Dkt. 68-1 at 13-29.

Plaintiffs claim that the agencies removed federal regulatory protection from certain waters but "did not point to any good reasons" for doing so. Dkt. 73 at 13. That argument ignores the agencies' explanation that the 2020 Rule (1) gives effect to Section 101(b) by preserving the federal-state balance Congress intended; (2) avoids constitutional problems arising from undue intrusion of federal jurisdiction into traditional spheres of state power; and (3) provides greater regulatory certainty. *See* Dkt. 68-1 at 13-15.

A. The agencies were not required to disprove the science underlying the 2015 rule to change their position.

Plaintiffs complain that the agencies did not "grappl[e] with the facts and evidence that informed decades of their prior policy and practice." Dkt. 73 at 10. By this, Plaintiffs mean that

the agencies did not adopt and incorporate the 2015 Connectivity Report into the 2020 Rule. *Id*. The agencies, however, were not required to adopt Plaintiffs' view of the science; courts defer to an agency's "weigh[ing] of competing scientific standards." Dkt. 68-1 at 20 (citing *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 442 (10th Cir. 2011).

Further, the agencies explained in abundant detail their decision not to wholly adopt the Connectivity Report in the 2020 Rule. They stated that they were guided by the connectivity gradient from the Report, but that the Report overall was of limited utility because it "is a science, not policy" document and the agencies had to make legal and policy determinations in crafting the Rule. 85 Fed. Reg. 22,288. As the agencies elaborated: "science alone cannot dictate where to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA." *Id*. In fact, simply adopting the Connectivity Report as the basis for jurisdiction would have produced a rule that was unlawful under *SWANCC* and *Rapanos* and CWA Section 101(b) and the Constitution.

Plaintiffs assert that the agencies "sidestepped scientific analysis" and failed to "address … their prior conclusions 'head-on,'" Dkt. 73 at 13 (citing *Mayor of Baltimore v. Azar*, 2020 WL 5240442, at *11 (4th Cir. 2020)). They are wrong. In *Mayor of Baltimore*, the Department of Health and Human Services ("HHS") was confronted with comments from "literally all of the nation's major medical organizations" that they had "grave medical ethical concerns" with the HHS rule at issue. *Id*. at *10. Instead of responding to those comments, HHS "merely stated—with no support—that it 'disagrees with the commenters contending the [Final Rule] infringes on the legal, ethical, or professional obligations of medical professionals." *Id*. The court found the agency's explanation to be insufficient because HHS "cannot simply state it 'believes' something to be true—against the weight of all the evidence before it—without further support." *Id*.

City of Baltimore is very far afield from this case. Instead of saying that they believe the Connectivity Report or other science was wrong without further explanation, the agencies explained that the scientific documents alone cannot control the content of the Rule because the definition of WOTUS is not a purely scientific question. 85 Fed. Reg. 22,288. The agencies did not dismiss the science like HHS dismissed the medical organizations in *City of Baltimore*. Instead, they acknowledged the science, they incorporated the connectivity gradient concept from the Connectivity Report, they adopted other scientific analyses to determine "typical year" characteristics, and they explained why they did not adopt the Connectivity Report in its entirety. *Id*. Therefore, they did address the science question "head-on" as *City of Baltimore* requires, *see* 2020 WL 5240442, at *11, and they did provide a "reasoned explanation" as *Jimenez-Cedillo* mandates, *see* 885 F.3d at 298.

Contrary to Plaintiffs' claim, Dkt. 73 at 13, the agencies were not required to "dispute or distinguish the factual conclusions" of the Connectivity Report or any other scientific document. *See* Dkt. 68-1 at 20-21. That is because the agencies' policy change was not premised on disagreement with the science indicating the connectivity between streams and wetlands on the one hand and navigable waters on the other. Indeed, the 2020 Rule incorporates the concept of connectivity. 85 Fed. Reg. 22,288. The reason for the Rule change was not that the prior science was wrong, but rather that the prior science alone could not answer the jurisdictional question given Supreme Court precedent and the federal-state relationship embodied in the structure of the CWA. In light of all that law, wholesale adoption of the science report as the basis of jurisdiction would have been legal error.

B. Plaintiffs' unhappiness with the agencies' line drawing does not establish an APA violation.

Plaintiffs do not challenge the rule that "[a]n agency has 'wide discretion' in making line-drawing decisions" and that courts are not concerned with whether the location of the line drawn is "precisely right." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214-15 (D.C. Cir. 2013); *see* Dkt. 68-1 at 22. Therefore, Plaintiffs' repeated criticisms that certain streams or wetlands should not have been excluded when others were included are not persuasive. *See* Dkt. 73 at 15-19. Plaintiffs try to distinguish *National Shooting Sports* on the ground that, there, the agency used an expert analysis of data to determine where to draw the regulatory line. Dkt. 73 at 32. But that is no distinction at all. Here, the agencies used a reasoned analysis of Supreme Court precedent, a reasonable interpretation of the statutory language and structure, and scientific analysis informed by the Connectivity Report to draw the lines in the 2020 Rule. The agencies made a policy determination that states' traditional rights should be preserved under the CWA and the reach of federal jurisdiction should not press against constitutional limits, and because those predicate determinations are reasonable, the outer limits of the agencies' line drawing is not subject to being second guessed on review. *See, e.g.*, 85 Fed. Reg. 22,289-90 ("The agencies conclude that the final rule appropriately reflects and balances these general guiding principles by exercising jurisdiction over perennial and intermittent tributaries but not ephemeral streams and dry washes, while under certain circumstances allowing such channelizing features to maintain jurisdiction between upstream and downstream more permanent waters").

C. Regulatory certainty is a "good reason" supporting the new Rule.

Plaintiffs again argue that the 2020 Rule does not provide regulatory certainty because the "typical year scheme" is "even more convoluted" than the 2015 Rule it replaced. Dkt. 73 at 26. Plaintiffs, however, disregard the evidence that the 2020 Rule provides greater regulatory

certainty to the regulated community than the prior regime. *See* Dkt. 68-1 at 29 (citing Parrish Decl. ¶¶ 52-54). Additionally, the agencies did not hide from the fact that the typical-year standard will evolve and develop as new technical principles are incorporated or that field work will still be required under that standard. Instead, they addressed the issue and determined that "replacing the multi-factored case-specific significant nexus analysis with categorically jurisdictional and categorically excluded waters in the final rules provides clarifying value for members of the regulated community." 85 Fed. Reg. 22,270. The reasoned-explanation standard does not require anything more. Intervenors, who represent a large portion of the regulated community, agree that the new Rule is a vast improvement over the agencies' prior positions, providing far more certainty, and Intervenors' experience as reflected in the Parrish declaration (and set forth in their voluminous comments on the proposed Rule) supports the agencies' conclusion.

D. The ever-changing regulatory regime could not engender reasonable reliance interests.

Plaintiffs do not meaningfully respond to Intervenors' point that the 2015 Rule could not have engendered significant reliance interests because it was the subject of widespread and continuous litigation, was quickly enjoined in more than half of the states, and was held unlawful by two courts. *See* Dkt. 68-1 at 16-17. Instead, Plaintiffs assert that the 2020 Rule "reverses clean water protections that have been in place for almost half a century under the Clean Water Act, and the public had every reason to rely on those protections." Dkt. 73 at 28. But Plaintiffs provide only a vague description of what protections that supposedly were in place for half a century are now "reversed" by the 2020 Rule. Regulation of waters and wetlands has been consistently changing, and characterized by "case-by-case protections" that do not provide the certainty sufficient to engender reasonable reliance. *See id.* at 28-29. As the litany of cases over

agency jurisdiction illustrates—*SWANCC* and *Rapanos* are just the tip of the iceberg—the scope of CWA jurisdiction has been uncertain and highly contested for decades. The 4-1-4 ruling in *Rapanos* in 2006 guaranteed that, ever since, the scope of federal jurisdiction has been in flux. It is frankly absurd for Plaintiffs to suggest that the areas at the margins of jurisdiction—all that is in issue—have been subject to a consistent legal position that engenders reliance interests in anyone at all.

III. THE WASTE TREATMENT SYSTEM EXCLUSION IS LAWFUL.

Plaintiffs' contend that the Waste Treatment System ("WTS") Exclusion is unlawful because it was expanded to exempt some navigable waters from the definition of WOTUS. Dkt. 73 at 2-3. They reach this conclusion by focusing on hypothetical application of the WTS Exclusion to certain cooling ponds. But the 2020 Rule does not impose a change, and Plaintiffs' argument fails to address that WTSs have been excluded from the definition of navigable waters since 1979. *See* 44 Fed. Reg. 32854, 32901 (June 7, 1979). As the agencies previously explained to this Court, cooling ponds, too, have been part of the WTS exclusion since 1980. *See* Dkt. 69 at 33-34.

Plaintiffs acknowledge, as they must, that the Fourth Circuit has considered and upheld the agencies' decades-long practice of treating a WOTUS converted into a WTS subject to a Section 404 permit as no longer a WOTUS. *Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 209-16 (4th Cir. 2009) (holding that the Corps' application of the WTS exclusion to a stream that would otherwise be a WOTUS was permissible). Plaintiffs attempt to skirt *Ohio Valley* by classifying its holding as a "limited exception for waste treatment systems constructed in jurisdictional waters pursuant to a section 404 permit." Dkt. 73 at 4. They contend that, in contrast, the WTS Exclusion contained in the 2020 Rule "is not limited to treatment systems

constructed pursuant to a Section 404 permit," but also applies to WTSs constructed prior the 1972 CWA amendments. *Id*. at 4-5.

This argument undermines Plaintiffs' presentation of the WTS Exclusion in the 2020 Rule as a novel exception that has now "opened up any lake … to unregulated pollution." Dkt. 73 at 5. As Plaintiffs appear to admit, the 2020 Rule by no means permits companies to treat *any* navigable water as a "cooling pond" and begin discharging into it with abandon. The exclusion continues to apply, as it has done for decades, only to "waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA Amendments." 85 Fed. Reg. 22,325. That is, it permits the construction of a WTS system in a WOTUS subject to CWA's Section 404 permit program—an exception approved by the Fourth Circuit and characterized by Plaintiffs as a "limited exception." As for WTSs lawfully constructed *prior* to the 1972 CWA Amendments—that is, features that have been used to treat waters for decades and are critical to preventing downstream pollution—those systems were constructed subject to then-applicable state and federal laws and have also been covered under a WTS exclusion for decades. *See, e.g.*, 80 Fed. Reg. 37,097 (June 29, 2015) (disclaiming intent to amend WTS exclusion "such that all excluded waste treatment systems must be designed to meet the requirements of the Clean Water Act" in response to concerns that WTSs built before the CWA may not be exempt).

For these reasons, Plaintiffs' broad characterization of the WTS Exclusion as an alarming change inconsistent with the CWA is incorrect.

IV. IT IS PREMATURE TO ADDRESS THE REMEDY QUESTION.

Plaintiffs present the remedy of vacatur as a given. Dkt. 73 at 62. But "it is simply not the law" that courts must vacate every agency action found to violate the APA. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002). The determination whether to

vacate a regulation falls within the Court's broad, equitable discretion. *See Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015).[1] Recognizing this, other courts have remanded a prior definition of WOTUS without vacatur. *Georgia v. Wheeler*, 418 F. Supp. 3d at 1382; *Texas v. EPA*, 389 F. Supp. 3d 497.

When determining whether to remand without vacatur, courts "must weigh (1) 'the seriousness of the [regulations'] deficiencies'" and "(2) 'the disruptive consequences of an interim change that may itself be changed.'" *Shands*, 139 F. Supp. 3d at 270 (quoting *Allied-Signal*, 988 F.2d at 150-51). Plaintiffs' suggestion that remand without vacatur is appropriate "largely only" where there is a risk of nullifying a regulation "central to public safety" is not accurate. *See* Dkt. 73 at 63. Federal courts throughout the country frequently exercise their discretion to leave regulations in place during remand when vacatur would be highly disruptive, and they have applied this rule in different contexts.[2] For example, the Eleventh Circuit has held that temporary suspension of industry activities potentially causing "layoffs, lost wages, and unfulfilled contracts" were relevant factors to determining whether to vacate EPA action, even in the presence of allegations of environmental harm absent vacatur. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1291 (11th Cir. 2015).

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[1] *See also Cent. Me. Power Co. v. Fed. Energy Regulatory Comm'n*, 252 F.3d 34, 48 (1st Cir. 2001) (holding whether to vacate "rests in the sound discretion of the reviewing court"); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (holding a court "may exercise equitable powers in its choice of a remedy, as long as the court remains within the bounds of the statute and does not intrude into the administrative province").

[2] *See Cal. Comm'ns Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012) (remanding EPA final rule without vacatur in part given risk of economic harms and disruption and despite allegations of environmental harm absent vacatur); *Nat'l Org. of Veterans Advocates, Inc., v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1381 (Fed. Cir. 2001) (remanding without vacatur Department of Veterans Affairs regulation restricting the award of dependency and indemnity compensation given potential for disruption); *Cent. & S. W. Servs;., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding EPA regulation without vacatur where it would be disruptive to the regulated industry to vacate); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (treating requirement that an agency would need to issue refunds as a "disruptive consequence[]" that weighed in favor of remand without vacatur).

But Plaintiffs get ahead of themselves. Any question of remedy is most efficiently addressed after the Court issues its ruling on the legality of the 2020 Rule. The contours of the Court's ruling will necessarily inform that analysis. The question of whether nationwide or more limited relief is appropriate is also most efficiently addressed once the contours of the Court's ruling are clear. Intervenors respectfully request the opportunity to provide supplemental briefing on the question of remedy should the Court find any portion of the 2020 Rule unlawful (which it should not, for the reasons stated above).

CONCLUSION

For these reasons and those set forth in Defendant-Intervenors' opening brief, this Court should grant summary judgment in favor of Defendant-Intervenors and deny Plaintiffs' cross-motion for summary judgment.

Dated: October 19, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 19, 2020, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the District of South Carolina on all parties registered for CM/ECF in the above-captioned matter.

/s/ *W. Thomas Lavender, Jr.*