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**Pro hac vice*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

MICHAEL REGAN, et al.,

Defendants,

and

STATE OF GEORGIA, et al.,

Defendant-Intervenors.

No. 20-cv-03005-RS

[PROPOSED] AMICUS BRIEF OF BUSINESS COALITION IN SUPPORT OF THE AGENCIES' MOTION TO REMAND WITHOUT VACATUR

Date: September 9, 2021
Time: 1:30 p.m.
Dept: San Francisco Courthouse, Courtroom 3—17th Floor
Judge: Hon. Richard Seeborg

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Amici are fourteen trade groups that represent a broad cross-section of the Nation's infrastructure, commercial and residential construction industries, and mining, manufacturing, forestry, agriculture, livestock, and energy industries, all of which are vital to a thriving national economy, including providing much needed jobs. These businesses represent a large portion of the Nation's economic activity, provide tens of millions of jobs, and provide Americans with food, shelter, and essential goods and services.[1]

[1] Each *amici* member 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 behalf of these members); **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 manage more than 46 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); **Public Lands Council** ("PLC"), https://www.publiclandscouncil.org (PLC represents cattle and sheep producers with the mission to advocate for western ranchers); **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).

Many of *amici*'s members construct residential developments, multi-family housing units, commercial buildings, shopping centers, factories, warehouses, waterworks, roads and other infrastructure. During 2019, total public and private investment in the construction of residential structures alone totaled over $550 billion. U.S. Census Bureau, *Annual Value of Construction Put in Place 2008-2019*, https://www.census.gov/construction/c30/historical_data.html. Every $1 billion of residential construction generates around 16,000 jobs. Spending on commercial and institutional facilities such as shopping centers, schools, office buildings, factories, libraries, and fire stations has an even larger job creation effect, at around 18,000 jobs per $1 billion of spending.

In addition, many of *amici*'s members construct and maintain critical infrastructure: highways, bridges, railroads, tunnels, airports, electric generation, transmission, and distribution facilities, and pipeline facilities. Infrastructure investments increase economic growth, productivity, and land values. Not only are investments in infrastructure critical to quality of life throughout the Nation, but they create many jobs. Every $1 billion in transportation and water infrastructure construction creates approximately 18,000 jobs.

Amici's agricultural members grow virtually every agricultural commodity produced commercially in the United States, including significant portions of the U.S. wheat, soybean, cotton, milk, corn, poultry, egg, pork, and beef supply. Agriculture and livestock-related industries contributed over $1 trillion to the U.S. gross domestic product and employed 22 million people in 2019. U.S. Dep't of Agric., Economic Research Serv., *Ag and Food Sectors and the Economy* (May 4, 2020), https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy; *see also* U.S. Dep't of Agric., Economic Research Serv., *Ag and Food Statistics: Charting the Essentials, February 2020* (Feb. 2020), https://www.ers.usda.gov/webdocs/publications/96957/ap-083.pdf. Forestry-related businesses support 2.9 million total jobs and are associated with $128.1 billion in total payroll. And forest products—paper, wood, and furniture manufacturing—contribute nearly 6% of GDP. Forest2Market, *New Report Details the Economic Impact of US Forest Products Industry* (May 9, 2019), https://blog.forest2market.com/new-report-details-the-economic-impact-of-us-forest-products-industry; Nat'l Alliance of Forest Owners, *The Economic Impact of Privately-Owned*

Forests in the 32 Major Forested States (Apr. 4, 2019), https://nafoalliance.org/wp-content/uploads/2018/11/Forest2Market_Economic_Impact_of_Privately-Owned_Forests_April2019.pdf; *see also* Am. Forest & Paper Ass'n, *State Industry Economic Impact–United States* (Aug. 2018), https://www.afandpa.org/docs/default-source/factsheet/2018-update/united-states-august-2018.pdf?sfvrsn=2.

Additionally, *amici* represent producers of most of America's coal, metals, and industrial minerals. In 2017, U.S. mining activities directly and indirectly generated over 1.5 million U.S. jobs and $95 billion in U.S. labor income, and contributed $217.5 billion to the U.S. GDP. *See* Nat'l Mining Association, *The Economic Contributions of U.S. Mining*, at E-1 (Sept. 2018), https://nma.org/wp-content/uploads/2016/09/Economic_Contributions_of_Mining_2017_Update.pdf. They also represent the energy industry that generates, transmits, transports, and distributes the nation's energy to residential, commercial, industrial, and institutional customers. Together, oil and natural gas supply more than 60 percent of our nation's energy. U.S. Energy Information Ass'n, *Annual Energy Outlook 2019*, https://www.eia.gov/outlooks/aeo/data/browser/#/?id=1-AEO2019&cases=ref2019&sourcekey=0.pdf. Overall, as of 2017, the oil and natural gas industry supported 10.3 million U.S. jobs and contributed 8% of U.S. GDP. American Petroleum Inst., *Oil & Natural Gas: Supporting the Economy, Creating Jobs, Driving America Forward* (2018), https://www.api.org/~/media/Files/Policy/Taxes/DM2018-086_API_Fair_Share_OnePager_FIN3.pdf.

Individually and collectively, *amici*'s members are thus of critical importance to the Nation's economy. Their experience, planning, and operations make them experts in the Clean Water Act ("CWA") and the practical consequences of the regulatory definition of "waters of the United States" ("WOTUS") challenged here, the *Navigable Waters Protection Rule*, 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule"). *Amici* have a strong interest in ensuring that federal CWA jurisdiction is exercised lawfully and in promoting uniformity across the Nation and over time in the definition of what features are WOTUS. Their members must comply with the CWA's prohibition against unauthorized "discharges" into areas that are ultimately deemed jurisdictional. The now-operative 2020 Rule provides their members much-needed certainty in describing features

that are or are not WOTUS. As documented in the Declaration of Don Parrish ("Parrish Decl.") (Ex. 1)[2] ¶¶25-54, the prior regulatory regimes imposed unclear standards, and businesses did not know which features on their lands were jurisdictional and which were not. That uncertainty was compounded by court rulings that meant different regulatory regimes applied in different states. Uncertainty as to which features were jurisdictional deprived *amici*'s members of notice of what the law requires and made it impossible for them to make informed decisions concerning the operation, logistics, and finances of their businesses. And it put them at risk of severe criminal and civil penalties and citizen suits for failing to predict how the Act would be applied.

The 2020 Rule culminated more than five years of multiple administrative rulemakings and litigation, in which many members of the *amicus* coalition participated at every step. Parrish Decl. ¶¶17-22. They have submitted comments on every proposed rule and litigated for a lawful, reasonable standard since the U.S. EPA and Army Corps of Engineers (the "agencies") proposed what became the 2015 rule defining WOTUS. *See* 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). They were among the most active litigants challenging the 2015 Rule's unlawful expansion of federal jurisdiction. Many of the *amici* challenged the 2015 Rule in district courts in Texas and Georgia—where the courts held the 2015 invalid—and as *amici* in the District of North Dakota and elsewhere. Among other things, they persuaded the U.S. Supreme Court that these challenges belong in district court, resolving a long-time split among the circuits as to where jurisdiction lay. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617 (2018).

More recently, the Business Coalition *amici* defended the 2020 Rule as Intervenor-Defendants in similar litigation before the District of South Carolina, which granted the agencies' nearly identical motion to remand the 2020 Rule without vacatur. *See* Order, *South Carolina Coastal Conservation League v. Regan*, 2:20-cv-01687 (D.S.C. July 15, 2021).

[2] This declaration details the participation of members of the Business Coalition *amici* in former suits challenging the regulatory definition of WOTUS, as well as the harms that overly broad and vague definitions of WOTUS cause to the regulated community. *Amici* previously filed a declaration in this action at Dkt. 94-1. They also filed the Parrish Declaration before the District of South Carolina as an exhibit to their motion in support of the agencies' successful motion to remand the 2020 Rule without vacatur. *See* Order, *South Carolina Coastal Conservation League v. Regan,* 2:20-cv-01687 (D.S.C. July 15, 2021).

The Business Coalition *amici* previously sought to participate in the present litigation as Intervenor-Defendants. *See* Dkt. 41. While their intervention motion was pending, this Court considered the Business Coalition's brief in opposition to plaintiffs' motion for preliminary injunction as submitted "in the nature of [an] *amicus* brief[]." Dkt. 171 at 6. Although the intervention motion was later denied, this Court determined that the Business Coalition *amici* "likely have significantly protectable interests at stake" and stated that they would be permitted to participate as *amici* in the resolution of this case. Dkt. 200 at 2-3.

For all these reasons, *amici* believe that their experience with the development of and litigation over the regulatory definition of WOTUS—including their members' experience operating under prior regulatory regimes—should inform this Court's decision on the agencies' request to remand without vacatur—a decision that may dictate the regime under which their members must operate in the short-term, with lasting consequences for their businesses.

INTRODUCTION

Plaintiffs challenge the agencies' final action promulgating the 2020 Rule. The agencies have requested that this Court remand the 2020 Rule without vacatur so that they may engage in new rulemaking. Dkt. 250. This Court should grant that request.

Courts may exercise their broad, equitable discretion to grant an agency's request for voluntary remand without vacatur in order to reconsider a previous position in appropriate cases. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). To determine whether to grant remand without vacatur, courts consider (1) the seriousness of an order's purported deficiencies, and (2) "'the disruptive consequences of an interim change that may itself be changed.'" *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 267 (D.D.C. 2015) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 151 (D.C. Cir. 1993)). Both factors weigh heavily in favor of remand without vacatur here.

First, the 2020 Rule is a lawful interpretation of the CWA that comports with the statutory language and Supreme Court precedent. In denying plaintiffs' preliminary injunction motion, this Court has already concluded that plaintiffs are unlikely to succeed on the merits of their claims, many of which consist of "little more than policy arguments." Dkt. 171 at 11. And although the

agencies have requested remand to reconsider the 2020 Rule due to their concerns about whether the Rule satisfies their current policy choices, they do not argue that the 2020 Rule is legally invalid. In any case, as the agencies explain in their remand motion this Court need not—and should not—expend resources further addressing the merits.

Second, vacating the 2020 Rule pending the anticipated new administrative rulemaking would disrupt business operations, and with them the national economy. Vacatur would impose confusing standards on a regulatory regime that is of immense practical importance to a large number of essential industries. This is not just a question of hardship caused by swapping one regime for another. Because of the complex and shifting regulatory history of the definition of WOTUS, vacatur of the 2020 Rule would result in a hopelessly confusing chain of changing standards. Vacatur would presumably result in reinstatement of the so-called 2019 Repeal Rule, which repealed the 2015 Rule and governed immediately before the 2020 Rule took effect. But the 2019 Repeal Rule is also subject to widespread litigation, creating a risk that the next-in-line 2015 Rule—a regulation that was held unlawful by two federal courts but not vacated—could be reinstated next. *See* Parrish Decl. ¶ 72. But that 2015 Rule was preliminarily enjoined in more than half of the states, and in those states the prior 2008 guidance remained in effect. This regulatory patchwork would occur, moreover, under the specter of yet another, unpredictable transition: the industry will be forced to adjust *again* once the agencies issue a revised rulemaking. These repeated regime shifts would wreak havoc on the ability of businesses to plan operations.

Apart from the risk of regulatory shifts, vacatur of the 2020 Rule would substantially harm regulated parties and landowners, who would face increased uncertainty over whether their property includes WOTUS. Because vacatur would presumably lead to a broader application of WOTUS, more property will be subject to high permitting and compliance costs, property owners and operators will be subjected to an increased risk of regulatory violations, and landowners' ability to use their land will be reduced. In addition to those costs, vacatur would make it harder for industry members to determine whether their property contains WOTUS. Removing that regulatory certainty would increase the cost of making jurisdictional determinations and make the scope of a law with harsh criminal and civil penalties far less predictable. It would also force the regulated

community to return to standards that generated widespread confusion and hamstrung operations—a change that would come with the loss of productivity and jobs.

On the other hand, maintaining the status quo while the agencies reconsider the 2020 Rule would not harm plaintiffs, who in their complaint and in their preliminary injunction motion have raised solely speculative harms (harms which, in any event, the states have the power to address if they so choose). Plaintiffs' unsubstantiated speculation cannot override evidence of immense harm to the regulated community. As the District of South Carolina has already determined, it is prudent to grant the agencies' request for remand the 2020 Rule without vacatur.

FACTUAL AND LEGAL BACKGROUND

The history of the frequently changing federal regulation of WOTUS and the uncertainty caused by litigation over the breadth of that term provide important background and context to understand the harm to the regulated community if the 2020 Rule is vacated on remand.

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 WOTUS. 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 administrative 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.

Subsequently, in *Rapanos*, the Court rejected an expansive interpretation of WOTUS that included 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 WOTUS include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 732, 739. Justice Kennedy, concurring in the judgment, expressed support for a "significant nexus" test but categorically rejected the idea that

"drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a "significant nexus." *Id*. at 781.

Supreme Court Justices 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 did not take up the Justices' request, relying instead on a vague significant nexus standard implemented through guidance documents, causing significant confusion in the regulated community. *See* Parrish Decl. ¶ 18 (explaining that "[t]he scope of federal jurisdiction under the CWA had not been clear under the prior regime"); *id.* ¶¶ 47-54 (explaining harms under the pre-2015 regime).

B. THE UNLAWFUL 2015 RULE.

It was against this background that the agencies issued a wholesale reinterpretation of WOTUS in the 2015 Rule. Clean Water Rules: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). 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.

The agencies' new definition of WOTUS swept in features remote from navigable waters that had never before been subject to federal jurisdiction. Its sweeping reach to desiccated features

remote from navigable waters significantly increased confusion among regulated parties and regulators alike. *See, e.g.*, Parrish Decl. ¶¶ 18, 47-54.

For the regulated community, including *amici* and their members, 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 that 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. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051 n.1, 1055 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. 2018); *American Farm Bureau Fed'n v. EPA*, 3:15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87.

Ultimately, district courts in Texas and Georgia held that the 2015 Rule is unlawful. The Texas court 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 Georgia court addressed the substance of the Rule. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). It held that the Rule's assertion of jurisdiction over all "interstate waters" impermissibly reads the term "navigable" out of the statute; its definition of "tributary" extends federal jurisdiction beyond that allowed under the CWA; and its categorical assertion of jurisdiction over all waters

"adjacent" to tributaries was an impermissible construction. *Id.* at 1363-68. And it 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.

C. THE 2019 REPEAL RULE AND 2020 NAVIGABLE WATERS PROTECTION RULE.

In 2017, the agencies announced their intent to repeal and replace the 2015 Rule in a "two-step process." 82 Fed. Reg. 34,899, 34,899 (July 27, 2017). The first step—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*.

In repealing the 2015 Rule, the agencies observed 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." 83 Fed. Reg. 32,227, 32,238 (July 12, 2018). The Repeal Rule became effective on December 23, 2019. 84 Fed. Reg. 56,626 (Oct. 22, 2019).

When developing the 2020 Rule to replace the 2015 Rule, the agencies engaged in extensive stakeholder outreach 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"). To achieve the "objective of the Clean Water Act to restore and maintain the integrity of the nation's waters" (*id*. at 22,250), the agencies relied on science to "inform[] the[ir] 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 struck "a reasonable and appropriate balance between Federal and State waters" that was "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 all prior definitions of WOTUS. Parrish Decl. ¶ 57.

The Rule also contains 12 exclusions that are "not 'WOTUS.'" Ephemeral features like washes, rills, and gullies that flow only in direct response to precipitation, are categorically excluded from WOTUS. 85 Fed. Reg. 22,340. 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. ¶ 59. Other notable exclusions include ditches that are not tributaries or constructed in jurisdictional features; diffuse stormwater runoff and sheet flow; irrigated uplands; artificial ponds; and water filled depressions or pits incident to mining or construction. HEREHERE

D. THIS LITIGATION

Plaintiffs filed this action on May 1, 2020, seeking to vacate the 2020 Rule on the grounds that it is contrary to the CWA and arbitrary and capricious. Dkt. 1. On June 19, 2020, this Court

denied plaintiffs' motion for preliminary injunction, primarily because plaintiffs are not likely to succeed on the merits of their claims. Dkt. 171 at 9-14. The Court rejected plaintiffs' argument the 2020 Rule is not a reasonable interpretation of the CWA because: (1) plaintiffs' reliance on the *Rapanos* concurrence and dissent to fashion a holding from that case "is suspect"; (2) even if the *Rapanos* concurrence and dissent could be understood to hold that the *Rapanos* plurality's articulation of the maximum possible reach of CWA was improper, the agencies were not required to construe the statute more broadly than they did in the 2020 Rule; and (3) the *Rapanos* concurrence and dissent did not hold that the statutory terms were entirely unambiguous or that the agencies had no discretion in construing those terms even after a judicial interpretation of the statute. *Id*. at 11.

This Court also rejected plaintiffs' claim that the 2020 Rule is arbitrary and capricious, explaining that plaintiffs' argument is only "ultimately a policy disagreement" with the Rule. *Id.* at 12. The Court concluded that the agencies adequately explained the reasons for the new rule, reasonably balanced competing interests and objectives, and properly determined that the 2020 Rule need not extend federal regulation as far as the Constitution would permit. *Id*. at 12-13.

Turning to irreparable harm, the Court found that the agencies and intervenors had "raised substantial challenges to the adequacy of the showing of irreparable harm, particularly insofar as it rests of speculative assumptions." *Id.* at 14. Balancing the plaintiffs' inability to show a likelihood of success on the merits against the other facts, the Court denied the motion. *Id*. at 14-15.

ARGUMENT

I. THE COURT SHOULD GRANT REMAND WITHOUT VACATING THE 2020 RULE.

Courts have inherent equitable power to remand agency actions without vacatur. *See California Cmtys. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992-994 (9th Cir. 2012). The Court should exercise that power here. This Court has already held that plaintiffs' arguments against the 2020 Rule are unlikely to prevail, and the regulated community would suffer immense harm if the Rule were vacated.

A. THE AGENCIES ARE ENTITLED TO VOLUNTARY REMAND.

Voluntary remand is proper when an agency requests "a remand (without confessing error) in order to reconsider its previous position." *SKF USA Inc.*, 254 F.3d at 1029; *see also N. Coast Rivers All. v. United States Dep't of the Interior*, 2016 WL 8673038, at *2–3 (E.D. Cal. Dec. 16, 2016) ("Courts in this Circuit generally look to the Federal Circuit's decision in *SKF USA* for guidance when reviewing requests for voluntary remand"). "Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *California Comm. Against Toxins*, 688 F.3d at 992.

Voluntary remand is appropriate here. Consistent with an administrative agency's authority to reconsider its policies within the limits prescribed by law, the agencies state they have reviewed the 2020 Rule in light of the change in administration and decided to commence a new rulemaking to replace the Rule. Dkt. 250 at 6-7. The agencies do not confess legal error, though they acknowledge that they wish to engage in a new round of notice and comment rulemaking to address some of the issues raised in this litigation. *Id*. As the agencies explain, remand will conserve judicial resources by avoiding further litigation of a rule that may be replaced. Dkt. 140-1 at 15-16. Remand also will facilitate the administrative process because it will allow the agencies to devote their resources to rulemaking rather than litigation, as well as to avoid the appearance of pre-judging issues that will be reconsidered in a new notice and comment rulemaking. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386–87 (D.C. Cir. 2012) (expressing support for allowing the administrative review process to "run its course"). For these reasons, the request for remand should be granted.

B. REMAND WITHOUT VACATUR IS APPROPRIATE.

"[W]hen equity demands, [a] regulation can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). To determine whether a rule should be remanded to an agency without vacatur, courts generally consider "(1) 'the seriousness of the order's deficiencies'" and "(2) 'the disruptive consequences of an interim change that may itself be changed.'" *Shands Jacksonville Med. Ctr. v. Burwell*, 139

F. Supp. 3d 240, 267 (D.D.C. 2015) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 151 (D.C. Cir. 1993)). Those factors here show that vacatur is not appropriate.

First, the "seriousness of the order's deficiencies" does not support vacatur. *Shands*, 139 F. Supp. 3d at 267. The Court has already concluded that plaintiffs are unlikely to prevail on their challenges to the Rule because it is consistent with the CWA and is not an arbitrary and capricious administrative action. Dkt. 171 at 9-14. The agencies do not contradict this Court's holding, claim that the Rule suffers from any fatal defects, or state in their motion for voluntary remand that the Rule violates the CWA. Instead, this is a circumstance in which the agencies are considering a policy change under a new administration. Accordingly, the request for voluntary remand is not predicated on any argument or assumption that the Rule is invalid.

Courts often remand agency action without vacatur where, as here, the rule has not been held invalid on the merits. *E.g.*, *WildEarth Guardians v. Bernhardt*, 2020 WL 6255291, at *1 (D.D.C. Oct. 23, 2020) (remanding without vacatur where the court had not reviewed the challenged acts on the merits); *see also Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135-36 (D.D.C. 2010) (refusing to vacate agency decision when the court had not made "an independent determination that" the decision was unlawful). Vacatur at this stage, after the Court has determined on a preliminary injunction record that plaintiffs' challenges to the Rule are not likely to prevail, would be "particularly" inappropriate and disruptive and would needlessly "reshuffle[e]" the regulated community. *TransWest Express LLC v. Vilsack*, 2021 WL 1056513, at *5 (D. Colo. Mar. 19, 2021).

Second, in determining whether to grant the equitable remedy of remand without vacatur, courts balance the equities and consider prejudice to the parties. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1286 (11th Cir. 2015). Ultimately, "resolution of [remedy] turns on the Court's assessment of the overall equities." *Shands*, 139 F. Supp. 3d at 270. Under the unique circumstances created by the convoluted history of the agencies' attempts to define WOTUS, and the burden imposed on the regulated community by the shifting regulatory landscape, the balance of the equities strongly militates against vacatur. By contrast to the speculative, unsubstantiated harms asserted by plaintiffs—based on alleged gaps that states have

full authority to fill—the regulated community stands to be seriously damaged. Vacating the 2020 Rule—which this Court has held would likely survive plaintiffs' challenges—would create immediate harm and enormous uncertainty across the entire American economy, including for *amici*'s members.

1. VACATUR WOULD CAUSE SERIOUS DISRUPTION AND HARM.

In evaluating the disruptive effects of vacatur, courts consider consequences to businesses, including potential suspension of industry activity, lost jobs, and other costs as "essential facts" that are "clearly relevant." *Black Warrior*, 781 F.3d at 1291. Those factors favor remand without vacatur here. Vacatur would cast *amici*'s members back into the same sort of uncertainty that has plagued them for years under vague, overbroad, and frequently changing jurisdictional rules, suspending critical business projects and costing livelihoods. *See* Parrish Decl. ¶¶ 25-54.

Clarity regarding which waters are jurisdictional is critical to the vitality of the businesses that operate under these regulations. Landowners or operators who make a mistake face severe criminal and civil penalties. *See id.* ¶ 39. Under a broader definition of WOTUS, businesses would lose the clarity and consistency that the agencies finally provided with the clear jurisdictional standards of the 2020 Rule. *Id.* ¶¶ 57-58. They would again become subject to the significant nexus standard, which is vague and difficult to predict. *Id.* ¶ 65; *see also id.* ¶¶ 47-54 (discussing the inconsistently applied "significant nexus" standard applied through a guidance document adopted in the pre-2015 regime). For example, farmers would again be required to obtain federal permits for minor maintenance tasks, such as replacing obsolete farm infrastructure—a requirement that may discourage them from engaging in needed maintenance because the permitting process saddles them with costs and attorney fees greater than the value of the maintenance. *Id.* ¶ 71.

Further, absent the 2020 Rule's clear, bright-line rules, "farmers with drainage ditches and ephemeral drains located in and around farm fields would need to again exercise caution and avoid placing seed, fertilizer and pesticides into those potentially regulated features." *Id.* ¶ 66. The farmers would face a choice: either (1) leave their lands fallow for fear of incurring liability under vague regulations or (2) seek unnecessary permits at a cost of tens of thousands of dollars. The

greater regulatory burden may become cost-prohibitive for some farmers, leading to the loss of family farms that have been in families for generations. *Id.* ¶ 71. Mining and oil companies will also need to exercise caution over, if not delay or avoid, important new extraction projects if the project's legality is in doubt, particularly around ephemeral features. *Id.* ¶ 67. With greater uncertainty about federal jurisdiction, the cost of home building would also significantly spike. *Id.* ¶ 68. These concerns cut across all aspects of nearly every industry.

And while the agencies intend to replace the 2020 Rule, it is not yet clear *how.* Were the 2020 Rule vacated and then replaced, companies not only would need to adjust back to the former regime, but also would need to prepare for *another* unpredictable switch in the scope of jurisdiction. Vacatur would add to the roller-coaster of regulatory change *amici*'s members have endured, exacerbate uncertainty over whether features are jurisdictional, with the enormous legal and practical consequences that can entail, and thereby further constrain landowners' ability to use their property productively. *Id.* ¶¶ 25-54, 66. By maintaining the status quo under the 2020 Rule while the agencies make a considered decision about how to proceed, this Court will prevent economically and socially harmful uncertainty in the interim.

Vacatur also would be disruptive to the agencies. The District of South Carolina determined under nearly identical circumstances that remand without vacatur was appropriate. *See* Order, *South Carolina Coastal Conservation League v. Regan*, 2:20-cv-01687 (D.S.C. July 15, 2021). Denial of the agencies' motion in this case would thus create conflicting rulings. And other courts addressing challenges to the former, 2015 WOTUS Rule determined that remand to the agencies, rather than vacatur, was appropriate out of concern for disruption and interference with the administrative process. For example, the Southern District of Georgia held the 2015 WOTUS Rule substantively and procedurally unlawful but determined that, because "administrative efforts are already underway to repeal and replace the WOTUS Rule with a new [lawful] rule," "an order vacating the Rule may cause disruptive consequences to the ongoing administrative process." *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1382 (S.D. Ga. 2019); *see also Texas v. U.S. E.P.A.*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019) (remanding without vacatur given risk of disruption and in order to

"facilitate the Agencies' active attempts to improve on their work of protecting the environment and bringing predictability and clarity to the definition of the phrase WOTUS").

2. REMAND WITHOUT VACATUR WILL NOT PREJUDICE PLAINTIFFS.

Balanced against these significant harms, plaintiffs offer only speculation that they will be harmed by the 2020 Rule, as this Court found in denying their preliminary injunction motion. *See* Dkt. 171 at 14 ("[T]he agencies and the intervenor states[] have raised substantial challenges to the adequacy of the showing of irreparable harm, particularly insofar as it rests on a number of speculative assumptions"). The crux of plaintiffs' allegations of environmental harm—as set forth in their preliminary injunction papers—is their conjecture that irreversible environmental damage will result from the bright-line rules of federal jurisdiction under the 2020 Rule. *See* Dkt. 30 at 29-38. But plaintiffs admit that they have the ability to protect the waters within their own boundaries regardless of the breadth of federal jurisdiction. Though they claimed that it would be "impracticable for them to fill the regulatory gaps created by the Rule before its effective date or during the pendency of this action" (*id*. at 30), that was fully 14 months ago and is no longer an even plausible claim of harm. The plaintiff States have had ample time to exercise the responsibilities that the Clean Water Act recognizes they bear: "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b); *see SWANCC*, 531 U.S. at 174 (Congress in the CWA did not intend to "readjust the federal-state balance" by "significant[ly] imping[ing] [on] the States' traditional and primary power over land and water use"). While the plaintiff States may prefer not to expend resources to protect their waters, "nothing in the [2020 Rule] affects the[ir] ability" to "apply and enforce independent authorities over aquatic resources." *Resource and Programmatic Assessment for the Navigable Waters Protection Rule* 79 (Jan. 23, 2020).[3]

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

The environmental plaintiffs before the District of South Carolina relied on similar speculation that states will leave features that are not WOTUS unprotected and that rampant water pollution will occur, but the district court rejected their argument that such speculation justifies vacatur of the 2020 Rule. For instance, those plaintiffs argued that the 2020 Rule poses harm to waters because the agencies have made a greater percentage of "no federal jurisdiction" findings among the jurisdictional determinations (JDs) that they have issued under the 2020 Rule than under former rules.[4] Such assertions of harm suffer from the same flaw as those that plaintiffs raise before this Court—they are neither supported, nor probable. Both arguments conflate clearer standards for federal jurisdiction with a lack of water quality controls and instantaneous environmental impairment. Although they assume that third parties will immediately pollute features that are no longer federally covered, without restraint and in quantities that immediately impair downstream features, neither evidence nor logic supports that conjecture.

Plaintiffs' speculation also overlooks that federal protections do remain in place to prevent the destruction that plaintiffs fear. As the agencies explain, "[i]f a pollutant is conveyed through an ephemeral stream to a jurisdictional water, an NPDES permit may likely still be required." *Resource and Programmatic Assessment*, *supra*, at 92.

Throughout their complaint and preliminary injunction papers, plaintiffs refer to risks posed by pollution from upstream jurisdictions. But that concern requires three unsubstantiated leaps: (1) upstream jurisdictions will allow third parties to pollute ephemeral or remote features that are clearly outside WOTUS under the 2020 Rule, (2) pollution from ephemeral features and features remote from navigable waters will reach plaintiff States downstream, and (3) it will do so in quantities that impair water features in plaintiff States. Those assertions ignore the fact that federal jurisdiction continues to protect against discharges into WOTUS. And they ignore that other jurisdictions' representatives have an obligation to their own citizens to protect water resources. At

[4] There are a number of reasons why the agencies may have made a greater percentage of "no jurisdiction" findings under the 2020 Rule, including the possibility that, after years of regulatory uncertainty, more private landowners may have submitted relatively easy cases seeking "no jurisdiction" findings to afford themselves clarity. It is also possible that the agencies ruled on the clearest cases of no jurisdiction under the 2020 Rule first; there is, of course, no data regarding the outcomes of pending JDs that the agencies have not ruled on.

bottom, they simply rely on conjecture about future harms, and on the proposition that state lawmakers and regulators will not do their jobs. The disruption to the regulated community and the administrative process if the Rule were vacated far outweighs plaintiff States speculation that they might be harmed, and their desire to avoid the burden of protecting their own resources.

CONCLUSION

This Court should grant the agencies' motion to remand the 2020 Rule without vacatur.

Dated this 30th day of July, 2021.

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CERTIFICATE OF SERVICE

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

Dated at Los Angeles, California, this 30th day of July, 2021.

s/ C. Mitchell Hendy