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.*, *Intervenors-Defendants*.	Case No. 2:20-cv-01687 DCN

INTERVENOR-DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR-DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Dated: August 24, 2020

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The Intervenor-Defendants submit this motion and brief in support of their cross-motion for summary judgment and in opposition to plaintiffs' motion for summary judgment (Dkt. 58).

NATURE OF THE CASE

Plaintiffs challenge a 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") within the meaning of the Clean Water Act ("CWA"). See The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule"). Intervenor-Defendants are seventeen national and regional trade groups whose members are directly regulated by this definition: countless businesses that own 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. Intervenors represent among them a large portion of the Nation's economic activity.[1]

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[1] Each Intervenor advocates for regulatory standards and policies that enable the success of the industry members that they represent. *See* **American Farm Bureau Federation** ("AFBF"), https://www.fb.org (AFBF is the "voice of agriculture" formed to represent farm and ranch families); **American Petroleum Institute** ("API"), https://www.api.org/about (API "represents all segments of America's oil and natural gas industry," with the mission to promote "a strong, viable U.S. oil and natural gas industry"); **American Road & Transportation Builders Association** ("ARTBA"), https://www.artba.org/about (ARTBA represents the transportation construction industry with the "core mission" of "market development and protection on behalf of the U.S. transportation and design construction industry"); **Chamber of Commerce of the United States**, https://www.uschamber.com/about (the U.S. Chamber is "the world's largest business organization representing companies of all sizes" formed to advocate for pro-business policies on the behalves of these members); **Edison Electric Institute** ("EEI"), https://www.eei.org/about/mission/Pages/default.aspx (EEI represents all U.S. intervenor-owned electric companies with the mission to promote the longterm success of the electric power industry); **Leading Builders of America** ("LBA"), https://leadingbuilders.org (LBA represents "many of the largest homebuilding companies in North America" with the purpose "to preserve home affordability for American families … by becoming actively engaged in issues that have the potential to impact home affordability"); **National Alliance of Forest Owners** ("NAFO"), https://nafoalliance.org (NAFO is committed to advancing federal policies that support the long-term economic, social, and environmental benefits of sustainably managed, privately owned forests on behalf of its member companies that own and

Conducting these businesses often requires determining if property includes waters of the United States subject to CWA jurisdiction and hence to CWA permitting requirements, with the threat of criminal and civil liability if activity occurs in WOTUS without a permit. The 2020 Rule corrects years of regulatory uncertainty under which Intervenors' members previously operated, replacing unclear and bloated standards with brighter lines. Because that Rule complies with the Administrative Procedure Act ("APA") and reasonably interprets the CWA within parameters laid down by judicial precedent, plaintiffs' motion for summary judgment should be denied and Intervenors' cross-motion granted.

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manage more than 43 million acres of private working forests); **National Association of Home Builders** ("NAHB"), https://www.nahb.org (NAHB represents more than 140,000 builder and associate members in all 50 states with the purpose of protecting housing opportunities for all and working to achieve the professional success of its members); **National Cattlemen's Beef Association** ("NCBA"), https://www.ncba.org/about (NCBA represents more than 175,000 American cattle producers with the goal to "advance the economic, political, and social interests of the U.S. cattle business"); **National Corn Growers Association** ("NCGA"), https://www.ncga.com (NCGA represents nearly 40,000 corn farmers nationwide and the interests of more than 300,000 growers with the mission "to create and increase opportunities for corn growers to help them sustainably feed a growing world."); **National Mining Association** ("NMA"), https://nma.org (NMA is the voice for U.S. mining with a membership of more than 250 corporations and organizations involved in mining and with the mission to build support for public policies that advance full and responsible utilizations of coal and mineral resources); **National Pork Producers Council** ("NPPC"), http://nppc.org/about-us (NPPC is the global voice for the Nation's 60,000 pork producers with the mission to "fight[] for reasonable legislation and regulations" that protect the livelihood of pork producers); **National Stone, Sand, & Gravel Association** ("NSSGA"), https://www.nssga.org (NSSGA is the leading advocate for the aggregate industry on behalf of its members—stone, sand and gravel producers—with the goal of promoting policies that protect the safe and environmentally responsible use of aggregates); **North Carolina Farm Bureau** ("NCFB"), https://www.ncfb.org (NCFB advocates for farm and rural families on behalf of its 35,000 farmer members); **Public Lands Council** ("PLC"), https://www.publiclandscouncil.org (PLC represents cattle and sheep producers with the mission to advocate for western ranchers); **South Carolina Farm Bureau** ("SCFB"), https://www.scfb.org (SCFB seeks to strengthen the future of agriculture in South Carolina); **U.S. Poultry & Egg Association**, https://www.uspoultry.org (the association is the world's largest and most active poultry organization with the mission to serve as the voice for the feather industries).

FACTUAL AND LEGAL BACKGROUND

A. Statutory and Regulatory Background.

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). Through the CWA, Congress also intended to "recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate pollution." *Id.* § 1251(b). As one part of the CWA's scheme, Congress created two permit programs—section 404 permits for dredge and fill activities, and section 402 permits for other discharges. Those 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 in turn 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 scope of the agencies' jurisdiction under the CWA. The history of the agencies' definitions of WOTUS, however, has been one of regulatory uncertainty, only increased by the agencies' litigation losses. That history is important to understanding the impetus for the 2020 Rule, which seeks to cure these past defects by drawing much brighter definitional lines.

In 1974 and 1977, the U.S. Army Corps of Engineers issued initial regulations defining "waters of the United States." 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974); 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). The agencies' interpretation of their own regulations continued to expand over the next few decades, even as the text remained the same. The Supreme Court confronted those increasingly aggressive interpretations in a series of decisions beginning in 1985.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), 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" falls within the "definition of 'waters of the United States.'" *Id.* at 133,

135 (emphasis added). Despite *Riverside Bayview* tying wetland jurisdiction to a close physical connection to navigable waters, the agencies "adopted increasingly broad interpretations" of their regulations, 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, the Court held, 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.

Most recently, in *Rapanos*, the Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water." 547 U.S. at 720-21. Justice Scalia, writing for a four-Justice plurality, held that "waters of the United States" 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.

Courts faced with the agencies' expansive but vague approach to their jurisdiction repeatedly warned that "the reach and systemic consequences" of the CWA are "a cause for concern" and urged the agencies to define their jurisdiction in clear terms. Justice Kennedy, joined by Justices Thomas and Alito, complained that "the [CWA's] reach is 'notoriously unclear' and the consequences to

landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Eng'rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1816 (2016) (quoting *Sackett v. EPA*, 566 U.S. 120, 132 (2012)) (Kennedy, J., concurring). And this lack of clarity "raise[s] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Id.* at 1817. *See also Rapanos*, 547 U.S. at 757 (to cure their "essentially limitless" interpretation of their jurisdiction, the agencies should issue a definitional rule that ordinary people can understand and that abides by "the clearly limiting terms Congress employed in the [CWA]") (Roberts, C.J., concurring).

Following the *Rapanos* decision, the agencies relied on a vague significant nexus standard implemented through guidance documents, causing confusion in the regulated community. *See* Exhibit 1, Testimony of Valerie Wilkinson Before the House Oversight and Gov't Reform Comm., *An Examination of the Federal Permitting Processes* ("Wilkinson Testimony") at 2-7 (Mar. 15, 2018) (explaining lack of clarity regarding federal jurisdiction under regime in place prior to 2015); Exhibit 2, Declaration of Don Parrish ("Parrish Decl."), ¶ 18 (explaining that "the scope of federal jurisdiction under the CWA had not been clear under the prior regime").

B. The Unlawful 2015 Rule.

It was against this background that the agencies issued a wholesale reinterpretation of "waters of the United States" in 2015. Clean Water Rules: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (the "2015 Rule"). Despite Chief Justice Roberts' warning in *Rapanos* that the plain language of the CWA was "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 the 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 prohibitions on discharges to navigable waters, the agencies issued an expansive definition of WOTUS that swept in features

remote from navigable waters that had never before been subject to federal jurisdiction. The agencies asserted that the 2015 Rule would "mak[e] the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science." 80 Fed. Reg. 37,055. But, in reality, the Rule's sweeping reach to desiccated features remote from navigable waterways only served to significantly increase confusion among regulated parties and regulators alike. *See, e.g.*, Parrish Decl. ¶ 18; Wilkinson Testimony at 8 (explaining that "[t]he agencies added new terms, definitions, and interpretations of federal authority over private property that are more subjective and provided the agencies with greater discretionary latitude to expand their regulatory authority").

For example, the 2015 Rule defined jurisdiction to sweep in distant and ephemeral features, such as creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes. 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. 37,076. It further treated certain categories of features as jurisdictional under a case-by-case significant nexus analysis, employing a three-step test that turned on subjective observations and opaque analyses. 80 Fed. Reg. 37,058. 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 of federal jurisdiction. And, to an even greater extent than prior guidance, the Rule left "property owners . . . at the agency's mercy." *Sackett*, 566 U.S. at 132 (Alito, J., concurring); *see also* Parrish Decl., ¶¶ 18, 25-48.

In the eyes of the regulated community, including Intervenors here, the 2015 Rule was a disaster, imposing huge risks on their members for ordinary land use activities, while bearing no discernible relation to the statutory text or Supreme Court precedent. It was incredibly difficult for the regulated parties operating under the 2015 regime to determine whether a feature on their property qualified as a "water of the United States." Parrish Decl. ¶ 27. Under such an expansive but unclear rule, businesses had to "either seek exorbitantly expensive permits or internalize significant

costs to avoid accidentally building or operating in features that had not previously been classified as a WOTUS, but were now potentially jurisdictional." *Id.* ¶ 30. As a result, some businesses were required to decrease productivity or abandon projects. *Id.* ¶¶ 33, 34, 36.

Dozens of lawsuits were filed in district courts and courts of appeals across the country by States and by the regulated community challenging the 2015 Rule. Parrish Decl. ¶¶ 19, 21, 23. 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.

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. EPA*, 3:15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87. Accordingly, defects in the rule meant it was enjoined in 27 States. But the 2015 Rule went into effect on a patchwork basis in those states not covered by the preliminary injunctions, forcing regulated parties who operate nationwide to straddle two conflicting legal regimes. Parrish Decl. ¶ 25.

Ultimately, district courts in Texas and Georgia held that the 2015 Rule is unlawful. The Southern District of Texas held that the 2015 Rule "is not sustainable on the basis of the administrative record" and remanded it 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). The court 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 tributaries was an impermissible construction. *Id.* at 1363-68. And the court held that the 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" under *SWANCC*. *Id.* at 1370, 1372. The court remanded the 2015 Rule to the agencies because by that time, recognizing the serious problems with the rule and cognizant that the rule had been enjoined or struck down in most of the country, the agencies had begun to reconsider it in new rulemakings.

C. The 2019 Repeal Rule and 2020 Navigable Waters Protection Rule

In 2017, the agencies published a notice of rulemaking in the *Federal Register*, explaining their intent to repeal and replace the 2015 Rule in a "comprehensive, two-step process." 82 Fed. Reg. 34,899, 34,899 (July 27, 2017). The first step of this process—what we refer to as the "Repeal Rule"—would "rescind" the 2015 Rule, restoring the status quo ante by regulation. *Id.* "In a second step," the agencies "[would] conduct a substantive re-evaluation of the definition of 'waters of the United States'" in conformity with the CWA and judicial precedent. *Id.*

The agencies proposed the step-one Repeal Rule on July 27, 2017. 82 Fed. Reg. 34,899. In light of delay in issuing a final Repeal Rule—due in part to the need to review thousands of comments received regarding the proposal—the agencies later issued a Supplemental Notice of Proposed Rulemaking that reiterated the agencies' intent to seek a permanent repeal of the WOTUS Rule as the first step in a two-step process to review and revise the 2015 definition. 83 Fed. Reg. 32,227 (July 12, 2018). The Supplemental Notice explained the agencies' concern that the 2015 Rule was not legally supportable, noting that numerous "court rulings against the 2015 Rule suggest that the interpretation of the 'significant nexus' standard as applied in the 2015 Rule may not comport with and accurately implement the legal limits on CWA jurisdiction intended by Congress and reflected in decisions of the Supreme Court." *Id*. 32,238. The Repeal Rule was finalized on October 22, 2019, and became effective on December 23, 2019. 84 Fed. Reg. 56,626 (Oct. 22, 2019). The final Repeal Rule explained that it would serve as a "familiar, if imperfect" solution to the issues with the 2015 Rule, until such time as the agencies could finalize step-two, a new definition of WOTUS. *Id.* at 56,664 (internal quotations omitted).

The agencies proposed step-two of their repeal and replace process, the 2020 Rule, on February 14, 2019. 84 Fed. Reg. 4154 (Feb. 14, 2019). In developing the final 2020 Rule, the agencies engaged in a variety of stakeholder outreach, including through public webcasts and hearings, and afforded the public 60 days for comment. *See* 85 Fed. Reg. 22,261 (the agencies "reviewed and considered approximately 620,000 comments received on the proposed rule from a broad spectrum of interested parties").

The agencies promulgated the 2020 Rule to implement the "objective of the Clean Water Act to restore and maintain the integrity of the nation's waters." *Id*. at 22,250. That involved relying on science to "inform[] the agencies' interpretation of [WOTUS]," while recognizing 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. To correct the illegalities inherent in the 2015 Rule, the agencies thus struck "a reasonable and appropriate balance between Federal and State waters" that is "intended to ensure that the agencies operate with the scope of the Federal government's authority over navigable waters." *Id.* And, to address the significant confusion generated under prior regimes, the agencies sculpted the 2020 Rule with "categorical bright lines" to improve clarity and predictability. *Id.* at 22,273.

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 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). 85 Fed. Reg. 22,273. These bright line standards significantly advance clarity for regulated parties, and help avoid the costs associated with the uncertainties under prior definitions of WOTUS. Parrish Decl. ¶ 53.

The Rule also contains 12 exceptions that are "not 'WOTUS.'" Ephemeral features like washes, rills, and gullies that flow only in direct response to precipitation, are categorically excluded from the definition of WOTUS. 85 Fed. Reg. 22,340. The 2020 Rule's exclusion of these ephemerals is critical to the ability of businesses to identify what features on their land may be jurisdictional and thus avoid exorbitant permitting costs or productivity losses associated with a vague or more

sweeping definition of WOTUS. Parrish Decl. ¶ 52. Other notable exclusions include 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.

Also critical to the operations of many regulated parties, the 2020 Rule preserves a long-standing exclusion for waste treatment systems ("WTS") without changing that exclusion's established scope that dates back decades. *E.g.*, 44 Fed. Reg. 32,854, 32,901 (June 7, 1979) (NPDES regulation providing that "waste treatment systems … are not [WOTUS]"). Many businesses rely on the WTS exclusion to handle and treat wastewater during their operations. Indeed, WTS is an essential element to many industrial projects and necessary to protect water quality adjacent to and downstream of the operation. *See* Edison Electric Institute, Comment on the 2020 Rule at 1, 10 (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-8115.

"To improve regulatory predictability and clarity," 85 Fed. Reg. 22,252, the 2020 Rule includes a definition of WTS: "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge." *Id.* at 22,339. And "[c]ontinuing the agencies longstanding practice," the 2020 Rule requires that "any entity with a waste treatment system would need to comply with the CWA by obtaining a section 404 permit for new construction in a water of the United States, and a section 402 permit for discharges from the waste treatment system into [WOTUS]."*Id*. at 22,324-25.

ARGUMENT

I. THE AGENCIES PROVIDED A REASONED EXPLANATION FOR THE 2020 RULE.

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 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). In exercising their rulemaking authority, agencies need not rigidly adhere to past policies, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), but may "'adapt their rules and policies to the demands of changing circumstances.'" *State Farm*, 463 U.S. at 42. Thus, "'[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis,' for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal citations omitted). Agencies may consider new information, reconsider past information, reinterpret ambiguous statutes, review prior assumptions, and set new policies based on their current understanding of facts and law. *See United States 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 must 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. The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Fox*, 556 U.S. at 515. Instead, the agency need only "'display awareness that it is changing position[,] show that there are good reasons for the new policy,'" and "'be cognizant that long-standing policies may have engendered serious reliance interests that must be taken into account.'" *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 298 (4th Cir. 2018). "The reasoned explanation requirement" is intended "to ensure that agencies offer genuine justifications for important decisions," not "contrived reasons." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). The agencies here did more than required.

A. The 2020 Rule is supported by a reasoned explanation.

Although plaintiffs claim the agencies "discarded over 40 years of agency practice" without "explaining why or justifying their own contradictory approach," Dkt. 58-1 at 18, the agencies in fact did not "depart from a prior policy *sub silentio*." *Fox*, 556 U.S. at 515. To the contrary, they provided explanations for the 2020 Rule that span 75 pages of the Federal Register and meticulously set forth the agencies' interpretation of the CWA's text, structure, and purpose (85 Fed. Reg. 22,252-54), the regulatory history (*id*. at 22,254-55), legal precedent bearing on the phrase "waters of the United States" (*id*. at 22,256-59), and the rulemaking process. *Id*. at 22,259-337. This is not a rule backed by "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). The agencies satisfied each element of the "reasoned explanation" requirement.

1. The agencies acknowledged their change in position.

The agencies "display[ed] awareness that [they were] changing position." *Jimenez-Cedillo*, 885 F.3d at 298. They explained that the change was intended to "eliminat[e] 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 Supreme Court precedent and comport with the structure of the CWA. 85 Fed. Reg. 22,273.

2. The agencies explained the reasons for their change in position.

The agencies "show[ed] that there are good reasons for the new policy." *Jimenez-Cedillo*, 885 F.3d at 298. They explained that the 2020 Rule balances the CWA's "two national goals" of preventing pollution and preserving states' control over their water and land resources. 85 Fed Reg. 22,252; *see* 33 U.S.C. §§ 1251(a), (b). The agencies found that the 2015 Rule had rested on too narrow a "view of Congress' policy in section 101(b)," one "limited to implementation of the Act's regulatory programs by States and State authority to impose conditions on 'waters of the United

States' that are more stringent than the conditions that the agencies impose under the Act." 85 Fed. Reg. 22,269. The agencies rejected that view of the states' roles under the CWA as inconsistent with statutory text and history. *Id*. at 22,269-70. Under the reasoned-explanation test, "an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies." *Encino Motorcars*, 136 S. Ct. at 2127. That is what the agencies did.

Executive Order 13778 directed 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 on the Congress and the States under the Constitution." See 82 Fed. Reg. 12,497, 12,497 (Feb. 28, 2017). The agencies explained that the distinction drawn in the statute between waters subject to pollution abatement by non-federal regulatory means and "navigable waters" subject to federal discharge regulation confirms the need to balance these policies. 85 Fed. Reg. 22,253; *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") (emphasis added).

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 Congress" preserving states' rights. 85 Fed. Reg. 22,260. The 2015 Rule could not be reconciled with a "major role for the States in implementing the CWA." *Id*. at 22,252. The policy change reflected in the Rule is thus in part the result of rebalancing jurisdiction to match Congress' purposes in the CWA. That is a "good reason" for the change. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. SEC*, 63 F.3d 1123, 1127 (D.C. Cir. 1995) (agencies enjoy a "wide berth" in "balancing conflicting statutory policies").

The agencies also implemented the Rule to be consistent with constitutional limits on their jurisdiction. In *SWANCC*, 531 U.S. at 172-73, the Court explained that Congress did not manifest a clear intent in the CWA for federal regulation to extend to the very limits of the agencies' constitutional authority under the Commerce Clause. Statement of such a clear congressional intent is necessary because an interpretation of WOTUS to be as broad as the federal government's Commerce Clause authority would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power"—the power over local land use. *Id*. at 173. The agencies intended in the 2020 Rule to bring the definition of WOTUS within that precedent, 85 Fed. Reg. 22,264-65, and changing a rule to comply with precedent is a good reason for a change.

Another "good reason" for the change in policy from the 2015 Rule to the 2020 Rule is that the new Rule is intended to provide greater regulatory certainty that was lacking in the prior regulations by implementing categorical rules. 85 Fed. Reg. 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 22,317-18. 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 uncertain significant nexus analysis for tributaries in favor of "a clear definition of 'tributary' that is easier to implement." *Id*. at 22,291. These changes bring much needed clarity to the regulated community. Parrish Decl. ¶¶ 49-53. Without doubt, "[r]emoving the source of confusion" is "'good reason[] for the new policy.'" *Gonzales-Veliz v. Barr*, 938 F.3d 219, 235 (5th Cir. 2019).

3. The agencies took account of reliance interests.

The agencies were cognizant of their responsibility to take account of any legitimate reliance interests. *See Jimenez-Cedillo*, 885 F.3d at 298. As an initial matter, the 2015 Rule could not have engendered significant reliance interests because from the day it became effective it was the subject of widespread and continuous litigation and was soon enjoined. The 2015 Rule became effective on August 28, 2015. 80 Fed. Reg. 37,054. Only six weeks later, on October 9, 2015, the Sixth Circuit stayed the rule nationwide, *In re EPA & Dept. of Defense Clean Water Rule*, 803 F.3d at 809, and that stay remained in effect more than two years and four months, until February 28, 2018. *In re U.S. Dep't of Defense*, 713 F. App'x 489, 490-91 (6th Cir. 2018). By the time the nationwide stay was lifted, the new Administration had already issued Executive Order 13778 on February 28, 2017, directing the agencies to revisit the 2015 Rule.

Separately, district courts enjoined the 2015 Rule in 27 states. The court in North Dakota issued a stay on August 27, 2015, even before the 2015 Rule became effective, that eventually covered 13 states. *North Dakota*, 127 F. Supp. 3d at 1051 n.1, 1059-60. The court in Georgia stayed the rule in eleven additional states, including South Carolina and North Carolina, on June 8, 2018. *Georgia*, 326 F. Supp. 3dat 1370. On September 12, 2018 the Texas district court stayed the rule in three additional states. *American Farm Bureau Federation* v. *U.S. EPA*, 3:15-cv-162, Dkt. 140 (S.D. Tex. Sept. 12, 2018). Then, in 2019, two courts held that the 2015 Rule violated the APA. *See supra*, pp. 7-9. In short, from the day it became effective to the day it was repealed, the 2015 Rule was enjoined either nationwide or in a significant part of the country because multiple courts held that plaintiffs challenging the rule were likely to succeed on the merits; and then the challengers did in fact succeed on the merits, and the Administration announced it would revisit the rule. The agencies took this history of losses into account in promulgating the new rule. *E.g.*, 85 Fed. Reg. 22,258-59,

22,272. **No one could plausibly claim to have reasonably relied on a rule with that sort of adverse litigation history.**

In any event, the agencies, in arriving at the final rule, consulted with state, local, and tribal governments, conservation groups, environment and public advocacy groups, small businesses, stakeholders in the agriculture, mining, and energy and chemical industries, scientific organizations, drinking water agencies, wastewater management businesses, and the general public, among others. 85 Fed. Reg. 22,260. The agencies "considered approximately 620,000 comments received on the proposed rule from a broad spectrum of parties." *Id*. at 22,261. The agencies recognized the 2020 Rule would affect states, and they discussed how states may adapt to the change in federal jurisdiction. *Id*. at 22,270, 22,333-34. The agencies addressed asserted state reliance interests by finding that the 2020 Rule "does not impose any new costs or other requirements on states, 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*. at 22,336. And they provided the general public with extensive opportunities to make their views known, including pre-proposal outreach webinars, an open "recommendation docket" to which 6,300 recommendations were submitted by interested parties, in addition to the formal comment process. *Id.* at 22,260-61. All that is more than an adequate recognition of any reliance interests. *See Encino Motorcars*, 136 S. Ct. at 2126.

4. The cases plaintiffs cite are inapt.

The Rule is thus different from situations in which the Court has found that agencies failed the reasoned-explanation standard. For instance, in *Encino Motorcars*, the Department of Labor issued a rule that automobile dealership "service advisors" were not exempt employees under a Fair Labor Standards Act provision exempting sales people employed at car dealers. 136 S. Ct. at 2123. That rule "took the opposite position" from the Department's prior practice. *Id*. The Department, however, "gave little explanation for its decision to abandon its decades-old practice of treating

service advisors as exempt" and "did not analyze or explain *why* the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services." *Id.* at 2123, 2127 (emphasis added). Instead, it "offered barely any explanation." *Id*. at 2126. By contrast, the agencies here provided a detailed explanation why the jurisdictional reach of the 2020 Rule is more appropriate under the CWA and the Constitution than the jurisdictional reach of the 2015 Rule. *E.g.*, 85 Fed. Reg. 22,251, 22,256-57, 22,259-60, 22,262-72.

In *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020) ("*DACA*"), the Court examined the Department of Homeland Security's rescission of the Deferred Action for Childhood Arrivals program. In defending its decision to rescind the program, the Department argued that it did not need to consider potential reliance interests that had been engendered by the program. *Id*. at 1913. This failure to acknowledge and consider those interests, the Court held, meant that the Department had not offered a reasoned explanation for its policy change. *Id*. at 1914-15. The Court explained that the Department could find that reliance on the program was unjustified, that reliance interests were entitled to diminished weight, or that other factors or concerns outweigh the reliance interests. *Id*. at 1914. The agency "has considerable flexibility in carrying out its responsibility," and "[m]aking that difficult decision was the agency's job," but it failed to make required the decision. *Id*.

The agencies did not fail to make that decision in the 2020 Rule. As explained, they acknowledged that the Rule was a change in policy, that some waters used by the general public that were covered under the 2015 Rule will not be covered in the 2020 Rule, and that some states "may incur new costs and administrative burdens." 85 Fed. Reg. 22,270. But the agencies found these interests were outweighed by the regulatory certainties provided by the new Rule in the face of "significant civil and criminal penalties" for CWA violations. *Id*. ("Given [those penalties], the agencies seek to promote regulatory certainty and to provide fair and predictable notice of the limits

of federal jurisdiction"). And they recognized the need to "avoid regulatory interpretations of the CWA that raise constitutional questions" and to "respect the primary responsibilities and rights of States to regulate their land and water resources." *Id*. at 22,269. The agencies acknowledged stakeholders' interests, gave every opportunity to stakeholders to express their views, took account of stakeholder interests in their analysis, and explained why they was making the changes they did from prior agency positions. That is easily enough to satisfy the reasoned explanation requirement.

B. Plaintiffs' Arguments That The 2020 Rule Is Arbitrary And Capricious Have No Merit.

Plaintiffs' claims that the 2020 Rule is nevertheless arbitrary and capricious boil down to their dissatisfaction that the agencies did not wholesale adopt the Connectivity Report that informed the 2015 rulemaking. But the agencies' decision to weigh that science against statutory and policy goals was well within their discretion. Although plaintiffs repeatedly assert that the agencies did not address scientific matters, the 2020 Rule establishes the opposite: the agencies were cognizant of the hydrological science, addressed that science, and considered that science along with other factors. There is no requirement that the agencies consider *only* science, nor that they follow plaintiffs' preferred scientific approach.

1. The agencies did not ignore scientific principles in the 2020 Rule.

Plaintiffs claim that the agencies did not provide a reasoned explanation because they "turned a blind eye" to the "scientific basis" underlying the 2015 Rule. Dkt. 58-1 at 19. But the 2020 Rule makes clear that the agencies did apply scientific standards.

The agencies took account of science, among other ways, when they established the method to calculate the "typical year," 85 Fed. Reg. 22,274-75, to "define the flow classifications (perennial, intermittent, ephemeral) used throughout the regulation," *id*. at 22,288, and to consider "inundation and flooding to create surface water connections." *Id*. The agencies also used the Connectivity

Report "to inform certain aspects of the revised definition of 'waters of the United States,' such as recognizing the 'connectivity gradient' and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system." *Id.* And they "engaged with the EPA's Scientific Advisory Board (SAB) during the development of the rule on several occasions," taking into consideration the "draft commentary" that SAB offered on the proposed rule and explaining too that the points raised by SAB were also raised by public commenters and that the agencies addressed those points in the final rule and its supporting documents. *Id.* at 22,261; Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act (Oct. 16, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11589. The agencies further addressed the SAB's critique that the Rule did not "fully incorporate the Connectivity Report" by explaining that they had used the Connectivity Report to inform the rulemaking "but recognize that science cannot dictate where to draw the line between Federal and State waters." 85 Fed. Reg. 22,261; *see id.* at 22,288. And they addressed "the assertions of some commenters" that the 2020 Rule was not based on science by explaining the ways science did inform the Rule and noting that they were required to "balance[] science, policy, and the law when crafting the proposed rule." *Id.* In all these ways, the rulemaking took account of science, and of the Connectivity Report and SAB commentary specifically.

Plaintiffs contend that is not enough. Underlying their argument is their belief that the agencies were required to scientifically rebut the Connectivity Report to be able to change regulatory course. But there is no such rule. The reasoned-explanation standard only requires the agencies to have a good reason for their change in course, *see Fox*, 556 U.S. at 515, and courts defer to an agency's "weigh[ing] of competing scientific standards." *Forest Guardians v. U.S. Forest Service*, 641 F.3d 423, 442 (10th Cir. 2011); *see also Alliance For the Wild Rockies v. Christensen*, 663 F.

App'x 515, 517 (9th Cir. 2016). Here, the agencies carefully explained their reasons for concluding that the Connectivity Report does not control the scope of CWA jurisdiction.

(a) The agencies made a legal and policy judgment.

The agencies explained that a scientific analysis of the interconnectedness of remote waters and wetlands cannot alone answer the legal question of the scope of federal jurisdiction under the statute: "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." 85 Fed. Reg. 22,271 (emphasis added). Instead, the definition of WOTUS "must be grounded in a *legal* analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law." *Id*. (emphasis added). They further stated that the 2015 Rule, which rested in large part on the Connectivity Report, failed to "implement the legal limits on the scope of the agencies' authority under the CWA" which were recognized by the district court in *Georgia v. Wheeler* when it held the 2015 Rule to be unlawful. 418 F. Supp. 3d 1336 (S.D. Ga. 2019); 85 Fed. Reg. 22,272.

The requirement that the science operate within the CWA's legal framework, not the other way around, is not a disputable proposition. It was acknowledged by the Science Advisory Board, which "recognized that '[t]he [Connectivity] Report is a science, *not policy*, document that was written to summarize the current understanding of connectivity or isolation of streams and wetlands relative to large water bodies.'" 85 Fed. Reg. 22,288 (emphasis added), quoting SAB Draft Commentary, *supra*, at 2; *see also* SAB Final Commentary (Feb. 27, 2020), Pl. Mot. Exh. 57, Dkt. 58-60, at 2 (SAB acknowledges that "in its advisory capacity" SAB "acts under no such constraint" imposed by "the CWA and subsequent case law" on the agencies).

That requirement was recognized too by the agencies when they promulgated *the 2015 Rule*. That Rule explained that the Connectivity Report, standing alone, cannot form the basis for the definition of WOTUS because "the agencies' interpretative task" also requires "policy judgment, as

well as legal interpretation." 80 Fed. Reg. 37,057. Indeed, the 2015 Rule acknowledged that while "[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters … it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA." *Id.* Therefore, the agencies "must rely, not only on the science," but also their technical expertise, practical experience, and "the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate." *Id.* Far from relying solely on the Connectivity Report, the agencies in 2015 proclaimed the need for administrable jurisdictional lines and concluded that the exercise was ultimately one of policy and legal line-drawing, informed but not dictated by science.

The 2020 Rule similarly rests on the need for "clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public." 85 Fed. Reg. 22,252. And the agencies explained that to achieve that goal they engaged in "line-drawing based primarily on their interpretation of their authority under the Constitution and the language, structure, and legislative history of the CWA, as articulated in decisions by the Supreme Court." *Id*. at 22,270. Understanding that the WOTUS definition is a line-drawing exercise rebuts plaintiffs' critique because "[a]n agency has 'wide discretion' in making line-drawing decisions" and the court is not concerned with whether the location of the line is "precisely right." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214-15 (D.C. Cir. 2013); *see also Commonwealth of Mass., Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 522 (1st Cir. 1993) ("the art of regulation involves line-drawing").

(b) The agencies explained their treatment of wetlands.

Because the definition of WOTUS is a legal, not scientific, exercise of discretionary line-drawing, plaintiffs' remaining criticisms fall away. They argue that the 2020 Rule "eliminates jurisdiction" over wetlands "with no substantive discussion of the [Connectivity] Report or the

resulting effects on water quality." Dkt. 58-1 at 19. But simply because the Connectivity Report found that wetlands can benefit downstream water integrity does not mean that those wetlands must come within the definition of WOTUS. As even the 2015 Rule recognized, that is a question of line-drawing within the agency's discretion. *See* 80 Fed. Reg. 37,057. And the agencies addressed the SAB's comment on this topic. 85 Fed. Reg. 22,261. They explained that, compared to the proposed rule, they "expanded jurisdiction over certain 'adjacent wetlands' … to better incorporate common principles from the *Rapanos* plurality and concurring opinions," and, in excluding some other wetlands, the Rule "strikes a better balance between the objective and policy in CWA sections 101(a) and 101(b)." *Id*. at 22,261-62; *see id*. at 22,271 ("The agencies have determined that requiring surface water flow in a typical year from relatively permanent bodies of water to traditional navigable waters and wetlands adjacent to such waters as a core requirement of the rule is the most faithful way of interpreting the Federal government's CWA authority over a water"). Therefore, the exclusion of some wetlands in the 2020 Rule is not an "unexplained inconsistency in agency policy" and does satisfy the reasoned-explanation test. *See Encino Motorcars*, 136 S. Ct. at 2126.

(c) The agencies explained their treatment of ephemeral features.

The same response applies to plaintiffs' claim that "nowhere does the Rule substantively engage or acknowledge the basis for the agencies' past practice and the scientific record regarding the importance of ephemeral streams to downstream water quality." Dkt. 58-1 at 20. First, the agencies did not need to rebut the scientific record of a connection between ephemeral streams to downstream water quality because science alone cannot answer the jurisdictional question and the agencies made a determination that the policies underlying the CWA supported their line-drawing. Second, the agencies *did* address this question, acknowledging that the Connectivity Report supports the conclusion that ephemeral streams "exert a strong influence on the character and functioning of downstream waters." 85 Fed. Reg. 22,288. They observed that the SAB recommended using a

"connectivity gradient" to recognize the probability that impacts occurring along the gradient will be transmitted downstream, but the SAB also recognized that the Connectivity Report is not a "policy document." *Id*. The agencies explained that they used the Connectivity Report "to inform" the new WOTUS definition, including by "recognizing the 'connectivity gradient' and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system." *Id*.

Plaintiffs assail this use of the connectivity gradient, claiming that the agencies "make no attempt to explain how they chose where on the gradient to draw jurisdictional lines, how those lines make sense on the ground, or why a departure from past practice is warranted." Dkt. 58-1 at 20. But that is simply a complaint about the agencies' line-drawing—something that is firmly within the agencies' discretion. *See Nat'l Shooting Sports Found.*, 716 F.3d at 214-15; *Commonwealth of Mass.*, 984 F.2d at 522. The agencies explained that they considered the connectivity gradient in light of their policy decision to draw lines to preserve state sovereignty and provide regulatory certainty (85 Fed. Reg. 22,288, 22,325); that they "looked to science to inform" their definition of the term "'ephemeral'" (*id*. at 22,271); and that, balancing the science and the legal principles established in the statute and precedent, they had concluded that "certain ephemeral features do not sever jurisdiction of an upstream relatively permanent jurisdictional water so long as they provide a surface water connection to a downstream jurisdictional water in a typical year." *Id.* at 22,287.

The agencies explained that this treatment of ephemeral features incorporated both the *Rapanos* plurality's "requirement that jurisdictional waters be continuously present, fixed bodies of water and that dry channels, transitory puddles, and ephemeral flows be excluded from jurisdiction" and "Justice Kennedy's concern that speculative and insubstantial connections may not be sufficient to establish jurisdiction." *Id.* at 22,278. In support, the agencies examined and rejected comments suggesting inclusion of ephemeral streams based on flow quantity or other case-by-case

determinations because the Rule "is intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community." *Id.* at 22,325. Thus, the agencies' treatment of ephemeral features is not an "unexplained inconsistency" but rather is the result of a well-explained balancing of scientific principles, court precedent, and statutory and policy goals.

For all these reasons, plaintiffs' argument that the 2020 Rule "rests upon factual findings that contradict those which underlay [the agencies'] prior policy," Dkt. 58-1 at 18, is built on an incorrect premise. The agencies' decision to reconsider the WOTUS definition in light of the agencies' EA statutory policies and goals is not a contradictory *factual* determination, but rather a *legal* one. And "reevaluation of which policy would be better in light of the facts … is well within an agency's discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037-38 (D.C. Cir. 2012); *see Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) ("We do not question that the Department was entitled in 2003 to give more weight to socioeconomic concerns than it had in 2001, even on precisely the same record"). The agencies explained their reasoning for their recalibration of federal jurisdiction, and nothing more is required under the reasoned explanation standard. *See Fox*, 556 U.S. at 515-16.

2. The agencies did not ignore water quality.

Plaintiffs say the agencies failed to consider the effects of the Rule on the CWA's objective "to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" Dkt. 58-1 at 21. They point to a chart in the agencies' Economic Analysis ("EA") that, they claim, shows the Rule "will significantly harm the Nation's waters at the conceptual level." *Id.* at 22; *see* Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" (Jan. 22, 2020), https://beta.regulations.gov/document/EPA-HQ-OW-2018-0149-11572.

But that chart was accompanied by a note stating that it "assumes no state responses to changes in CWA jurisdiction. The analysis in Section II.A. suggests that many states will continue to

regulate newly non-jurisdictional waters, thereby reducing any potential impacts from changes in CWA jurisdiction." EA 105. The agencies made this same point in the Rule, noting that some states may fill any regulatory gap, and some "may be able to find more efficient ways of managing local resources than the Federal government," but others "may regulate only a subset of affected waters." 85 Fed. Reg. 22,334. Still, the agencies concluded, "net benefits would increase, assuming that a State can more efficiently allocate resources towards environmental protection due to local knowledge of amenities and constituent preferences." *Id*. Thus, the agencies did not ignore an aspect of the problem—they considered the likelihood that states would exercise their powers to efficiently fill any regulatory gaps and determined that there would be a net benefit from the Rule.

3. The agencies took account of the variety of interests at stake.

For the reasons explained above, Part I.A.3 & 4, plaintiffs' argument that the agencies did not consider their reliance interests is incorrect and their appeal to *DACA* is misplaced because that case is easily distinguished.

Plaintiffs seem to claim that their interests in the definition of WOTUS are more compelling than anyone else's and should have carried extra weight with the agencies. They assert that "people have bought homes and made their livings based upon decades of federal protections for clean water." Dkt. 58-1 at 23. But, first, a large amount of water is still within federal CWA jurisdiction. Second, even if some features are now not federally regulated, states could step in and fill any necessary gaps. Third, insofar as plaintiffs' claim reliance on the 2015 Rule, that is dubious at best because the Rule has been under constant challenge and enjoined for years in all and then half the country. Fourth, the agencies analyzed the interests of, and potential impact on, small business entities, 85 Fed. Reg. 22,335, and numerous other stakeholders, *id*. at 22,260.

Fifth, plaintiffs ignore the interests of the business community, which suffered under prior regulatory regimes' broad but uncertain scope and patchwork implementation. Parrish Decl. ¶¶ 25-

27. That uncertain scope delayed projects pending costly jurisdictional determinations, caused farmers to leave land unused because they could not tell if a puddle in their field was a regulated water, and forced businesses to forego projects because they were unable to predict whether features on their land were jurisdictional. Parrish Decl. ¶¶ 25-38. The costs of obtaining a CWA permit were "significant" and the process "arduous." *Hawkes Co.*, 136 S. Ct. at 1812, 1815. Those costs forced businesses to abandon projects or take land out of use. Parrish Decl. ¶¶ 31-34. Thus, even if some people benefitted under prior rules, many others did not. It was within the agencies' discretion to weigh those considerations. *See Dep't of Homeland Security*, 140 S. Ct. at 1914 (agency has "considerable flexibility" in weighing reliance interests).

4. The agencies did not improperly treat similarly situated streams and wetlands differently.

Plaintiffs argue that the 2020 Rule treats similarly situated streams and wetlands differently, but they acknowledge that an agency may treat similarly cases differently if "it can provide a legitimate reason" for doing so. Dkt. 58-1 at 24-25. Even crediting plaintiffs' premise that all types of streams, with different flow patterns, have "similar" ecological functions, the agencies offered a legitimate reason for treating ephemeral streams differently from other streams: rather than engaging in burdensome case-by-case determinations, the agencies valued regulatory certainty by providing bright line rules, including a categorical exclusion of ephemeral streams. 85 Fed. Reg. 22,325. Providing certainty is a legitimate reason to resolve matters in a particular way. *New York v. U.S. EPA*, 413 F.3d 3, 37 (D.C. Cir. 2005) (the "need for regulatory certainty" was legitimate factor in agency "balancing … the environmental, economic, and administrative goals" of Clean Air Act).

The same analysis applies to plaintiffs' argument that similarly situated wetlands are treated differently under the Rule. Dkt. 58-1 at 25. Plaintiffs attempt to parse the minutiae of jurisdictional and non-jurisdictional wetlands, but ignore that the agencies have discretion to draw lines "on the

continuum between open waters and dry land." 85 Fed. Reg. 22,310. As for plaintiffs' specific examples, the agencies explained the difference between wetlands separated from jurisdictional waters by a natural berm or bank and those separated by artificial features. Natural berms or banks "indicate that a sufficient surface water connection exists between the jurisdictional water and the wetland" because, for instance, "a natural river berm can be created by repeated flooding and sedimentation events when a river overtops its banks and deposits sediment between the river and the bank." 85 Fed. Reg. 22,311. By definition, an artificial berm is not created by that sort of natural flooding. Additionally, a wetland flooded by a jurisdictional water exhibits characteristics of a direct hydrologic surface connection, but flooding of a water by a wetland "is more like diffuse stormwater run-off and directional sheet flow over upland." *Id.* at 22,310. Plaintiffs do not like where the agencies drew the lines, but the agencies had rational reasons for their judgment.

5. The regulatory certainty provided by the 2020 Rule is not illusory.

Plaintiffs suggest that the entire 2020 Rule must be overturned as arbitrary and capricious solely because they find the Rule's "typical year" concept confusing. Dkt. 58-1 at 26. The agencies "use the term '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. 22,274. "Typical year" is defined to mean "when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." 33 C.F.R. § 328.3(c)(13); 40 C.F.R. § 120.2(3)(xiii); 85 Fed. Reg. 22,339. This metric helps "ensure that flow characteristics are not assessed under conditions that are too wet or are too dry." 85 Fed. Reg. 22,274.

The agencies provided detailed explanation of the how a "typical year" is to be calculated, describing the data they will consider to derive normal periodic range of precipitation and relevant

geographic area while preserving flexibility to allow use of best available data sources. *Id.* at 22,274-75. The agencies also explained that they "currently use professional judgment and a weight of evidence approach as they consider precipitation normalcy along with other available data sources," and they list three such data sources and where they can be found. *Id*. at 22,275. Further, the agencies are permitted to develop the typical year rule through application to specific aquatic resources. *See Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1206 (D.C. Cir. 2020).

Even if the application of the typical year requirement will evolve and become clearer in application over time, the 2020 Rule with its bright-line, categorical rules still provides more regulatory certainty than the prior regime. *See* Parrish Decl. ¶¶ 52-54. The agencies "acknowledge[d] that field work may frequently be necessary to verify whether a feature is a water of the United States." 85 Fed. Reg. 22,270. But they explained that "replacing the multi-factored case-specific significant nexus analysis with categorically jurisdictional and categorically excluded waters in the final rule provides clarifying value for members of the regulated community." *Id*. Indeed, the evidence shows that the bright line definitions of the 2020 Rule allow construction, building, mining, farming, and other businesses to operate without the delays, costs, and uncertainties that result from prior agency rules. Parrish Decl. ¶¶ 49-53.

In sum, the agencies provided a reasoned explanation for their policy change in the 2020 Rule. They were cognizant that they were changing prior policy, addressed reliance interests and the effects on parties from the rule change, and provided good reasons for the change in the form of greater regulatory certainty, compliance with the CWA's objectives of ensuring state sovereignty over land and water resources, and conformity with Supreme Court precedent. Plaintiffs' objections reveal that they are unhappy with the agencies' explanations, but that is irrelevant. The agencies left no unexplained inconsistencies in the Rule and exercised their discretion to answer the legal question of their jurisdiction while balancing available science and broader policy concerns.

II. THE 2020 RULE IS CONSISTENT WITH THE CLEAN WATER ACT.

Plaintiffs claim that the 2020 Rule violates the CWA because it does not adopt Justice Kennedy's significant nexus test from his *Rapanos* concurrence (Dkt. 58-1 at 30-33), improperly addresses the role of the states under the Act (*id*. at 33-38), and does not define WOTUS as co-extensive with the "Nation's waters" (*id*. at 38-39). None of those arguments have merit.

A. The 2020 Rule is consistent with controlling Supreme Court precedent.

The agencies were not required to follow Justice Kennedy's concurrence in *Rapanos,* and the Rule complies with the Supreme Court's binding holdings on the interpretation of WOTUS. This issue involves the intersection of two legal doctrines. One doctrine is that under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 865-66 (1984), an administrative agency's interpretation of truly ambiguous terms in a statute it is empowered to enforce will be given deference. That is because resolving actual statutory gaps "involves difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980. Pursuant to that rule, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982.

In analyzing whether the 2020 Rule was an improper exercise of the agencies' discretion, the court must determine whether there has been a precedential judicial interpretation of unambiguous statutory language. There can be no dispute that WOTUS is, overall, an ambiguous term. Still, courts may find that the term unambiguously has (or does not have) certain core attributes. *See SWANCC,* 531 U.S. 159; *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). For instance, in *SWANCC*, 531 U.S. at 174, the Court held that WOTUS may not be interpreted to include ponds and mudflats based on the "Migratory Bird Rule." That does not mean that WOTUS is unambiguous in

all of its other applications. Thus, to determine whether *Rapanos* cabins the agencies' authority, the court must determine what, if anything, is the legal holding of that case, and whether that holding was a construction of ambiguous or unambiguous language in context.

That is where the second relevant legal doctrine comes into play. *Rapanos* was a fractured decision without a majority opinion. The Supreme Court's guidance in this situation is that "'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (emphasis added). "[T]he *Marks* rule produces a determinative holding 'only when one opinion is a logical subset of other, broader opinions.'" *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1141 (10th Cir 2012); *see United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) ("A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably described as a logical subset of the other"); *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009) ("Where no standard put forth in a concurring opinion is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes, *Marks* breaks down"); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (applying logical subset rule under *Marks*); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justice who support the judgment").

In a situation where "the plurality and concurring opinions do not share common reasoning whereby one analysis is a 'logical subset' of the other," there is no controlling opinion. *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013). That is the case here because neither the *Rapanos* plurality opinion nor Justice Kennedy's concurrence is the logical subset of the other—they are

distinct approaches to defining the scope of WOTUS. The plurality applied a two-part test to determine whether a wetland was within the jurisdictional reach of the CWA. First, there must be "waters" that contain a "relatively permanent flow," and second, there must be a "continuous surface connection" between the water and the wetland. *Rapanos*, 547 U.S. at 757 (plurality). By contrast, Justice Kennedy's significant nexus test provided that wetlands "possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780 (Kennedy, J., concurring).

The plurality did not accept Justice Kennedy's significant nexus test, explaining that the test "leaves the [CWA]'s 'text' and 'structure' virtually unaddressed." *Id*. at 753. The plurality continued that the "case-by-case determination of ecological effect" of a wetland on a navigable water under the significant nexus test "*was not the test*" and had been "*specifically rejected*" by the Court's prior cases. *Id*. at 754. Likewise, Justice Kennedy did not accept the plurality's test, finding it to be "inconsistent with the Act's text, structure, and purpose." *Id*. at 776 (Kennedy, J.) He concluded that the plurality's reliance on the permanence of water flow "makes little practical sense" and was precluded by the common understanding of "waters." *Id*. at 774. The plurality's test, but not the significant nexus test, would exclude wetlands that abut navigable-in-fact waters but lack a continuous surface connection, and it would include remote wetlands with a surface-water connection with a small but continuously flowing stream that may be excluded by the significant nexus test. *Id*. at 776-77. Because the *Rapanos* plurality and concurrence took entirely different approaches, under *Marks* neither opinion is the binding holding of *Rapanos*. *See Cundiff*, 555 F.3d at 209-10 (neither the *Rapanos* plurality or concurrence is a logical subset of the other under *Marks*).

In the absence of a controlling opinion under *Marks*, the court should still determine whether there is common ground between the *Rapanos* plurality and concurrence. *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); *King*, 950 F.2d at 781 (the focus of the *Marks* analysis and the logical subset test is on finding "a common denominator of the Court's reasoning"). Both the plurality and Justice Kennedy agreed that (1) the word "navigable" in the CWA must be given some effect, *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring); *see id*. at 731 (plurality); (2) WOTUS includes some waters and wetlands not navigable-in-fact but which bear a substantial connection to navigable waters, *id*. at 739, 742 (plurality); *id*. at 784-85 (Kennedy, J.); (3) environmental concerns cannot override the statutory text, *id*. at 778 (Kennedy, J.); and (4) WOTUS cannot include drains, ditches, streams remote from navigable-in-fact water and carrying only a small volume water toward navigable-in-fact water, or waters or wetlands that are alongside a drain or ditch, *id*. at 733-34, 742 (plurality); *id*. at 778, 778-91 (Kennedy, J.). Under *Brand X*, those are conclusions about the core meaning of WOTUS that the Agencies cannot ignore in their subsequent rulemaking, and the 2020 Rule is consistent with those requirements. *E.g.*, 85 Fed. Reg. 22,251-52.

B. Plaintiffs misunderstand the Rule's foundations and ignore governing precedent.

Plaintiffs argue that the 2020 Rule "embrace[s] the *Rapanos* plurality" but a "majority of the Supreme Court in *Rapanos* unambiguously rejected Justice Scalia's approach." Dkt. 58-1 at 30. Those points are both incorrect and irrelevant.

As an initial point, Plaintiffs' premise is false because the 2020 Rule does not wholly adopt the *Rapanos* plurality opinion nor wholly reject Justice Kennedy's concurrence. Instead, the agencies explained that "there are sufficient commonalities between these opinions to help instruct the agencies on where to draw the line between Federal and State waters." 85 Fed. Reg. 22,268. For instance, the 2020 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." *Id*. at 22,291. The agencies further 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. Additionally, both opinions "also agreed that the connection between the wetland and the tributary must be close." *Id*. The agencies sought to implement guidance from "the [opinions'] common analytical framework." *Id*. The 2020 Rule thus uses both the *Rapanos* plurality and concurrence as guideposts.

Further, Plaintiffs argument that a "majority" of the *Rapanos* Court rejected the plurality decision is misguided. As explained, to determine the legal holding of a fragmented decision, *Marks* instructs courts to consider the opinions of the Justices "who concurred in the judgments." 430 U.S. at 193; *see O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (in determining precedential effect of its fragmented decisions, the Court looks to the opinions of "the Justices whose votes were necessary to the judgment"). This analysis plainly excludes consideration of dissenting opinions. *King*, 950 F.2d at 783 ("*Marks* has never been so applied by the Supreme Court, and we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority"); Jonathan H. Adler, *Reckoning With Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 Mo. Envt'l L. & Pol'y Rev. 1, 14 (2006) ("it would be wrong to view any part of Justice Stevens' dissent as a 'holding' of the Court. Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent is part of the actual holding of the case").

Without offering any reason why a dissenting opinion may be considered in determining the controlling rule of a fractured decision, plaintiffs cite two cases: *Vasquez v. Hillery*, 474 U.S. 254 (1986), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*., 460 U.S. 1 (1983).

Vasquez does not support using a dissenting opinion to fashion a holding under *Marks* because there the "dissenters" explicitly concurred in the relevant part of the judgment. *See King*, 950 F.2d at 783.

Moses H. Cone likewise offers no support for Plaintiffs' position. The issue there was whether the Court's fragmented decision in *Will v. Calvert Fire Insurance*, 437 U.S. 655 (1978), "undermined" or "at least modifie[d]" the Supreme Court's abstention analysis in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). 460 U.S. at 17. In *Will*, the Court reversed the appellate court's grant of mandamus relief ordering the district court to consider certain claims instead of abstaining from them in light of pending state court litigation presenting the same issues. A four-Justice plurality decision by Justice Rehnquist applied a version of the *Colorado River* test and held that the district court did not abuse its discretion by staying the federal court action. 437 U.S. at 664-67 (Rehnquist, J., plurality). Justice Blackmun concurred in the reversal of the mandamus writ, stating that the court of appeals should consider whether the district court stay was proper under *Colorado River* (which had been decided subsequent to the stay order). *Id*. at 667-68 (Blackmun, J., concurring). The four-Justice dissent stated that abstention was not proper under *Colorado River*. *Id*. at 668-77 (Brennan, J., dissenting).

In rejecting the argument that the plurality opinion in *Will* changed the elements of the *Colorado River* test, the Court in *Moses H. Cone* stated that "it is clear that a majority of the Court reaffirmed the *Colorado River* test" in *Will*. 460 U.S. at 17. The Court explained that the *Will* plurality's supposed modification of *Colorado River* "was opposed by the dissenting opinion" and Justice Blackmun's concurrence, and that on remand "the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test." *Id*. The Court in *Moses H. Cone* thus did not rely on the *Will* dissent to derive any new rule of law. It simply performed a head count to verify that existing law *had not changed*.

Therefore, there is no binding holding from *Rapanos* that agencies cannot consider the plurality decision. In fact, the Supreme Court's own understanding of *Rapanos* confirms this because the Court looks to the plurality when it seeks guidance from that case. For instance, in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Court issued a fragmented decision addressing the meaning of language in the CWA regarding discharge of pollutants "from any point source." 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—even though not a holding under *Marks*—is the source from which to draw guidance about the meaning of the statute.

C. Interpretation of the meaning of WOTUS does not depend only on science.

Plaintiffs' claim (Dkt. 58-1 at 31-33) that the 2020 Rule ignores science and "embrace[s] a non-scientific approach that ignores the effects of downstream water." This is not a correct reading of the Rule, as explained above (at Part II.B.1). Plaintiffs assert that the jurisdictional reach of the statute "is inherently and inescapably a practical science-based question that considers the functional relationship among the nation's waters rather than ignoring them." The Rule, however, does not ignore that functional relationship. *E.g.*, 85 Fed. Reg. 22,271 (explaining relevance of features that illustrate a wetland is "inseparably bound up with" a jurisdictional water); *id*. at 22,311 (same); *id*. at 22,271 (explaining use of connectivity gradient); *id*. at 22,288 (same).

But the Rule does recognize that connectivity, alone, is an insufficient basis to identify WOTUS. *Id*. at 22,271. Plaintiffs ignore that the determination of the jurisdictional reach of the CWA is at its core a legal issue of statutory construction, not a purely scientific issue. *See id*.

("While science informs the agencies' interpretation of the definition of [WOTUS], 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"); 80 Fed. Reg. 37,057 (agencies cannot rely "only on the science" in defining WOTUS). And in arguing that the agencies must exercise jurisdiction in the broadest way possible (Dkt. 58-1 at 33), plaintiffs disregard the holding in *SWANCC* that the CWA does not contain the required clear statement that Congress intended the agencies to exercise jurisdiction to the full extent of their constitutional authority. 531 U.S. at 172, 174; *see* 85 Fed. Reg. 22,265 ("This final rule, in contrast to the 2015 Rule, avoids pressing against the outer limits of the agencies' authority under the Commerce Clause and Supreme Court case law and recognizes the limiting principles articulated by the *SWANCC* decision"). Consistent with *SWANCC*, and as embodied in Section 101(b) of the CWA, the agencies must honor the states' authority over their land and water resources. Moreover, and in response to plaintiffs' argument (at 34) that the agencies cannot remove once-protected waters from their jurisdiction, the agencies are permitted to make policy determinations when interpreting truly ambiguous terms of a statute. *See Brand X*, 545 U.S. at 981. Thus, there are other considerations than connectivity of water resources that are relevant to the interpretation of WOTUS. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("no legislation pursues its purposes at all costs").

D. The 2020 Rule is a proper interpretation of the states' role in water resource regulation.

Plaintiffs argue that the 2020 Rule places too much emphasis on the states' role in regulating water and land resources. Dkt. 58-1 at 35-38. Congress stated that one purpose of the CWA is to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use … of land and water resources, and to consult with the [EPA] in the exercise of [its] authority under this chapter." 33 U.S.C. § 1251(b). It is

congressional policy "that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title" and that the federal government will "support and aid research" and "provide Federal technical services and financial aid" to states in connection with pollution prevention, reduction, and elimination. *Id*.

Congress defined the form of the federal-state relationship in the CWA. That relationship features non-regulatory federal support for states in controlling pollution in "waters" and federal regulatory responsibility over a subset of those waters known as "navigable waters." See 85 Fed. Reg. 22,253. For instance, Congress authorized the EPA to make grants to states to develop techniques to control pollution in "any waters," 33 U.S.C. § 1255(a)(1), and to fund research "for prevention of pollution of any waters," *id.* § 1255(c). Thus, the federal government is to provide a support role to states as they exercise their authority over the broad category of "any waters." By contrast, federal regulatory authority extends not to "any waters" but only to "navigable waters" defined as WOTUS. *Id*. § 1362(7). An interpretation of the CWA that recognizes that federal regulatory authority over WOTUS does not reach as far as state authority over "any waters" therefore cannot be in violation of the "federal-state partnership" created by the CWA.

Further defining the contours of the federal-state relationship, Congress provided "for grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution." *Id*., § 1256(a). That provision reflects the important role of states in pollution prevention and the non-regulatory support role Congress assigned the agencies under the CWA.

Thus, the federal-state relationship that the CWA envisions reserves a major role to the states while providing a federal baseline of standards and support. The 2020 Rule preserves that state role by restricting federal overreach while still providing categorical jurisdiction rules that confer federal authority over a large amount of water and wetlands. *See* 85 Fed. Reg. 22,252 ("Congress provided a

major role for the States in implementing the CWA, balancing the preservation of the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation"; the 2020 Rule "strikes a reasonable and appropriate balance between Federal and State waters" to achieve that goal).

Additionally, the 2020 Rule is consistent with the structure of the federal-state relationship contemplated by the Constitution. *SWANCC* held that Congress did not manifest a clear intent in the CWA for federal regulation to extend to the very limits of the agencies' constitutional authority. 531 U.S. at 172-73. Statement of such a clear intent is necessary because an interpretation of WOTUS to be as broad as the federal government's Commerce Clause authority would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173.

Plaintiffs claim that Section 101(b) assigns to states a role in implementing federal programs but does not have any broader relevance. Dkt. 58-1 at 36-37. That reading is based on a misunderstanding of the statute's history. As the *Rapanos* plurality explained, the "statement of policy" that Congress intended in the CWA "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution," and "to plan the development and use . . . of land and water resources" was included in the CWA as amended in 1972. 547 U.S. at 737. The 1977 amendments to the CWA then added language defining certain roles for states in permitting programs under the Act. 91 Stat. 1567, 1575, Public Law 95-217 (1977). Given this history, the *Rapanos* plurality explained that the statement of policy from the 1972 Act "plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. § 1344(g)-(*l*)." 547 U.S. at 737; *see* 85 Fed. Reg. 22,270. In other words, the evolution of the statutory text confirms that the agencies were entitled to rely on the preservation of state authority over land and water resources as one overriding policy of the CWA.

E. WOTUS is not synonymous with the "Nation's waters."

In addition to its policy of preserving state authority over land and water resources, the CWA also provides that another statutory objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA fulfills that objective, in part, by establishing federal regulatory authority over the discharge of pollutants into "navigable waters," *id*. § 1342(a), and over the discharge of dredged or fill material into "navigable waters," *id*. § 1344(a). "Navigable waters" are "the waters of the United States." *Id*. § 1362(7).

Plaintiffs claim that "Nation's waters" means the same thing as WOTUS. Dkt. 58-1 at 38-39. But they offer no application of statutory construction principles to support that position, citing instead instances where the terms have been used in judicial opinions interchangeably where the definition of the terms has not been at issue. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 96, 102 (2004) (no dispute over whether waters were "navigable waters"); *Riverside Bayview*, 474 U.S. at 137 (quoting statement of a Senator that a failed legislative attempt to narrow definition of "navigable waters" "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act"); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 311-12 (1981) (not addressing the definition of "Nation's waters" or "navigable waters").

Plaintiffs make no meaningful effort to explain why the use of "Nation's waters" at one point in the statute but "navigable waters" at other points means the terms are synonyms when the obvious answer is that Congress used two different terms because it meant two different things. *See Bailey v. United States*, 516 U.S. 137, 146 (1995). In the 2020 Rule, the agencies rejected that very argument, explaining that "[f]undamental principles of statutory interpretation support the agencies' recognition of a distinction between the 'nation's waters' and 'navigable waters.'" 85 Fed. Reg. 22,253. As the agencies explained, "'Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.'" *Id.* Further, as explained above, Congress used "any waters"

when referring to federal non-regulatory authority and "navigable waters" when referring to federal regulatory authority. Both of those waters are subsets within the "Nation's waters."[2]

III. THE WASTE TREATMENT SYSTEM EXCLUSION IS LAWFUL.

The 2020 Rule continues a longstanding exclusion for waste treatment systems ("WTS") that, as the agencies explain, has "been expressly included in regulatory text for decades." 85 Fed. Reg. 22,317. The WTS exclusion is critical to the operations of many regulated entities, which commonly rely upon it to treat, settle, retain, reduce or remove pollutants before water is discharged, recycled, or reused. The exclusion advances the purposes of the CWA, because these treatment systems function to protect water quality adjacent to and downstream of industry operations. *See, e.g.*, Edison Electric Institute, Comment Letter on 2020 Rule at 3 (April 15, 2020), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-8115 ("electric companies utilize onsite features" to "recycle and reuse water at generating sites"); Utility Water Act Group, Comment Letter on 2015 Rule at 57 (Nov. 14, 2014), https://beta.regulations.gov/document/EPA-HQ-OW-2011-0880-15016 ("The electric utility industry commonly uses systems of interconnected pipes, channels, basins, ponds, and other features for collecting and treating wastewater"). For decades, many such systems have incorporated features that would otherwise qualify as WOTUS, often to take advantage of pre-existing features such as wet depressions or drainage systems, when it is impracticable or infeasible to construct the WTS entirely outside of such areas, or where using existing features minimizes environmental impacts. *E.g.*, National Mining Association, Comment Letter on 2015 Rule at 21 (Nov. 14, 2014), https://beta.regulations.gov/document/EPA-HQ-OW-

[2] While the CWA defines "navigable waters" as "the waters of the United States," Congress elsewhere defined the "waters of the United States" as "navigable waters." Aquatic Nuisance Prevention and Control Act, 16 U.S.C. § 4702(16). Congress clearly does not believe that "waters of the United States" expands the "navigable waters" concept to include all the water in the Nation. Consistent with Supreme Court precedent, the navigable waters of the United States are a subset of the Nation's waters, not coterminous with them.

2011-0880-15169. After all, if a water body would not otherwise meet the definition of WOTUS, no exclusion would be needed. And it makes no sense to apply water quality standards to a water feature that is used to treat wastewater or stormwater under a permit issued under the CWA.

For decades, the agencies have consistently provided that WOTUS converted into a WTS subject to a Section 404 permit (or before the CWA was enacted) are no longer WOTUS. State Program Requirements, 63 Fed. Reg. 51,164, 51,183 (Sept. 24, 1998); EPA, *Guiding Principles for Constructed Treatment Wetlands* 16 (Oct. 2000); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 214 (4th Cir. 2009) (citing Letter from Benjamin H. Grumbles, Ass't Adm'r, EPA, to John Paul Woodley, Ass't Sec'y of the Army (Mar. 1, 2006)). This exact scheme has already been considered and upheld by the Fourth Circuit Court of Appeals. *See Ohio Valley*, 556 F.3d at 214 ("impoundments 'created by discharge of fill material . . . if permitted by the Corps under Section 404 for purposes of creating a waste treatment system, would no longer be waters of the U.S.'").

This longstanding understanding of how WTSs work within the CWA permitting system makes sense, requiring WTS to be lawfully constructed in accordance with Section 404 and to manage any discharges in accordance with Section 402. The CWA's Section 404 permit program (33 U.S.C. § 1344) regulates the discharge of dredged or fill material to construct a WTS in WOTUS. The process to obtain a Section 404 permit from the U.S. Army Corps of Engineers is rigorous. Among other things, a permit applicant must show, and the Corps conclude, that there is no practicable alternative to constructing the WTS in the WOTUS that would have less adverse impacts, and the applicant must mitigate effects on WOTUS. If the agencies conclude that a WTS should not be constructed in particular WOTUS, they can deny a Section 404 permit to build the system. In addition, discharges from a WTS into a WOTUS must comply with Section 402's NPDES permit requirements. 33 U.S.C. § 1342. NPDES permits prevent pollution reaching WOTUS by ensuring that subsequent discharges to downstream waters comply with water quality standards.

The 2020 Rule continues this pre-existing practice, explaining:

> Continuing the agencies' longstanding practice, any entity with a waste treatment system would need to comply with the CWA by obtaining a section 404 permit for new construction in a water of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States. Consistent with the proposal, the agencies intend for this exclusion to apply 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. 22,324-25. Keeping this system in place, the only changes made to the exclusion were minimal. The agencies simply removed "a cross-reference to a regulatory definition of 'cooling ponds' that no longer exists in the Code of Federal Regulations,'" which they explained was a "ministerial change." *Id.* at 22,325. And they further defined the meaning of "waste treatment system," which includes "cooling ponds" in a lawfully-constructed WTS. *Id.* at 22,328. The agencies explained that they provided a definition of WTS "to enhance implementation clarity." *Id.* at 22,317.

A. The agencies provided a reasoned explanation for the WTS Exclusion.

Plaintiffs complain (at 12-13) that the 2020 Rule's inclusion of cooling ponds within its definition of WTS, along with its clarification that waters are not jurisdictional if they fall under an exclusion (85 Fed. Reg. 22,325), means that the 2020 Rule does not protect navigable waters. Plaintiffs characterize the WTS exclusion as a "dramati[c]" expansion of the WTS exclusion, different from the 2015 Rule and prior regimes. Dkt. 58-1 at 13. And they argue that the 2020 Rule lacks adequate explanation for this supposed change in policy. Those concerns are wrong.

First, it is incorrect to suggest that the 2020 Rule fails to protect navigable waters. The WTS exclusion removes cooling ponds that are part of a waste treatment system from the definition of WOTUS only where the regulated party "obtain[ed] a section 404 permit for new construction in a [WOTUS], and a section 402 permit for discharges from the waste treatment system into

[WOTUS]," and where the WTS was "constructed in accordance with the requirements of the CWA" or "constructed prior to the 1972 CWA amendments." 85 Fed. Reg. 22,325.

That is nothing new. Removing WTS from the scope of federal jurisdiction is a long-standing practice. The Fourth Circuit has reviewed prior agency practice and upheld the legality of converting jurisdictional waters into excluded WTS. *Ohio Valley*, 556 F.3d at 214. Moreover, the 2015 Rule (the regime to which Plaintiffs ultimately wish to return) similarly explained that "[c]ooling ponds that are created under section 404 in jurisdictional waters and that have NPDES permits are subject to the waste treatment system exclusion, which is not changing." 80 Fed. Reg. at 37,099. The 2020 Rule introduces no policy reversal that needs explaining: just as the agencies described, the WTS exclusion, including as to cooling ponds, continues long-existing practice.

B. The WTS Exclusion is a permissible interpretation of the CWA.

Plaintiffs next attack a strawman, suggesting (Dkt. 58-1 at 16) that the 2020 Rule does not protect navigable-in-fact waters because of the WTS exclusion. They insist that the WTS exclusion fails to comply with the CWA by turning "lakes and other public waterways … into waste treatment systems." *Id*. Putting aside the fact that the WTS exclusion in the 2020 Rule simply codifies practices that have been in place for decades, again, this argument rests on mischaracterizations. There is no question that the 2020 Rule protects navigable-in-fact waters. As the cornerstone of the 2020 Rule, the agencies "interpret the term [WOTUS] to encompass … traditional navigable waters." 85 Fed. Reg. 22,251. The WTS exclusion does not undercut that centerpiece, but furthers it. As the agencies explained, "[c]ontinuing the agencies' longstanding practice," the 2020 Rule requires that "any entity with a waste treatment system would need to comply with the CWA by obtaining a section 404 permit for new construction in a water of the United States, and a section 402 permit for discharges from the waste treatment system into [a WOTUS]." *Id*. at 22,324-25. The WTS

exclusion does not enable a regulated party to pollute in navigable waters—rather, WTSs are a heavily-regulated exception relied upon to protect water quality downstream.

CONCLUSION

Plaintiffs' motion for summary judgment should be denied and Defendant-Intervenors' cross-motion should be granted.[3]

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Respectfully submitted,

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[3] Plaintiffs suggest that if this Court finds any part of the 2020 Rule to violate the APA, it should vacate the Rule. Other courts, however, found remanding the 2015 Rule to the agencies rather than vacatur to be appropriate. *See Texas*, 389 F. Supp. 3d at 506; *Georgia*, 418 F. Supp. 3d at 1370. And the appropriate remedy may depend on what provisions are affected. Intervenors suggest that the issue of remedy should be addressed in separate briefing were the issue to arise.