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, in his official capacity as Administrator of the U.S. Environmental Protection Agency, et al.,

Defendants,

and

AMERICAN FARM BUREAU FEDERATION, et al.,

Intervenor-Defendants.

Case No. 2:20-cv-01687-DCN

REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Navigable Waters Protection Rule ("NWPR") (85 Fed. Reg. 22,250 (Apr. 21, 2020)) is a textbook example of agencies exercising their discretion and expertise to define a "notoriously unclear" statutory term: the scope of jurisdictional "waters of the United States" under the Clean Water Act ("CWA"). While Plaintiffs assert that the NWPR is unlawful (Dkt. No. 73 ("Plfs. Reply")), their allegations rest on a number of critically deficient arguments. Plaintiffs, for example, badly mischaracterize the Supreme Court's decision in *Rapanos*. *Rapanos* informs what the Agencies *cannot* regulate, not what they *must* regulate. Plaintiffs also misconstrue the full scope of statutory guidance provided by Congress in the CWA. And Plaintiffs all but ignore the Agencies' consideration of all relevant legal, scientific, and policy choices, which is fully documented in the administrative record. Plaintiffs' challenge to the waste treatment system exclusion is also meritless. Moreover, Plaintiffs failed to adequately demonstrate their standing to bring this facial challenge to the NWPR. The NWPR is lawful under the Administrative Procedure Act ("APA") and the CWA.

ARGUMENT

I. The NWPR Is Consistent With the Clean Water Act and *Rapanos*.

The NWPR's definition of "waters of the United States" is consistent with the CWA and *Rapanos v. United States*, 547 U.S. 715 (2006). Plaintiffs suggest that the *Rapanos* concurring and dissenting opinions can be stitched together to form a floor for CWA jurisdiction that the NWPR falls below. But Plaintiffs have it backwards. *Rapanos* considered the *ceiling* of CWA jurisdiction, and the NWPR falls beneath that threshold. Further, in developing the NWPR, nothing in the CWA precluded the Agencies from considering a wider range of policy concerns set forth in the administrative record.

A. *Rapanos* Does Not Prohibit the NWPR's Definition of "Waters of the United States."

Plaintiffs insist that *Rapanos* forecloses the Agencies' interpretation of "waters of the United States." Plfs. Reply at 40-42. But *Brand X* and *Chevron* instruct otherwise. As the Agencies explained in their opening motion, if "the statute is silent or ambiguous with respect to the specific issue," courts must defer to the agency's construction of the statute if it is "permissible." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). It is undisputed that the phrase "waters of the United States" is ambiguous. *See* Plfs. Reply at 40. Under *Chevron*, statutory ambiguity is construed as an implicit policy-making delegation by Congress to executive agencies to fill in the gaps. *Chevron* instructs that this delegation exists in the statute itself. From this, it follows that deference to an agency's interpretation must be accorded, even if a prior Supreme Court decision interpreted the ambiguous statute differently. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) ("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.") (emphasis added). As explained in their opening motion ("Defs. Mot./Opp." (Dkt. No. 69)) and below, the Agencies' interpretation of "waters of the United States" is reasonable and warrants *Chevron* deference.

Plaintiffs, however, claim that *Brand X* does not apply because *Rapanos* rejects the NWPR's interpretation of "waters of the United States." Plfs. Reply at 37-42. This argument fails for a number of reasons.

First, Plaintiffs' assertion that the concurring and dissenting opinions in *Rapanos* can be cobbled together to create binding precedent precluding the NWPR is incorrect. Plfs. Reply at

37-3. In denying a motion to preliminarily enjoin the NWPR, the *California* court rejected this argument. *See California v. Wheeler*, No. 20-cv-03005-RS, 2020 WL 3403072, at *6 (N.D. Cal. June 19, 2020). The *California* court further noted that even if the concurring and dissenting Justices together concluded that the "plurality's articulation of the maximum permissible reach of the statute is an improper construction, a holding that the Agencies must construe the statute more broadly is a bridge too far." *Id*. "[N]othing in either the *Rapanos* concurrence or the dissent—or in the two read together—can be characterized as a holding 'that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.' " *Id*. (quoting *Brand X*, 545 U.S. at 982).

Moreover, none of the cases Plaintiffs cite supports the claim that a concurrence and dissent can be combined to create new legal precedent.[1] In fact, case law expressly holds to the contrary. *E.g.*, *United States v. Drayton*, No. PWG-13-0251, 2014 WL 2919792, at *9 (D. Md. June 26, 2014), *aff'd*, 589 F. App'x 153 (4th Cir. 2015) (rejecting defendant's claim that a concurring Justice's agreement with four dissenting Justices on a narrow issue created a precedential conclusion of law); *see also, e.g.*, *Whole Woman's Health v. Paxton*, 972 F.3d 649,

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[1] None of the cases Plaintiffs cite actually holds that points of law embraced by any five Justices create binding law. Plfs. Reply at 38-40. Rather, in each of these cases, the Supreme Court merely observed—in dicta—that five or more concurring/dissenting Justices agreed on some point. Further, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*., 460 U.S. 1, 17 (1983), the Supreme Court merely acknowledged in dicta that because only four Justices believed that the existing *Colorado River* abstention test should be modified, there was no majority agreement to modify the *Colorado River* test. The five dissenting/concurring Justices did not make new law—rather, the plurality failed to wrangle the necessary fifth vote to change existing law. Likewise, in *Vasquez v. Hillery*, 474 U.S. 254, 261 n. 4 (1986), the Court noted in dicta that three plurality and two dissenting justices in a prior Supreme Court case sought to reaffirm the well-established principle that grand jury discrimination requires reversal of the conviction in all cases, meaning that the four Justices who sought a new harmless-error standard failed to secure a fifth majority vote to change the existing standard.

653 (5th Cir. 2020) ("[A]ny intimation that the views of dissenting Justices can be cobbled together with those of a concurring Justice to create a binding holding must be rejected. That is not the law in this or virtually any court following common-law principles of judgments.").

Nor is there merit to Plaintiffs' assertion that Justice Kennedy and the four *Rapanos* dissenters "rejected every material aspect of Justice Scalia's plurality opinion." Plfs. Reply at 35. In fact, Justice Stevens' *Rapanos* dissent *expressly* acknowledged that lower courts could base a finding of CWA jurisdiction on the plurality opinion. *Rapanos*, 547 U.S. at 810 n. 14 (Stevens, J., dissent) ("In sum, in these and future cases the United States may elect to prove jurisdiction under either [the plurality or Justice Kennedy's 'significant nexus'] test.").[2] This is hardly the "unambiguous" rejection of "every material aspect" of the *Rapanos* plurality that Plaintiffs claim. Had the dissenting Justices found the *Rapanos* plurality's jurisdictional test impermissible under the CWA, they would not have endorsed it as an acceptable test for CWA jurisdiction.

More fundamentally, as the Agencies explained in their opening motion, the NWPR is not a wholesale codification of the *Rapanos* plurality test. The NWPR expressly draws from prior Supreme Court case law, the *Rapanos* plurality, Justice Kennedy's concurrence, and from the commonalities between the two. *See, e.g.*, 85 Fed. Reg. at 22,268. The NWPR also addresses many of the concerns the Justice Kennedy concurrence and *Rapanos* dissent had with the

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[2] Plaintiffs also incorrectly suggest that the four *Rapanos* dissenters' acquiescence in allowing Justice Kennedy's "significant nexus" test to be used by lower courts requires that the NWPR "be vacated" for "discard[ing]" the "significant nexus" test. Plfs. Reply at 47-48. But this argument overlooks that the dissent also endorsed the plurality's jurisdictional test; indeed, a number of circuit courts have held that *Rapanos* counsels that the plurality's jurisdictional test can be used to establish CWA jurisdiction. *E.g.*, *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); *Northern California River Watch v. Wilcox*, 633 F.3d 766, 780-81 (9th Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011). *See also* Defs. Mot./Opp. at 17.

plurality opinion. For example, the NWPR addresses the *Rapanos* dissent's primary criticism of the plurality opinion—that it "define[d] 'adjacent to' as meaning 'with a continuous surface connection to' other water," though "a dictionary" requires only that waters "lie close to each other, but not necessarily in actual contact." *Rapanos*, 547 U.S. at 805. Indeed, the NWPR extends CWA jurisdiction to certain wetlands that have a close hydrologic connection to—but do not necessarily abut—other jurisdictional waters, including wetlands separated from jurisdictional waters only by natural dunes or berms. 85 Fed. Reg. at 22,307.

Second, Plaintiffs continue to mischaracterize *Rapanos* by insisting the *Rapanos* opinions dictate what waters the Agencies *must* regulate. Plfs. Reply at 42. As the Agencies explained in their opening motion, Defs. Mot./Opp. at 9-10, nothing in the *Rapanos* opinions sets forth what must be regulated under the CWA. *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (noting the "generous leeway [afforded] by the courts" for the Agencies to "develop[] *some* notion of an outer bound to the reach of their authority"). Rather, *Rapanos* speaks to what waters the Agencies *cannot* regulate. The *Rapanos* petitioners made an as-applied challenge to the Corps' interpretation of its then-existing regulations. *Rapanos* was not a facial rule challenge like Plaintiffs' challenge here. Furthermore, the fact that each of the separate opinions in *Rapanos* encouraged the Agencies to define "waters of the United States" through new regulations underscores both the ambiguity of the statutory language and the Court's understanding of the limits of its own guidance.[3]

[3] *See* 547 U.S. at 758 (Roberts, C.J., concurring) (remarking "how readily the situation could have been avoided" had the Agencies exercised their "delegated rulemaking authority" under the CWA); *id*. at 782 (Kennedy, J., concurring) (prescribing a jurisdictional test to be applied to certain wetlands "[a]bsent more specific regulations" promulgated by the Agencies); *id.* at 778 (criticizing the plurality for granting "insufficient deference to . . . the authority of the Executive to implement th[e] statutory mandate").

Third, Plaintiffs wrongly claim that *Rapanos* unambiguously forecloses the NWPR, and that *Brand X* therefore does not apply. Plfs. Reply at 40. Even if Plaintiffs correctly construed the substance of the separate *Rapanos* opinions (which they do not), *Brand X* still requires that the Agencies be given deference in promulgating the NWPR.

Indeed, *Brand X* provides that an agency's interpretation of ambiguous statutory language will trump a court's interpretation, even if the court's interpretation is contrary to the agency's interpretation. *See Brand X*, 545 U.S. at 982; *accord Fernandez v. Keisler*, 502 F.3d 337, 348 (4th Cir. 2007) (granting *Chevron* deference to an agency's interpretation of an ambiguous statutory provision, even though the Fourth Circuit had previously held that a contradictory reading of the provision was correct); *Patel v. Napolitano*, 706 F.3d 370, 375-76 (4th Cir. 2013) (holding same). In other words, agency discretion to interpret ambiguous statutory language cannot be usurped by court's prior contrary interpretation. Accordingly, because "waters of the United States" is indisputably an ambiguous statutory phrase and because the NWPR is a reasonable interpretation of that phrase, the NWPR is entitled to *Chevron* deference.

Undeterred, Plaintiffs cite inapposite cases purportedly holding that an agency may not promulgate interpretations of ambiguous statutory phrases that have been contradicted in a prior court ruling.[4] Plfs. Reply at 40. The cases Plaintiffs cite actually *support* the Agencies' position. For example, in *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1153 (10th Cir. 2011), the Tenth Circuit held that an agency's interpretation of an immigration statute was reasonable and entitled to *Chevron* deference, despite the fact that the same court's earlier decision in *Padilla–Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2006), had interpreted the statute in a contrary manner.

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[4] *Mejia v. Sessions*, 866 F.3d 573, 583 (4th Cir. 2017), is inapt because it does not involve a *Brand X* claim where an agency's interpretation of an ambiguous statute was challenged for being in tension with prior case law.

In *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1112-13 (9th Cir. 2009), the agency advanced the same interpretation of an ambiguous statutory provision that had been previously rejected as "unreasonable" by the Ninth Circuit in *Cuevas–Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005). *See Mercado*, 580 F.3d at 1107. Thus, the *Mercado* court determined that the agency's interpretation was not a "new" one and refused to apply *Brand X*. *Id.* at 1109, 1114. In the NWPR, by contrast, the Agencies *are not* advancing the same statutory interpretation of "waters of the United States" that was rejected in *Rapanos* (*Rapanos* involved an as-applied challenge to an assertion of CWA jurisdiction over particular wetlands in Michigan where the Corps applied the older 1980s Regulations), 547 U.S. at 729. The NWPR is a national rule setting forth a new and entirely reasonable definition of "waters of the United States" that has never been invalidated by any court. Accordingly, *Rapanos* does not "unambiguously" foreclose the NWPR's definition of "waters of the United States."

B. In Defining "Waters of the United States," It Was Reasonable for the Agencies to Consider a Wide Range of Policy Concerns.

Because "waters of the United States" is an ambiguous statutory phrase, the only question the Court must answer is whether the NWPR reflects a permissible construction of the CWA. *Chevron*, 467 U.S. at 843. This need not be "the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). As explained in the Agencies' opening brief, Defs. Mot./Opp. at 8-16, the NWPR is a reasonable interpretation of "waters of the United States" because it is consistent with the text, structure, objective, and policies of the Act.

Just as they did in their opening motion, Plaintiffs insist that the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), must guide the Agencies' discretion in setting the CWA's jurisdictional limits

to the exclusion of any other consideration. While Plaintiffs again point to legislative history and Supreme Court case law in support of this claim, Plfs. Reply at 43-44, none of it suggests that the definition of "waters of the United States" must be established according to the CWA's statutory objective at the expense of all other considerations. In fact, as noted in the Agencies' opening brief, the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, specifically *dismissed* the significance of the very legislative history that Plaintiffs claim supports an expansive assertion of CWA jurisdiction, 531 U.S. 159, 168 n. 3 (2001) (observing that the legislative history merely "signifies that Congress intended to exert [nothing] more than its commerce power over navigation.").

All legislation, moreover, is a balance of competing purposes. To rely on "disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement [statutory] texts." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986) (Easterbrook, J.). Consistent with this principle, courts interpreting the CWA and other environmental statutes have routinely resisted holding that a statute's objectives somehow create binding statutory requirements that limit agency discretion. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 501 (2d Cir. 2017) (holding that EPA's Water Transfer Rule is "an interpretation supported by valid considerations" and noting that "[t]he Act does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulations"); *California*, 2020 WL 3403072, at *6 (concluding that plaintiffs' "arguments that the narrowness of the [NWPR] serves poorly to carry out the objectives of the CWA . . . do not provide a sufficient basis for a court to substitute its judgment for the policy choices of the Agency"). Certainly, while it is within the Agencies' discretion to consider—as they have done—the CWA's objective and impacts to

water quality, nothing precludes the Agencies from giving weight to other policy considerations, so long as the Agencies keep within the outer bounds of their statutory authority.[5]

In any event, the Agencies *did* evaluate the balance between scientific, water quality, and other policy considerations in conjunction with their statutory analysis. *See* Defs. Mot./Opp. at 17-27 (citing Dkt. No. 69-4 at § 11.3.3.2 ("Reduction in Jurisdictional Waters"), § 11.3.2.3 ("Concerns with States' Abilities to 'Fill the Gap' "), § 11.3.2.5 ("Interstate Impacts from the Proposed Rule"), § 11.4 ("CWA Programmatic Analysis"), § 11.6 ("Aquatic Resource Benefits and Ecosystem Services"); Dkt. No. 69-1 at 67, 114-15, 137; Dkt. No. 69-2 at 42). And scientific principles informed the Agencies' treatment of various definitions within the NWPR, including "ephemeral," "intermittent," "perennial," "adjacent wetlands," and "typical year." *See* Defs. Mot./Opp. at 21-24.

One policy advanced by the NWPR is articulated in CWA Section 101(b). The section states "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). While Plaintiffs dismiss Section 101(b) by characterizing it as merely a way to "delegate[] specific functions" to state regulatory programs, Plfs. Reply at 45, this characterization is not supported by the plain language of Section 101(b). And Plaintiffs have offered no compelling reason to infer this from the statute. *See generally* 33 U.S.C. § 1251(b).[6] As the *Rapanos* plurality notes, it

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[5] Plaintiffs also say that legislative history supports their claim that "waters of the United States" (33 U.S.C. § 1362(7)) is synonymous with "Nation's waters" (33 U.S.C. § 1251(b)). Plfs. Reply at 46-47. But again, this ignores the principle of statutory interpretation that whenever "two terms [in the same statute] are quite similar, we must assume that Congress made a deliberate choice to use different language." *Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001).

[6] Additionally, as the Agencies recognize in the NWPR, "the overarching policy statement of 101(b) 'to recognize, preserve, and protect the primary responsibilities and rights of States to

is well within the Agencies' discretion to account for this policy consideration.[7] *Rapanos*, 547 U.S. at 755-56 (Scalia, J., plurality) ("[C]lean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions."). Nothing in the CWA unambiguously precludes the Agencies' interpretation of the CWA set forth in the NWPR. The NWPR is a reasonable interpretation of "waters of the United States."

II. Plaintiffs' Record-Based Challenges to the NWPR Are Also Meritless.

Not only is the NWPR a permissible interpretation of "waters of the United States," it is a reasonably explained decision supported by a robust administrative record, and is neither arbitrary nor capricious under the APA.

A. The Agencies Appropriately Explained Their Change in Position.

In charging that the NWPR violates the APA, Plaintiffs chiefly complain that the NWPR represents a change in policy that was not, in their view, "justified." Dkt. No. 58-1 ("Plfs. Mot.") at 17-21; Plfs. Reply at 9-19. But Plaintiffs' argument demands that the Agencies provide a justification for the NWPR that is far more exacting than required under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). Agencies are free to change their existing policies, and to do so, an agency must merely "display awareness that it *is* changing position," *id.* at 515, and

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prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources,' was included in the Act in 1972; the additional 101(b) policy statement 'that the States . . . implement the permit programs under sections 402 and 404 of this Act' was not added until the 1977 amendments." 85 Fed. Reg. at 22,270. This indicates that Plaintiffs' interpretation of Section 101(b) is wholly incomplete, at best.

[7] While Plaintiffs counter that a state like Nevada would subsequently bear a disproportionate burden in regulating ephemeral streams and therefore the NWPR is unreasonable, the Nevada Department of Conservation and Natural Resources submitted public comments favoring the NWPR and expressing appreciation for the NWPR's "commitment to cooperative federalism." *See* Public Comment submitted by Bradley Crowell, Director, The Nevada Department of Conservation and Natural Resources, et al.(April 19, 2019) at 1 (attached hereto as Exhibit 2). This underscores the impact of considering policies such as "cooperative federalism" under CWA Section 101(b).

provide "a satisfactory explanation for its action," *id.* at 513 (internal quotation marks omitted). It "suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id* at 515.

Here, Plaintiffs have not shown, and cannot show, that the Agencies' explanation fails this standard. The Agencies have acknowledged that the NWPR represents a change in agency position. *See, e.g.*, Dkt. No. 69-1 at 78. The Agencies have also provided ample explanation as to why they "believe" the NWPR is "better than" the prior regulations. As the Agencies explained, the NWPR rectifies the legal deficiencies associated with the 2015 Rule and better captures the legal principles set forth in the CWA and Supreme Court cases that define the scope of "waters of the United States." *See* Defs. Mot./Opp. at 17-18 (citing *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1367 (S.D. Ga. 2019) (holding that the 2015 Rule was arbitrary and capricious in that it improperly relied on a one-size-fits-all distance limitation)); *see also* 85 Fed. Reg. at 22,271-72 (explaining that the NWPR is more consistent with the Agencies' constitutional and statutory authority than the prior regulatory regimes). Changing a rule to redress legal deficiencies is a "good reason" for changing an agency position. *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 133-34 (D.D.C.), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019) (holding ATF satisfied its obligation to reasonably explain why it changed positions in defining bump stocks as "machineguns" when ATF explained the decision was based on renewed legal analysis).

The Agencies also explained that the NWPR would help preserve the power of states to regulate water resources within their borders, effectuating the statutory goals set forth in CWA Section 101(b). 85 Fed. Reg. at 22,252, 22,260; *see also* Defs. Mot./Opp. at 12-14. In reply, Plaintiffs do not contest the relevance of CWA Section 101(b). Instead they argue that the

Agencies did not adequately explain how they took this provision into account. Plfs. Reply at 29-31.[8] This is refuted by the administrative record. The Agencies *extensively* explained how Section 101(b) informed their decisionmaking and how they balanced the Act's goal of preserving state and tribal authority over their respective water resources with other policy considerations. *See, e.g.*, Dkt. No. 69-1 at 6, 18-21, 24-27, 35-36, 42, 76, 117, 121, 128; *see also* 85 Fed. Reg. at 22,261-62, 22,273, 22,277, 22,287, 22,302, 22,308, 22,313.

The Agencies also explained that the NWPR would replace the convoluted "significant nexus" test with a simpler categorical test for CWA jurisdiction. Promulgating a new rule to provide greater clarity and certainty is indeed a good reason for an agency to change positions. *See, e.g.*, *New York v. EPA*, 413 F.3d 3, 27 (D.C. Cir. 2005).

Plaintiffs argue that the NWPR's categorical test for CWA jurisdiction is more convoluted than the prior case-by-case "significant nexus" test from *Rapanos*, does not account for every hypothetical circumstance, and is therefore arbitrary and capricious. Plfs. Reply at 25-28. This argument is meritless. Because Plaintiffs are making a facial challenge to the NWPR, to establish that the NWPR and its jurisdictional test are arbitrary and capricious, they are required to establish that "no set of circumstances exists under which the [NWPR] would be valid." *Reno v. Flores*, 507 U.S. 292, 301 (1993). That is, even if Plaintiffs "can point to a hypothetical case in

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[8] Plaintiffs also cite the recent CWA Section 401 Certification Rule (85 Fed. Reg. 42,210 (July 13, 2020)) in support of their belief that that the Agencies' concern for state sovereignty is "illusory." Plfs. Reply at 31. This argument ignores the goal of the CWA Section 401 Certification Rule to merely create a uniform procedure and timeline for states and tribes to act on Section 401 certification requests. *See* 85 Fed. Reg. at 42,211. That rule applies only to 401 certification requests for discharges in "federally regulated waters;" it does not disturb a state's ability to regulate waters that are not under federal jurisdiction. *Id.* The idea that the 401 Certification Rule somehow contradicts the NWPR's goal of promoting the states' role in water quality regulation is without merit.

which the rule might lead to an arbitrary result[, that] does not render the rule 'arbitrary or capricious.' [This is because their] case is a challenge to the validity of the entire rule in all its applications." *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 619 (1991). Plaintiffs have failed to make this showing. Plaintiffs first complain that the "typical year" analysis—which is used to inform whether certain water bodies are jurisdictional under the CWA, *see* 85 Fed. Reg. at 22,274—has some degree of flexibility and is therefore arbitrary. Plfs. Reply at 26. In a similar vein, Plaintiffs also suggest that the tests for whether a stream is "ephemeral," "intermittent," or "perennial," have complexities because they may need to be developed to account for regional factors. *Id.* at 26-27. But this flexibility is particularly needed given the diverse range of ecosystems throughout the United States. This flexibility also directly flows from the Agencies' consideration of science in developing the NWPR. *See* 85 Fed. Reg. at 22,288. The flexibility afforded by the NWPR is far better cabined and explained than is the vague and indeterminate "significant nexus" test. *See id.* at 22,274 (noting that the Agencies modified the definition of "typical year" from the proposal to "expressly include other climatic variables in addition to precipitation" and to signal that "the normal periodic range . . . need not be based on a calendar year"); *id*. at 22,294-95 (recognizing "the need to consider seasonality and timing of tributary flows" and describing how to evaluate intermittent tributaries that only flow during seasonally wet conditions).

But more significantly, Plaintiffs have failed to demonstrate how the NWPR's categorical test would be arbitrary and capricious in *all* cases. *See Sherley v. Sebelius*, 644 F.3d 388, 397 (D.C. Cir. 2011) ("[I]t is not enough for the plaintiffs to show the [NWPR] could be applied unlawfully") (internal citations omitted). Instead, Plaintiffs mostly quibble with the fact that the NWPR's jurisdictional test contains flexibility to account for atypical circumstances. Plfs. Reply

at 26-27. The Agencies explained how the NWPR creates brighter lines and will be easier to administer than prior regimes—that is all that is required from the Agencies. *See Flores*, 507 U.S. at 309 (holding a regulation is not arbitrary or capricious if it has a "reasonable foundation" in rationally pursuing a lawful purpose); *see also* Defs. Mot./Opp. at 27-28; Declaration of Don Parrish ¶¶ 49-54 (Dkt. No. 68-3) (noting that the NWPR provides clear bright line definitions for the regulated community).

Ultimately, Plaintiffs fail to recognize that the Agencies, in promulgating the NWPR, may account for other policy considerations beyond those arising from scientific analysis. Plaintiffs say that the Agencies "for decades" necessarily relied on only scientific principles to define the CWA's jurisdictional scope. *See* Plfs. Reply at 10, 14, 33.[9] But the Agencies have long stated that scientific analysis alone cannot dictate the CWA's line between federal and state waters. In the 2015 Rule's preamble, the Agencies clearly noted that defining CWA jurisdiction requires legal interpretation and policy judgment, in addition to scientific considerations. *See* 80 Fed. Reg. 37,054, 37,057 (June 29, 2015) (the "agencies' interpretive task in [the 2015 Rule]—determining which waters have a 'significant nexus'—requires scientific and policy judgment, as well as legal interpretation."). In defining the CWA's jurisdiction, the Agencies have always taken into account policy and legal considerations, in addition to scientific analysis. The NWPR is no different. The notion that the Agencies cannot consider other policy choices in addition to

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[9] Plaintiffs also say that they are not arguing that "only science" can be considered in defining the jurisdictional scope of the CWA. Plfs. Reply at 14. Yet, Plaintiffs continue to suggest that the Agencies, in promulgating the NWPR, were required to consider only the same circumstances that underlay the Agencies' previous policies and practices. Plfs. Reply at 10, 32-33. But as explained above, the Agencies provided a reasoned explanation, identifying valid reasons as to why the NWPR departed from prior regulations—this is all that is required from the Agencies. *Fox Television*, 556 U.S. at 516. And in any event, as explained above in Section I.B. (p. 9), the Agencies *did* consider water quality impacts.

the scientific considerations underlying the 2015 Rule has no merit. *See California*, 2020 WL 3403072 at *7-8 ("That the Agencies now choose a different approach, and a different balance between federal and state responsibilities does not mean they have disregarded the primary objective of the statute in an arbitrary or capricious manner that is likely to warrant setting aside the Rule.").

B. The Agencies Reasonably Explained Their Treatment of Ephemeral Streams and Wetlands Under the NWPR.

Plaintiffs next assert that the Agencies have not offered any "good reasons" for excluding ephemeral streams and certain wetlands from CWA jurisdiction. Plfs. Reply at 14-19. They argue that ephemeral, intermittent, and perennial streams should all be treated the same under the NWPR because they may share some functional similarities. *Id*. Plaintiffs make similar arguments with respect to the categories of wetlands that are, and are not, regulated under the NWPR. *Id.* These arguments ignore the other legal and policy reasons that warrant separate treatment, discount functional *dis*similarities that justify exclusion from CWA jurisdiction, and overlook agency discretion in balancing policy considerations to draw jurisdictional lines.

First, from a legal and policy perspective, the Agencies have offered a number of reasonable rationales for the exclusions in the NWPR. With respect to the exclusion of ephemeral streams, the Agencies explained that because the CWA jurisdiction "must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law," excluding ephemeral features is "the most faithful way of interpreting the Federal government's CWA authority over a water," 85 Fed. Reg. at 22,271. This is because ephemeral features "only flow during or in immediate response to rainfall," *id*. at 22,274, and are not "relatively permanent bodies of water," *id.* at 22,271; *see also Guedes*, 356 F. Supp. 3d at 133-34 (holding that an agency change in regulatory definition because the new definition better

comports with legal limitations is a good reason for the policy change). The Agencies also explained that the categorical exclusion for ephemeral streams has the "benefit of being less complicated than prior regulatory regimes that required a case-specific significant nexus analysis," providing for clearer jurisdictional line drawing, and restores a more balanced oversight of waters between federal and state/tribal authorities. 85 Fed. Reg. at 22,287-88.

The Agencies also offered good reasons for the exclusion of certain non-abutting wetlands. The NWPR provides objective, categorical tests for adjacency that are less confusing and indeterminate than the previous regulatory regime. *Id*. at 22,307-08; *see also* Defs. Mot./Opp. at 22-24. This is an entirely reasonable explanation for the NWPR's treatment of ephemeral streams and wetlands. *See Gonzales-Veliz v. Barr*, 938 F.3d 219, 235 (5th Cir. 2019) (holding that minimizing confusion is a "good reason" for a change in agency policy).

Second, from a technical perspective, the Agencies also reasonably explained how ephemeral streams are dissimilar from perennial and intermittent streams. 85 Fed. Reg. at 22,288 (citing the "connectivity gradient" and noting that of perennial, intermittent, and ephemeral streams, ephemeral streams were least likely to impact downstream water quality). With respect to wetlands, contrary to Plaintiffs' claim, Plfs. Reply at 17, the Agencies do explain why they excluded from CWA jurisdiction certain wetlands separated only by artificial barriers while including wetlands separated by natural barriers. 85 Fed. Reg. at 22,271 (noting that the Agencies looked to scientific principles in establishing that wetlands separated from jurisdictional waters by only a natural berm, bank, dune, or similar natural feature are "inseparably bound up with" and adjacent to those waters); *see also id.* at 22,312-14. Likewise, the Agencies explained the difference between wetlands that are inundated by flooding from jurisdictional waters as compared with those that flood (*i.e.*, fill-and-spill) into jurisdictional

waters. Wetlands inundated by flooding *from* a jurisdictional water in a typical year "are inseparably bound up with their adjacent jurisdictional waters and are therefore jurisdictional." 85 Fed. Reg. at 22,280 (citing *Rapanos* plurality). The Agencies further explained that fill-and-spill from a wetland *to* a jurisdictional water is more akin to diffuse stormwater run-off or directional sheet flow over upland and therefore does not render the wetland jurisdictional. *Id.*

Third, from a judicial review perspective, Plaintiffs inappropriately minimize the discretion the Agencies are given in drawing jurisdictional lines; at the same time, Plaintiffs all but ignore the actual reasons the Agencies offered (summarized above) as to why they excluded ephemeral streams and certain non-abutting wetlands from CWA jurisdiction. *See* Plfs. Reply at 19. Indeed, when "it comes to particular line-drawing decisions made in the course of setting policy," an agency "is not required to identify the optimal threshold with pinpoint precision. It is only required to identify the standard and explain its relationship to the underlying regulatory concerns." *Blaustein & Reich, Inc. v. Buckles*, 220 F. Supp. 2d 535, 547 (E.D. Va. 2002), *aff'd*, 365 F.3d 281 (4th Cir. 2004) (internal quotation marks omitted). Here, the Agencies did just that. They explained that among a number of factors informing the NWPR's jurisdictional lines, the Agencies relied on the "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," 85 Fed. Reg. at 22,270, and the need to promote "clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public." *Id.* at 22,252. Plaintiffs have not cited, and cannot cite, any specific provision in the CWA that precludes the Agencies from accounting for those policy considerations. *See California*, 2020 WL 3403072 at *7-8 (concluding NWPR's jurisdictional line drawing not arbitrary or capricious and not precluded by the CWA). Thus,

Plaintiffs' claim that the Agencies unreasonably excluded ephemeral streams and certain non-abutting wetlands from the NWPR is wrong.

C. The Agencies Reasonably Considered Reliance Interests.

Plaintiffs again assert that the Agencies failed to adequately address reliance interests and comments on those reliance interests. Plfs. Reply at 28-29. But as the *California* court noted, "given the long uncertainty about the permissible scope of federal regulation under the CWA, it is difficult to see how significant cognizable reliance interests would have arisen." *California*, 2020 WL 3403072, at *8; *see also Mozilla Corp. v. FCC*, 940 F.3d 1, 64 (D.C. Cir. 2019) (holding that a plaintiff's purported reliance interest was not reasonable when the prior regulation was in effect for only a few years and had been subject to persistent legal challenges). But even if Plaintiffs' purported reliance interests were reasonable (which they are not), the Agencies adequately addressed Plaintiffs' public comments regarding the issue. "[T]he extent to which the [agency] is obliged to address reliance [is] affected by the thoroughness of public comments it receives on the issue." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2129 n. 2 (2016). Here, the Agencies received only one comment citing *Fox Television* stating that the Agencies should address any states' reliance interests. Dkt. No. 69-1 at 27. The Agencies responded by noting that they disagreed with the comment, explained why the commenter did not have legitimate reliance interests in either the 2015 Rule or the pre-existing regulations, and referred to the Agencies' many legal and policy reasons for implementing the NWPR. *Id.* at 29. This response satisfies the APA's requirements.

III. Plaintiffs' Challenge to the NWPR's Waste Treatment System Exclusion Should be Denied.

A. Plaintiffs Waived Their Challenge to the Waste Treatment System Exclusion.

The gravamen of Plaintiffs' challenge to the waste treatment system exclusion is that the articulation of the exclusion in the NWPR purportedly reflects a new or expanded policy, especially as it applies to cooling ponds. Plaintiffs say this is inconsistent with the CWA. *See* Plfs. Mot. at 12-17 (Dkt. No. 58-1); Plfs. Reply at 2-6. But Plaintiffs waived these arguments by not raising them to the Agencies in rulemaking comments despite clear notice of this issue in the Agencies' proposal.[10] In their Reply, Plaintiffs do not contest their own failure to comment. Rather, they suggest that snippets of comments submitted by other parties adequately preserve their issues. Plfs. Reply at 6-8. This excuse is inaccurate and should be rejected.

Plaintiffs rely primarily on a four-sentence excerpt from a 12-page set of comments submitted by the Texas Commission on Environmental Quality ("TCEQ"). *See* Plfs. Reply at 6 (quoting excerpt in full). But the excerpt simply says that TCEQ believes that the inclusion of "cooling ponds" in the new definition of "waste treatment system" could "cause confusion." Nothing in this comment actually articulates Plaintiffs' claim: (1) that the new definition allegedly reflects an unwarranted expansion of the waste treatment system exclusion, particularly with respect to cooling ponds; or (2) that such alleged expansion is inconsistent with the CWA.

Nor can Plaintiffs' claims be saved by the fact that certain industry parties submitted comments *supporting* continued application of the waste treatment system exclusion to cooling

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[10] *See* Defs. Mot./Opp. at 32, 35; *see also 1,000 Friends of Maryland v. Browner*, 265 F.3d 216, 227 (4th Cir. 2001) ("As a general matter, it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved.") (internal quotation marks omitted).

ponds, and suggesting certain revisions to promote additional clarity. Plfs. Reply at 6-7 & n. 6. Industry comments advocating for the Agencies to continue and potentially clarify the proposed exclusion cannot be construed as putting the Agencies on notice of Plaintiffs' arguments as to why they believe the statute requires the exclusion to be narrowed or eliminated. The rulemaking process is not a guessing game. *See Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review more than the information before the Secretary at the time she made her decision risks our requiring administrators to be prescient . . . ."). If Plaintiffs had objections, they should have raised them clearly and candidly in their rulemaking comments. Plaintiffs' failure to do so constitutes waiver.

B. The NWPR's Waste Treatment System Exclusion, And Its Potential Application to Cooling Ponds, Reflects Long-Standing Policy.

The Agencies previously demonstrated that certain cooling ponds have been eligible for the waste treatment system exclusion in some fashion since 1980, and that after 1982, revisions to cross-referenced regulations potentially made the exclusion applicable to all cooling ponds on a case-by-case basis. *See* Defs. Mot./Opp. at 32-34. But Plaintiffs continue to incorrectly argue that the articulation of the exclusion in the NWPR, especially as it applies to cooling ponds, represents a "dramatic and unprecedented change." Plfs. Reply at 2-3. This is not accurate. Cooling ponds have long been eligible for the waste treatment system exclusion.[11]

First, relying on a section of the May 1980 rule preamble stating that "treatment systems created in [jurisdictional] waters or from their impoundment remain waters of the United States,"

[11] *See, e.g.*, Order, *In re Arizona Public Service Co.*, No. 19-06 (EPA Envtl. App. Bd., Sept. 30, 2020) (upholding application of the waste treatment system exclusion under the 2015 Rule to discharges to Morgan Lake from the Four Corners Power Plant in Arizona) (available at https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/05819647854bacb0852578db004a8fe9/0f211189dd0d353f852585f30069d17f!OpenDocument&Highlight=2,19-06).

45 Fed. Reg. 33,290, 33,298 (May 19, 1980), Plaintiffs argue that the waste treatment system exclusion was never meant to apply to waste treatment systems created in "jurisdictional rivers or streams." Plfs. Reply at 4-5. But in making this argument, Plaintiffs overlook that that excerpt from the May 1980 preamble references regulatory text that was suspended two months later, expressly to *avoid* the implication that Plaintiffs suggest. The May 1980 regulatory text would have limited the exclusion to "manmade bodies of water" that were not created in, or are impoundments of, waters of the United States. *See* 45 Fed. Reg. at 33,424. In July 1980, EPA suspended this portion of the regulation due to concerns that the regulation might be construed to require "permits for discharges into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years." 45 Fed. Reg. 48,620 (July 21, 1980).

Second, Plaintiffs mischaracterize EPA's longstanding policy on the potential application of the waste treatment system exclusion to cooling ponds. As the Agencies explained in their opening brief, the waste treatment system exclusion potentially applied to *any* cooling pond after a cross-referenced regulation was amended in 1982. Defs. Mot./Opp. at 33-34. The Agencies further explained that a 1993 guidance document issued by then-EPA Assistant Administrator for Water Robert Perciasepe—one of EPA's then-highest headquarters officials—confirmed this interpretation, and instructed EPA regional offices that they had discretion to determine which particular cooling ponds should be subject to the exclusion on a case-by-case basis. *Id*. at 33. *See* Memorandum, R. Perciasepe to W. Cunningham, "Waters of the United States" Determination for Proposed Cooling Pond Site in Polk County, Florida (Dec. 13, 1993), at 4-5, available at https://www3.epa.gov/npdes/pubs/owm0099.pdf ("Perciasepe Guidance").

Plaintiffs attempt to cabin this guidance in two incorrect and misleading ways. First, Plaintiffs characterize it as merely "regional" guidance, Plfs. Reply at 4, when in fact, it was

guidance issued by a senior EPA headquarters official *to* EPA regions. Second, and more importantly, Plaintiffs incorrectly suggest that the guidance only had relevance to the particular waters that prompted the inquiry, when the memorandum facially was intended to provide general legal and policy guidance for EPA regions to apply to particular waters on a case-by-case basis until a new rulemaking on these issues was initiated. *See* Perciasepe Guidance at 4-5.[12]

Third, Plaintiffs overlook and badly mischaracterize relevant precedent. In *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 212-15 (4th Cir. 2009), the Fourth Circuit reviewed the above-described 1980 rules, as well as subsequent administrative history. The court concluded that the Agencies have long followed a "consistent administrative practice" in applying the exclusion to waste treatment systems created in jurisdictional waters. Plaintiffs all but ignore *Ohio Valley*, obliquely acknowledging consideration of only a "limited exception" for waste treatment systems constructed pursuant to a CWA Section 404 permit. Plfs. Reply at 4-5. But while *Ohio Valley* did, in fact, involve waste treatment systems authorized pursuant to Section 404 permits, the court's underlying legal analysis clearly considered the application of the waste treatment system exclusion to CWA regulation as a whole. *See*, *e.g.*, *Ohio Valley*, 556 F.3d at 212-13 (discussing inter-relationship of the Corps of Engineers' and EPA's CWA regulations).[13]

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[12] The administrative record also reflects that other stakeholders have long viewed this guidance as reflecting national policy. *See, e.g.*, Hunton Andrews Kurth, Comments Submitted on Behalf of Utility Water Act Group (Apr. 15, 2019), at 56 (attached hereto as Exhibit 1).

[13] For related reasons, Plaintiffs' reliance on *West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1290 (S.D. W.Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991), *see* Plfs. Reply at 4, is also misplaced. Plaintiffs overlook that the Fourth Circuit extensively reviewed this earlier litigation as part of its comprehensive analysis of these issues in *Ohio Valley*, 556 F.3d at 213-15. It opined that *West Virginia Coal* turned mainly on West Virginia's failure to analyze the impacts of the initial *construction* of a waste treatment system, *id.* at 215, an issue that is distinct from the

In sum, "cooling ponds" have been potentially eligible for the waste treatment system exclusion for decades. EPA has also long recognized that the waste treatment system exclusion can properly be applied to waters that are otherwise considered to be jurisdictional waters under the CWA. The NWPR did no more, and no less, than continue these longstanding policies.

C. Potential Application of the Exclusion to Otherwise-Jurisdictional Waters Is Lawful.

At bottom, Plaintiffs' legal challenge contends that the CWA precludes application of the waste treatment system exclusion to lakes and impoundments that would otherwise be jurisdictional under the CWA. Plfs. Mot. at 16-17; Plfs. Reply at 2, 6. However, Plaintiffs never specify their asserted statutory or regulatory basis for this argument. More critically, they stubbornly refuse to grapple with the Fourth Circuit's decision in *Ohio Valley*, which resolves this question. As discussed above and in the Agencies' opening brief, in *Ohio Valley*, the Fourth Circuit made clear that the waste treatment system exclusion *can* properly be applied to waters that otherwise would be considered "waters of the United States." Defs. Mot./Opp. at 37-38; *see also Ohio Valley*, 556 F.3d at 209.

There is simply no principled basis to distinguish this aspect of *Ohio Valley* from this case. The Fourth Circuit's analysis was expressly based on the premise that, if not for application of the waste treatment system exclusion, the "natural stream" at issue in that case would have been subject to CWA jurisdiction pursuant to 33 C.F.R. § 328.3(a)(3) (2009). *See Ohio Valley*, 556 F.3d at 212. Of significance here, the then-existing Section 328.3(a)(3) extended CWA regulatory jurisdiction not only to the streams that were at issue in *Ohio Valley*, but also to

question of the application of the waste treatment system exclusion to the *operation* of the system, which is the question presented both in *Ohio Valley* and in this case.

certain intrastate lakes, which is one of the two types of waters highlighted by Plaintiffs in this case. Further, the environmental groups in *Ohio Valley* argued that the features at issue could also be considered jurisdictional "impoundments" under the then-existing 33 C.F.R. § 328.3(a)(4) (2009), which is the other category of waters highlighted by Plaintiffs here. *Ohio Valley*, 556 F.3d at 212. Nonetheless, after an extensive review, the Fourth Circuit held that the Act and pertinent regulations were reasonably construed to allow such waters to be considered excluded "waste treatment systems" rather than "waters of the United States." *Id.* at 216.

Finally, it is worth re-emphasizing that this is facial challenge. Plaintiffs have to show that the waste treatment system exclusion can *never* be lawfully applied to cooling ponds. *See* Defs. Mot./Opp. at 40; *see also, e.g.*, *Flores*, 507 U.S. at 300-01. For the above reasons, this is a showing that Plaintiffs simply did not and cannot make. As previously explained, any implementation issues are case-specific determinations, just as they have been for decades preceding the NWPR. Plaintiffs have a right to challenge any final permit decision or other final agency action reflecting any such determination. *See* Defs. Mot./Opp. at 40.[14]

IV. The Court Lacks Jurisdiction over Plaintiffs' Challenge to the NWPR.

As the Agencies explained in their opening brief, to establish standing, Plaintiffs are required to demonstrate a concrete and imminent injury that is traceable to the NWPR. *See* Defs. Mot./Opp. at 40-42. These standing requirements apply with particular force in the context of

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[14] Contrary to Plaintiffs' suggestion, the exclusion does not automatically apply to all cooling ponds. For example, the exclusion does not apply to a cooling pond created after 1972 that was constructed illegally (*i.e.*, without a permit) in a jurisdictional water. Applying the exclusion in that scenario would be contrary to the Agencies' statements in the preamble to the NWPR that "[c]ontinuing 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 that "consistent with the proposal, the agencies intend for [the waste treatment system exclusion] to apply only to waste treatment systems constructed in accordance with the requirements of the CWA." 85 Fed. Reg. at 22,325.

facial challenges to regulations under the APA. The Supreme Court could not have been clearer in *Summers v. Earth Island Institute*: plaintiffs do not have standing to challenge a "regulation in the abstract" without "any concrete application that threatens imminent harm" to their interests. "Such a holding would fly in the face of Article III's injury in fact requirement." 555 U.S. 488, 494 (2009). In this context, principles of standing and ripeness tend to overlap. But the bottom line is that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Parks Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003); *see also, e.g.*, *Puget Soundkeeper Alliance v. Wheeler*, 2019 WL 6310562, at *7 n. 8 (W.D. Wash. Nov. 25, 2019) (holding that the environmental plaintiff lacked standing to challenge 2015 Rule when he failed to identify "any project, proposed or existing, that is causing or will soon cause the harms he [alleges]").

In this case, Plaintiffs have failed to establish the requisite concrete and particularized injuries and therefore lack standing. To establish standing, Plaintiffs must, for example, identify waters that they use and that personally affect them, that were once regulated under the CWA and are no longer regulated because of the NWPR. They then must demonstrate the existence of actual, concrete scenarios in which pollutants are being or will be discharged into these now unregulated waters as a result of the NWPR. Plaintiffs' declarations, voluminous and lengthy as they are, fail this simple test.

Some declarations express fear that the regulatory change will increase pollution. But they do not tie their fears to a particular, non-hypothetical source of future pollution. *See, e.g.*, Belcamino Decl. (Dkt. No. 58-4); Irwin Decl. (Dkt. No. 58-5); Kendall Decl. (Dkt. No. 58-15).

Other declarations identify potential sources of pollution in cooling ponds, but do not explain why the NWPR has uniquely changed regulation of these waters. *See, e.g.*, Mead Decl. (Dkt. No. 58-11); Norris Decl. (Dkt. No. 58-12); Guzick Decl. (Dkt. No. 58-32); Owens Decl. (Dkt. No. 58-37). As explained previously, these waters have been regulated as jurisdictional "waters of the United States." *See* Defs.' Mot./Opp. at 39-40 n. 16. And as explained in Section III above (pp. 19-24), cooling ponds have been eligible for the waste treatment system exclusion for decades. The NWPR simply implements longstanding practice. Therefore, Plaintiffs' mere concern about these waters, without more, does not establish standing. At this summary judgment stage, Plaintiffs affidavits must contain *specific* facts to prove that an injury-in-fact exists. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs have failed to carry this burden.

While Plaintiffs offer other reasons for how they have standing, none of them are meritorious. *First*, Plaintiffs suggest that standing should exist because this Court did not evaluate standing in *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018), a case considering a rule extending the effective date of the 2015 Rule (the "Applicability Date Rule"). Plfs. Reply at 53. But judicial silence in a different case is no substitute for the evidentiary burden Plaintiffs bear to show standing in *this* case. Furthermore, the rules at issue in the two cases are completely different. While the 2018 case involved the timing of the 2015 Rule's effective date, this case involves the *substance* of the 2020 NWPR and the regulatory definition of "waters of the United States," a distinction the Court made explicit in its prior opinion. *South Carolina Coastal*, 318 F. Supp. 3d at 963, n. 1.

Second, Plaintiffs are wrong to say that a change in the regulatory treatment of "waters" necessarily increases risk to the environment. Plfs. Reply at 53-57. Plaintiffs must do more than

allege that a change in regulation that may narrow the scope of the United States' jurisdiction automatically threatens or harms the environment. Plaintiffs' abstract fears as to what *could* happen are the exact sort of hypothetical and speculative scenarios that are insufficient to show a concrete and cognizable injury. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Third, Plaintiffs suggest standing exists because the Agencies, in their Economic Analysis, recognized that the NWPR may lead to environmental harm. Plfs. Reply at 56; EA at 105. As Plaintiffs themselves have argued, standing cannot depend on generalized harms to the environment, but concrete and particularized harm to *Plaintiffs*. *Laidlaw*, 528 U.S. at 181. The Agencies' generalized and non-specific predictions in their Economic Analysis do not prove that *Plaintiffs* have suffered an actual or concrete injury.

Fourth, Plaintiffs point to preexisting pollution to show that a future injury is imminent. Plfs. Reply at 56. But this argument shows only that the NWPR itself may not have caused their alleged injuries. Moreover, it suggests their alleged injuries may not be redressable through vacatur.

Fifth, Plaintiffs refer to past practices to speculate as to what may happen in the future. Plaintiffs' observation of how "local developers have responded to past contractions in federal clean water protections" are wholly irrelevant to showing an imminent future injury. Plfs. Reply at 57. As the Supreme Court has explained, although "imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) (internal quotations omitted). Plaintiffs' members' allegations fall into this category; allegations of possible future injury that

at this point are speculative. To allow their claims to proceed would lower the threshold for standing below any meaningful limit.

Plaintiffs' contention—that the fear of a hypothetical environmental harm constitutes an actual and concrete, particularized injury—misunderstands the applicable case law. They cite *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., but this case presents a completely different probabilistic risk of environmental harm. There, plaintiffs submitted an affidavit from a "real person who owns a real home and lake in close proximity" to the defendant industry that was allegedly violating its discharge permit. 204 F.3d 149, 157 (4th Cir. 2000). The records were "replete with evidence" that the defendant was "fouling its receiving waters." *Id*. Similarly in *Laidlaw*, the defendant engaged in what the Court described as "continuous and pervasive illegal discharges of pollutants." 528 U.S. at 184. Plaintiffs in *American Canoe Ass'n v. Murphy Farms, Inc*. presented affidavits that described actual physical changes to the water, 326 F.3d 505, 518 (4th Cir. 2003). Plaintiffs also misunderstand the holding in *1000 Friend*, 265 F.3d 216. There, the Fourth Circuit recognized standing because EPA affirmatively approved a plan under the Clean Air Act, which opened the door for near certain transportation projects to be built by third-parties. No such certainty exists here.

Plaintiffs also fail to establish organizational standing. Plaintiffs' Reply does not directly address that an organization's redirection of its resources to litigation and counseling does not confer standing upon the organization. *See Turlock Irrigation District v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) ("[T]he expenditure of resources on advocacy is not a cognizable Article III injury."). Under Plaintiffs' view of organizational standing, standing would exist every time an organization opposes a legal determination and *chooses* to spend resources monitoring, opposing, and educating its members about that issue.

Plaintiffs likewise fail to establish an informational injury. A "constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled and that the denial of that information creates a 'real' harm with an adverse effect." *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337, 345 (4th Cir. 2017) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). Therefore, it is not enough for Plaintiffs to allege harm because they may not have the opportunity to know of CWA Section 402 National Pollutant Discharge Elimination System permits or Section 404 dredge or fill permits. Instead, Plaintiffs must prove an actual concrete interest was actually affected by the NWPR that could have been avoided if the Agencies had not acted. Because Plaintiffs fail to prove an injury in fact to establish standing, the Court lacks jurisdiction to consider their claims.

V. The Court Should Defer Ruling on a Remedy Until After Deciding the Cross-Motions for Summary Judgment and Additional Briefing on Remedy.

Should the Court decide against granting the Agencies' cross motion for summary judgment, it should not vacate the NWPR based on the limited information regarding remedy provided thus far, but should instead order additional briefing solely on the issue of remedy. This is not a case where the Court can simply vacate the NWPR and easily return to the status quo ex ante. Plaintiffs themselves argue for the application of different baselines. Plfs. Mot. at 40 n. 44. The parties are not embroiled in standalone litigation. The Agencies are defending the NWPR and related rules in multiple actions throughout the United States, some of them stayed. *See* Defs. Mot./Opp. at 5-7.

In support of vacatur, Plaintiffs cite inapt cases that involve the straightforward application, and thus vacatur, of a rule. *See, e.g.*, *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 20 (D.D.C. 2017) (vacating rule for failure to comply with notice and comment requirements). Indeed, it is well-settled that the Court has discretion to remand without vacatur.

See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (setting forth a two-part test to vacate that depends on the seriousness of the order's deficiencies and the disruptiveness of vacatur).

Plaintiffs also assert, without sufficient detail, that nationwide relief is the "only practical option," Plfs. Reply at 65, but the parties should be afforded the opportunity to brief substantively the *Allied-Signal* two-part test, taking into account the nature of the flaws (if any) identified by the Court. As the Agencies previously stressed, any injunctive relief should be tailored in as narrow a fashion as possible. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010).[15] If the Court must consider remedy, many paths forward exist. *See, e.g.*, *Natural Resources Defense Council, Inc. v. EPA*, 301 F. Supp. 3d 133, 144-45 (D.D.C. 2018) (vacating a rule but staying the order of vacatur until such time as the agency promulgated a replacement). Ultimately, in cases where "the egg has been scrambled and there is no apparent way to restore the status quo ante," the Court should not default to vacatur. *Sugar Cane Growers Co-operative of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). At this stage, the Agencies request the simple opportunity to brief in greater detail the issue of remedy should the Court rule against their Cross-Motion.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied and Defendants' cross-motion for summary judgment should be granted.

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[15] The Agencies acknowledge that this Court adopted a nationwide injunction in its 2018 decision involving the applicability date rule. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d at 968-70. But as the Court acknowledged, even in that case, "nationwide injunctions should be utilized 'only in rare circumstances.' " *Id*. at 969 n. 4 (internal quotation marks omitted).

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Respectfully submitted,

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