Bradley A. Benbrook (SBN 177786)
Benbrook Law Group
400 Capitol Mall, Ste 2530
Sacramento, CA 95814
Tel: (916) 447-4900
Fax: (916) 447-4904
Email: brad@benbrooklawgroup.com
Counsel for Intervening States

PATRICK MORRISEY
West Virginia Attorney General
Lindsay S. See*
Solicitor General
Benjamin E. Fischer*
Thomas T. Lampman*
Assistant Solicitors General
West Virginia Office of the Attorney General
1900 Kanawha Blvd. East
Building 1, Room E-26
Tel: (304) 558-2021
Fax: (304) 558-0140
Email: lindsay.s.see@wvago.gov
Counsel for Intervenor State of West Virginia

CHRISTOPHER M. CARR
Attorney General of Georgia
Andrew A. Pinson
Solicitor General
Ross W. Bergethon*
Deputy Solicitor General
Drew F. Waldbeser*
Assistant Solicitor General
Office of the Georgia Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Tel: (404) 651-9453
Fax: (404) 656-2199
Email: apinson@law.ga.gov
Counsel for Intervenor State of Georgia

(Add'l Counsel Listed on Signature Page)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

State of California, *et al.*,
Plaintiffs,
v.

Andrew Wheeler, *et al.*,
Defendants.

Case No. 3:20-cv-3005-RS

[PROPOSED] STATE INTERVENORS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hr'g Date:	June 18, 2020
Hr'g Time:	1:30 PM
Dep't:	San Francisco Courthouse, Courtroom 3, 17th Floor
Judge:	Honorable Richard Seeborg
Action Filed:	May 1, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

Other Authorities

INTRODUCTION

The federal agencies that administer the Clean Water Act published a new rule interpreting the statutory term "waters of the United States," which identifies the waters subject to federal regulation under the Act. The plaintiffs in this case, a group of states and cities, seek a universal preliminary injunction to prevent the agencies from implementing that rule anywhere in the country—not because the agencies tried to seize too much federal power over the States' sovereign lands and waters, but because the plaintiffs believe they did not go far enough. As a coalition comprised of almost half the states in the country, we oppose the plaintiffs' request to force federal agencies to exert regulatory control over more of our sovereign lands and waters. An "everything is connected" understanding of water quality does not mean that "everything is regulated" under the federal Clean Water Act, and the plaintiffs have not met their burden to justify the extraordinary and sweeping relief they seek.

First, the plaintiffs' claims under the Administrative Procedure Act ("APA") are not likely to succeed. Their claim that the agencies' new rule (the "2020 Rule") is contrary to the CWA rests on the mistaken idea that an opinion concurring in the judgment and four dissenting votes equals a "majority" view of the Supreme Court that forecloses the agencies' interpretation. And that interpretation, which generally limits federal jurisdiction to relatively permanent waters that contribute flow to traditional navigable waters or adjacent wetlands, fits comfortably within the parameters set by actual Supreme Court precedent construing the statutory text. That is certainly enough to defeat the plaintiffs' claim that the agencies' interpretation is not even "permissible" or "reasonable" under step two of *Chevron*. The agencies thus have "plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, J., concurring).

A similar problem scuttles the plaintiffs' claim that the 2020 Rule is arbitrary and capricious. The APA gives agencies wide latitude to act within the bounds of their statutory authority as long as they explain their actions. Under that generous standard, the plaintiffs' arguments cannot win. They argue that the agencies should have treated hydrological connectivity as a license to expand their regulatory jurisdiction to cover virtually all of the

nation's waters and wetlands. But as the agencies explained, with ample support in Supreme Court precedent, knowing the extent of hydrological interconnection does not answer the legal question of where to draw the line between federal and state jurisdictional waters. The plaintiffs also argue that asserting federal regulatory jurisdiction over fewer waters reflected "ignorance" of the CWA's goal of protecting water quality. But the agencies explained, with the support of the CWA and state law, that water quality would continue to be protected through cooperative federalism: waters not covered by the Act's regulatory programs would be protected, as needed, through the Act's non-regulatory measures that support the States and through other controls that States, Tribes, and local entities have developed to protect their lands and waters. The plaintiffs may disagree with the agencies' choices to not follow hydrological connectivity past the limits on their legal authority and, for waters beyond that authority, to trust the States to be good stewards of their sovereign waters instead. But they cannot say these choices were arbitrary.

Second, the plaintiffs have not demonstrated the other factors required for a preliminary injunction. They have not shown that irreparable harm is likely to result from implementing the 2020 Rule, especially not while this action is pending. The 2020 Rule is a withdrawal of federal jurisdiction, and the plaintiffs fail to connect that deregulatory action to concrete harms. They fail to show with any specificity how or when environmental damage will occur, and they all but dismiss the reality that states—including the state plaintiffs themselves—can and in many ways already do protect their sovereign lands and waters without depending on a federal regulatory scheme. Absent these showings, their alleged harms are too speculative to support preliminary injunctive relief. As for the public interest, a preliminary injunction would just as likely impede the States' stewardship of their natural resources, and the public has strong interests in preserving the clarity and predictability that the 2020 Rule brings.

And *third*, even if the plaintiffs could show some imminent and concrete harm, they certainly have not shown that a universal injunction is appropriate. Assuming such relief is within the power of a federal court to grant, injunctive relief must sweep no further than what is necessary to provide complete relief to the plaintiffs. The plaintiffs have not come close to

showing with particularity (rather than just speculation and assumptions) that preventing harms in their own states requires halting implementation of the 2020 Rule in all 50 States.

For these reasons and more addressed below, this Court should deny the motion for a preliminary injunction.

STATEMENT

The statutory term "waters of the United States" limits the geographic reach of federal regulatory jurisdiction under the Clean Water Act ("CWA" or "Act"). Most notably, the Act's key permitting programs for discharges of pollutants, 33 U.S.C. § 1342 (section 402), and "dredged or fill material," *id.* § 1344 (section 404), require permits for discharges into "navigable waters," which the Act defines as "the waters of the United States, including the territorial seas," *Id.* § 1362(7). And the Act requires states to develop water quality standards—which designate the use for which a given body of water is to be protected, and then set criteria that must be met to safely allow that use—for "waters of the United States" within their borders. *See id.* § 1313. That term is not used to limit the reach of the Act's many non-regulatory programs, including grant, research, and planning programs that support the States' efforts to control pollution and protect water quality. *See, e.g.*, *id.* § 1255(a)(1) (providing grants to states for researching ways to combat pollution in "any waters"). Nor does the CWA limit the States' sovereign authority to regulate other waters or wetlands beyond those considered "waters of the United States. *See id.* § 1370 (declaring that "[e]xcept as expressly provided in this chapter, nothing in this chapter shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States").

The Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies"), which jointly administer the CWA, have issued rules and guidance interpreting the term "waters of the United States" since the 1970s, and litigants have challenged those efforts for just as long. *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,254–55 (Apr. 21, 2020). Although those challenges have come from both sides—some arguing the rule brought too many waters under federal jurisdiction, others contending it did not sweep broadly enough—the recent Supreme Court decisions addressing the

agencies' definitional attempts have rebuffed them as too expansive. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 174 (2001) (rejecting assertion of federal jurisdiction over isolated ponds based on mere ecological connection to jurisdictional waters); *Rapanos*, 547 U.S. at 739, 742 (plurality op.) (rejecting assertion of jurisdiction beyond "relatively permanent, standing or continuously flowing bodies of water" and "wetlands with a continuous surface connection to" those waters); *id.* at 776 (Kennedy, J., concurring) (rejecting assertion of jurisdiction over all "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)"). In the latest such decision, Chief Justice Roberts even concurred to lament that, despite "enjoy[ing] plenty of room to operate in developing *some* notion of an outer bound to the reach of [the agencies'] authority, … the Corps chose to adhere to its essentially boundless view of the scope of its power," leading to "another defeat for the agency." *Id.* at 758.

Nonetheless, in 2015, the agencies published a new rule interpreting "waters of the United States" in a way that rendered the "vast majority of the nation's water features" jurisdictional. U.S. EPA & Department of the Army, *Economic Analysis of the EPA-Army Clean Water*, at 11 (May 20, 2015) ("2015 Rule Economic Analysis") (Docket ID: EPA-HQ-OW-2011-0880-20866), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866. As a consequence, many States, including most of the State Intervenors here, challenged the 2015 Rule. By September of 2019, the 2015 Rule had been enjoined in more than half of the States—in several cases, based on the conclusion that the agencies had again exceeded their statutory authority. 85 Fed. Reg. at 22,259; *see Or. Cattlemen's Ass'n v. EPA*, No. 19-00564 (D. Or. July 26, 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1367, 1381–83 (S.D. Ga. 2019); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364 (S.D. Ga. 2018); *Texas* v. *EPA,* No. 3:15-cv-162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056 (D.N.D. 2015); *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015), *vacated sub nom. In re United States Dep't of Def.*, 713 F. App'x 489 (6th Cir. 2018).

After this series of defeats, the agencies tried a different approach. Acknowledging the Supreme Court's admonition that their jurisdiction was not boundless, they included as "waters

of the United States" the kinds of waters and wetlands the Supreme Court had indicated were permissibly included (relatively permanent waters that contribute surface flow to traditionally navigable waters, and wetlands adjacent to those waters), and they left out those waters about which the Court had expressed doubt (ephemeral waters and isolated wetlands). *See* 85 Fed. Reg. 22,250, 22,251–52. The result was an interpretation of "waters of the United States" that left fewer waters subject to federal jurisdiction.

Four months after the 2020 Rule was finalized, *see* The Navigable Waters Protection Rule – Factsheets, EPA, https://www.epa.gov/nwpr/navigable-waters-protection-rule-factsheets, and ten days after it was published in the Federal Register, a group of 17 States, the District of Columbia, and one city filed this action to challenge the Rule under the APA, 5 U.S.C. § 706. Doc. 1. Seventeen days later, on May 21, they moved for a universal preliminary injunction to prevent implementation of the Rule in all 50 States. Doc. 30. The undersigned 23 States moved to intervene and now file this opposition to the plaintiffs' request.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The likelihood of success is the most important factor, *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017), but "[a]ll four elements must be satisfied." *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019).

ARGUMENT

I. The plaintiffs are not likely to succeed on the merits of their claims.

A. The 2020 Rule is not contrary to the CWA.

The plaintiffs claim that the 2020 Rule is contrary to the CWA because it does not include "ephemeral streams," wetlands that are not physically connected to jurisdictional waters, or "interstate waters" as "waters of the United States." Doc. 30 at 20–22, 38–39. They ask the Court to review this claim under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837

(1984), but they do not even argue that the agencies' interpretation fails at step one of that analysis—i.e., that Congress has directly spoken to the precise question at issue. *Id.* at 842–43. Rather, they contend that the rule is not even a *permissible* or *reasonable* interpretation of the CWA under step two. *See id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). That is a difficult standard to meet. *See id.* at 844 ("[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); *Hawaii ex. rel. Atty. Gen. v. Fed. Emergency Mgmt. Agency*, 294 F.3d 1152, 1159 (9th Cir. 2002) (explaining that when an agency's interpretation is reasonable, it must prevail, even if the court disagrees with it). And the plaintiffs have not met it here. The 2020 Rule's exclusion of "ephemeral features" and isolated wetlands from the definition of "waters of the United States" is consistent with both precedential and persuasive caselaw addressing the interpretation of that term. And the agencies' elimination of "interstate waters" as a standalone category is not just a permissible interpretation of "waters of the United States," but also necessary to ensure that the Rule does not sweep in waters with no connection to navigable waters.

1. The CWA does not require the agencies to assert federal jurisdiction over "ephemeral streams" or physically isolated wetlands.

Speaking generally, the 2020 Rule interprets the statutory term "waters of the United States" to include "[1] relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as [2] wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters." 85 Fed. Reg. at 22,273. As a result, the Rule excludes two kinds of features that had at least sometimes been included as "waters of the United States."

First, it excludes "ephemeral" features, both through its definition of jurisdictional "tributaries" and by specific exclusion. *Id*. at 22,251, 22,275–76, 22,286–87. Tributaries must "contribute[] surface water flow" to a traditional navigable water in a "typical year," either "continuously year-round" (those are "perennial" tributaries) or "continuously during certain

times of the year and more than in direct response to precipitation" (those are "intermittent" tributaries). *Id.* at 22,276, 22,286. And features that are "ephemeral" ("flowing or pooling only in direct response to precipitation") are excluded. *Id.* at 22,276.

Second, the Rule excludes wetlands that are physically isolated from any jurisdictional waters. To be "adjacent wetlands" covered by the Rule, a wetland must "abut" ("touch at least one side of") a jurisdictional water, be inundated by flooding of such a water in a typical year, or be physically separated only by certain natural features ("berm[s], bank[s], dune[s]," or similar features), or by artificial features that allow for a "direct hydrologic surface connection" between the wetland and jurisdictional water. *Id.* at 22,279–80.

The plaintiffs challenge as contrary to the CWA the 2020 Rule's exclusion of both "ephemeral" waters and wetlands that are not physically connected to jurisdictional waters. Doc. 30 at 22–23. But the agencies' interpretation is consistent with the only binding precedent that speaks to the issue and with persuasive authority around the country. By contrast, the opinion the plaintiffs depend on, Justice Kennedy's concurring opinion in *Rapanos*, is not precedential, and even if it were, it would not make the agencies' interpretation unreasonable.

a. Excluding ephemeral features and physically isolated wetlands from the "waters of the United States" is consistent with binding Supreme Court precedent and persuasive authority from around the country.

The Supreme Court has interpreted the statutory term "waters of the United States" on three separate occasions. The 2020 Rule's exclusion of ephemeral features and physically isolated wetlands reflects careful application of these precedents.

In *Riverside Bayview,* the Court upheld the Corps' assertion of jurisdiction over a wetland that "actually abut[ted] on a navigable waterway." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). In doing so, the Court acknowledged that the statutory term "waters" was a limiting term, but it held that "the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States" was not "unreasonable," based on both "the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters." *Id.* at 134. Even though the Court did not hold that the CWA *required* including adjacent wetlands as "waters of the United States,"

the 2020 Rule nonetheless maintains that interpretation in keeping with *Riverside Bayview*. *See* 85 Fed. Reg. at 22,251 (including as jurisdictional "adjacent wetlands," defined as "wetlands that abut a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water").

Next, in *SWANCC*, the Court held that the agencies exceeded the limits of the term "waters of the United States" by asserting jurisdiction over isolated ponds formed in abandoned gravel-mining trenches. 531 U.S. at 174. The Court agreed that the CWA permitted jurisdiction over "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," like the adjacent wetlands in *Riverside Bayview*. *Id.* at 167 (citing *Riverside Bayview*, 474 U.S. at 133–34). But that did not mean the agencies could "give … no effect whatever" to the term "navigable," which "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172; *see also id.* at 168 (finding persuasive "the Corps' original interpretation of the CWA," which "defined § 404(a)'s 'navigable waters' to mean 'those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce,'" and which "emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor'"). And depriving the term "navigable" of any effect was just what the agencies had done by asserting jurisdiction over isolated gravel pits unconnected to navigable waters beyond their use by migratory birds. *Id.* at 173–74. By contrast, the 2020 Rule avoids that mistake: It gives effect to the statute's use of the term "navigable waters" by including only traditional navigable waters and waters with specific surface water connections to traditional navigable waters and wetlands inseparably bound up with such waters. And, based on that limitation, the Rule "would not allow for the exercise of jurisdiction over waters similar to those at issue in *SWANCC*." 85 Fed. Reg. at 22,265.

Finally, in *Rapanos*, the Court vacated decisions that had upheld the Corps' assertion of jurisdiction over wetlands next to man-made ditches which, through a series of other man-made

ditches or drains, eventually connected to navigable waters a mile or more away. 547 U.S. at 757.

A plurality led by Justice Scalia voted for that judgment because, in the Justices' view, the term "waters of the United States" includes only "relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes," and "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739. As for wetlands, "only those wetlands with a 'continuous surface connection'" to jurisdictional waters could be included. *Id.* at 742.

Justice Kennedy, concurring in the judgment, disagreed with the plurality's limitations. 547 U.S. at 776. But he also identified limitations on the CWA's jurisdictional reach that the dissent had ignored. The dissent would have approved a definition of "tributaries" so broad that, when used as a jurisdictional hook for "adjacent" wetlands, it would cover wetlands "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781–82. But that result—"permit[ting] federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters"—would improperly read out of the CWA the "central requirement … that the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 778. So Justice Kennedy offered a third view: he would have considered waters or wetlands jurisdictional if they had a "significant nexus" to traditional navigable waters, meaning that the waters or wetlands in question needed to, "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of traditional navigable waters. *Id.* at 780.

The 2020 Rule incorporates the limitations on the CWA's jurisdiction that the plurality and Justice Kennedy identified. The agencies largely incorporated the plurality's view. *Compare* 85 Fed. Reg. at 22,273 (describing the 2020 Rule as encompassing "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or

are otherwise inseparably bound up with such relatively permanent waters") *with Rapanos*, 547 U.S. at 739 (plurality op.). And their definitions of "tributaries" and "wetlands," although covering fewer waters than the broader assertion of jurisdiction Justice Kennedy would have accepted as *permissible*, also avoid the expansive jurisdictional assertion that Justice Kennedy deemed an *impermissible* reading of the statute. *Compare* 85 Fed. Reg. at 22,251 (defining "tributary" as a "river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a … traditional navigable water in a typical year," and excluding "ditches") *with Rapanos*, 547 U.S. at 779 (opining that "[t]he deference owed to the Corps' interpretation of the statute does not extend so far" as to allow federal jurisdiction over wetlands next to "remote and insubstantial" "ditch[es] or drain[s]") (Kennedy J., concurring).

The agencies' interpretation of "waters of the United States" is reasonable in light of these opinions. "Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the [CWA], the [agencies] … enjoy[] plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Id.* at 758 (Roberts, J., concurring). In developing that outer bound, the 2020 Rule incorporates an interpretation of "adjacent wetlands" that *Riverside Bayview* deemed "not unreasonable," and it avoids incorporating interpretations that *SWANCC* and the five deciding votes in *Rapanos* would have deemed impermissible. In short, as Chief Justice Roberts recommended in *Rapanos*, the agencies "refin[ed] [their] view of [their] authority in light of" the Supreme Court's decisions and "provid[ed] guidance meriting deference under [the Court's] generous standards." *Id.*[1]

[1] That measured approach stands in stark contrast to the agencies' prior attempt. By the agencies' own admission, the 2015 Rule rendered the "vast majority of the nation's water features jurisdictional." 2015 Rule Economic Analysis, at 11, https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866. Unsurprisingly, numerous federal courts enjoined or remanded the 2015 Rule on the ground that it exceeded the agencies' authority under the CWA, including for flouting some of the limitations from the decisions described above. The District of North Dakota, for instance, enjoined the agencies' 2015 Rule after expressing concern that the its definition of "tributaries" "includes vast numbers of waters that are unlikely to have a nexus to navigable waters." *North Dakota* v. *EPA,* 127 F. Supp. 3d at 1056. The Southern District of Georgia preliminarily enjoined the 2015 Rule and then remanded it to the agencies because the rule's tributaries definition "seemed to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water," *Georgia v. Wheeler*, 418 F.Supp. 3d at 1383, and that the rule's "adjacent waters" coverage was unlawful based on its interaction with the tributaries definition and the selection of overbroad geographical limits

b. The agencies' interpretation is not foreclosed by a *Rapanos* "majority" made up of Justice Kennedy's concurrence and four dissenters.

The plaintiffs contend that the agencies' interpretation of "waters of the United States" is unreasonable because it is built around the *Rapanos* plurality's "relatively permanent waters and adjacent wetlands" standard, and "a majority of the Justices of the Supreme Court have found that that the plurality's standard is an unlawful interpretation of the Act." Doc. 30 at 32.

This argument badly distorts the law of judicial precedent. To find their "majority" that rejects the plurality's standard, the plaintiffs count Justice Kennedy's concurring opinion and the four *dissenting* votes in *Rapanos*. But dissenting opinions have no precedential value. "Comments in a dissenting opinion about legal principles and precedents are just that: comments in a dissenting opinion." *Georgia v. Public.Resource.Org, Inc*., 140 S. Ct. 1498, 1511 (2020) (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177, n. 10 (1980)). Indeed, the Supreme Court instructs lower courts deriving a rule from a fractured decision "to consider the opinions only of 'those Members who *concurred* in the judgments on the narrowest grounds.'" *United States v. Davis*, 825 F.3d 1014, 1024 (9th Cir. 2016) (en banc) (quoting *Marks v. United States,* 430 U.S. 188, 193 (1977) (citation omitted). The plaintiffs' five-Justice "majority" that "rejected" the agencies' interpretation is not a "majority" in the precedential sense of the term. *See, e.g*., *Davis*, 825 F.3d at 1025 (assuming but not deciding that "dissenting opinions may be considered in a *Marks* analysis," but acknowledging that *Marks* suggests otherwise); *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620–21 (7th Cir. 2014) (holding that "dissenting opinions cannot be counted under *Marks* to create binding precedent" where district court had counted the views of four dissenting justices, along with Justice Kennedy's position in a concurring opinion, as controlling); *United States v. Robison,* 505 F.3d 1208, 1221 (11th Cir. 2007) ("In our view, *Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented. *Marks* talks about those who 'concurred in the judgment[],' not those who did not join the judgment.") (citation omitted); *King v. Palmer,* 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("[W]e do not think we are free to combine a dissent with a

without showing a significant nexus." *Id.*; *see also In re EPA & Dep't of Def. Final Rule*, 803 F.3d at 807, *vacated for lack of original jurisdiction* at 713 Fed. App'x. 489; *Texas* v. *EPA*, 2018 WL 4518230, at *1; *Or. Cattlemen's Ass'n* v. *EPA,* No. 19-00564 (D. Or. July 26, 2019).

concurrence to form a *Marks* majority."); Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction, in The Supreme Court and the Clean Water Act: Five Essays* 81, 93–94 (L. Kinvin Wroth ed., Vt. Law Sch. 2007) (arguing, in reference to *Rapanos*, that the *Marks* rule excludes consideration of dissents not concurring in any part of the judgment of the Court).[2]

Nor is Justice Kennedy's concurring opinion, taken alone, controlling. *Marks* directs that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding ... may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks*, 430 U.S. at 193 (quotation and citation omitted). That "narrowest grounds" test has been applied in a number of different ways by lower courts, but the Ninth Circuit recently adopted what it calls "the reasoning-based approach." *Davis*, 825 F.3d at 1021. Under that approach, "[a] fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other." *Id.* at 1021–22. Put another way, the question is "whether the reasoning of a narrower opinion fit[s] entirely into the circle drawn by a broader opinion." *Id.* at 1021. If not, "only the specific result is binding on lower federal courts." *Id.* at 1022.

Applied to Justice Kennedy's *Rapanos* opinion, the Ninth Circuit's reasoning-based *Marks* test does not generate a binding precedent.[3] Although the plurality and Justice Kennedy agreed at the highest level of generality that any interpretation of "waters of the United States" must give some effect to the Act's use of the phrase "navigable waters," Justice Kennedy's reasoning cannot be described as "fit[ting] entirely into the circle drawn by" the plurality opinion. *Davis*,

[2] Even if it were appropriate to count dissenting votes in some cases, such an approach would still be unsuitable to *Rapanos,* where Justice Kennedy made clear that he disagreed fundamentally with the dissenters' conception of jurisdiction under the Act. *See* 547 U.S. at 778 (Kennedy, J., concurring) ("While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance.").

[3] Lower courts have disagreed on how to apply *Marks* to the *Rapanos* opinions. *See* Brian W. Blaesser and Alan C. Weinstein, Federal Land Use Law & Litigation § 8:16 (2019 ed.) (summarizing cases analyzing *Rapanos* under *Marks*).

825 F.3d at 1021. Indeed, the *reasoning* of the two approaches is apples and oranges, as the opinions acknowledge. The plurality's reasoning employs traditional principles of statutory construction and looks to whether the waters in question are "waters" as that term is traditionally understood, or wetlands with a continuous surface connection to those waters. *See, e.g., Rapanos*, 547 U.S. at 757 (asking "whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*"). Justice Kennedy's opinion focuses on the statute's purpose and looks to whether wetlands have a "significant nexus" to navigable waters, which he defines by reference to ecological considerations. *See, e.g., id.* at 780 ("[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"). And each opinion squarely rejects the other's reasoning as incompatible with their own. *See id.* at 754–56 (plurality op.) (rejecting Justice Kennedy's "significant nexus" test as a reading "in utter isolation from the text of the Act" that improperly adopts a "case-by-case test of ecological significance"); *id.* at 769 (Kennedy, J., concurring) (rejecting plurality's "relatively permanent" waters limitation for failing to address the statute's "concern[] with downstream water quality" and its "continuous surface connection" limitation on wetlands because a rule based on ecological considerations was a permissible interpretation of the CWA); *id.* at 776–77 (Kennedy, J., concurring) ("[B]y saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach."). Because the reasoning of Justice Kennedy's concurring opinion does not "fit entirely into the circle drawn by" the plurality's reasoning, it is not binding precedent under *Davis.* 825 F.3d at 1021.

The Ninth Circuit's decisions in *City of Healdsburg* and *Robertson* do not call for a different conclusion. Before the en banc Ninth Circuit decided *Davis*, a panel in *City of Healdsburg* had held that Justice Kennedy's *Rapanos* opinion controlled because it was "the narrowest ground to which a majority of the justices would assent if forced to choose in almost all cases." *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007). But *Davis* expressly rejected this "results-based" approach. *Davis*, 825 F.3d at 1021 (describing and rejecting alternative approach that "defines the narrowest ground as the rule that 'would necessarily produce results with which a majority of the Justices from the controlling case would agree'") (citation omitted). And although a panel later held in *Robertson* that *City of Healdsburg* was not "clearly irreconcilable" with *Davis* and thus remained circuit precedent, *Robertson* (1) impermissibly relied on the *dissent* in reaching that conclusion, and (2) was then vacated by the Supreme Court's grant of certiorari. *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017) (reasoning that Justice Kennedy's opinion was a logical subset of the dissent), *cert. granted, judgment vacated*, 139 S.Ct. 1543 (2019). In short, *City of Healdsburg* applied a test that was overruled, and *Robertson* applied the new test incorrectly. Applied properly, the Ninth Circuit's version of the *Marks* analysis does not permit the conclusion that Justice Kennedy's opinion in *Rapanos* is binding.

At best, then, the *Rapanos* plurality and concurring opinions are persuasive authority in the Ninth Circuit. That the agencies' interpretation here more closely resembles a standard articulated in a non-binding plurality than one from a non-binding concurrence does not render it unreasonable, as the plaintiffs contend.[4]

[4] Even if Justice Kennedy's *Rapanos* opinion *were* binding, that would not render the agencies' interpretation unreasonable, because Justice Kennedy did not purport to hold that the statute *required* his reading. "A court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation." *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009). For *Chevron* purposes, prior court constructions are binding over agency interpretations "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." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Justice Kennedy's *Rapanos* concurrence does not purport to do so. *See, e.g., Rapanos,* 547 U.S. at 778. Indeed, it criticizes the plurality for presenting *its* interpretation of the Act as the "only permissible reading of the plain text." *Id.*

2. The CWA does not authorize jurisdiction over "interstate waters" that have no connection to navigable waters.

The plaintiffs also contend that the 2020 Rule is not a permissible interpretation of "waters of the United States" because it no longer includes "interstate waters" as a standalone category of jurisdictional waters. 85 Fed. Reg. at 22,282–83. To the contrary, continuing to *include* "interstate waters" would have been the impermissible interpretation. Indeed, that conclusion follows even from Justice Kennedy's concurring opinion on which the plaintiffs so heavily rely. Justice Kennedy explained that the Act's regulation of "navigable waters" means that "the word 'navigable' … must be given some effect" in construing the scope of federal jurisdiction. *Rapanos*, 547 U.S. at 779. Yet treating "interstate waters" as jurisdictional merely because they happen to lie across a state border pays no attention at all to navigability. And the problem was magnified in prior rules, including the 2015 Rule, which also included *other* non-navigable waters based solely on their connection to interstate waters, which could themselves be non-navigable. For just that reason, at least one federal court has rejected the standalone "interstate waters" category as an impermissible construction of the CWA. *See Georgia v. Wheeler*, 418 F. Supp. 3d at 1359. The agencies reasonably followed suit, recognizing that waters that flow across state lines will continue to be jurisdictional only if they otherwise meet the definitions set out in the Rule. *See* Fed. Reg. at 22,284.

The plaintiffs are wrong that *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 317 (1981), *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 486, 492 (1987), or *Arkansas* v. *Oklahoma,* 503 U.S. 91, 110 (1991), interpret the CWA as applying to interstate waters regardless of navigability. *See* Doc. 30 at 39. All of these cases addressed disputes that arose in the CWA permitting context for waters that would otherwise be jurisdictional—Lake Michigan, Lake Champlain, and the Illinois River. *City of Milwaukee*, 451 U.S. at 307; *Ouellette,* 479 U.S. at 483–84; *Arkansas* v. *Oklahoma,* 503 U.S. at 95. Those decisions do not address non-navigable interstate waters, and the Court never concluded that the CWA authorized (much less requires) federal jurisdiction over such waters. *City of Milwaukee*, 451 U.S. at 350 ("[B]oth the Court and Congress fully expected that neighboring States might differ in their approaches to the regulation of the discharge of pollutants into their *navigable* waters.") (emphasis added); *Ouellette*, 479

U.S. at 500 (holding that state law is preempted as applied to an out-of-state point source polluting Lake Champlain, a navigable water) *Arkansas v. Oklahoma*, 503 U.S. at 114 (concluding that the EPA's decision to issue a permit for discharging into the Illinois River was not arbitrary).

B. The 2020 Rule is not arbitrary or capricious.

Judicial review of a claim that a rule is arbitrary and capricious in violation of the APA is "narrow and deferential." *California by & through Becerra v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020) (en banc) (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019)). In undertaking such review, "[a] court is not to ask whether a [rule] is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016), *as revised* (Jan. 28, 2016). Nor may the court "second-guess[] the agency's weighing of risks and benefits and penaliz[e] it for departing from the inferences and assumptions of others." *California v. Azar*, 950 F.3d at 1096 (cleaned up). Instead, the court's role is merely to check that the agency has "examined the relevant considerations and articulated a satisfactory explanation for its action." *Id.* And the challengers bear the "heavy burden" to demonstrate otherwise: they must show "that 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Absent that showing, the claim must fail.

The plaintiffs have not met their heavy burden here. Although they express strong disagreement with the agencies' choices in approaching the interpretive question before them, the plaintiffs have not established that the agencies failed to adequately explain the reasons for those choices. In fact, the agencies articulated good reasons for each of the features of the rule the plaintiffs attack: taking a law-based approach to defining the statutory term "waters of the United States," advancing the CWA's goal to protect water quality through cooperative federalism, and

applying a "typical year" approach to ensuring that waters are sufficiently permanent to qualify as "waters of the United States."

1. The agencies articulated a satisfactory explanation for their law-based approach to defining the statutory term "waters of the United States."

The plaintiffs contend that the agencies "ignored" or "disregarded" certain findings about the connections between tributaries, wetlands, and other waters from the "Connectivity Report," which EPA published during the prior Administration and then heavily relied on to support the 2015 Rule's unprecedented assertion of federal jurisdiction. Doc. 30 at 19–22. The plaintiffs cannot mean to suggest that the agencies actually failed to review or consider this report or the points they highlight. After all, the plaintiffs offer no support for that proposition. *See id.* (citing only the Connectivity Report itself and a technical support document from the 2015 Rule to support assertions that the agencies "ignored" findings from the report). And the record shows that the agencies *did* consider the report and each of the points the plaintiffs raise. *See* 85 Fed. Reg. at 22,261 ("[T]he agencies used the Connectivity Report to inform certain aspects of the definition of 'waters of the United States.'"); EPA, "The Navigable Waters Protection Rule – Public Commentary Summary Document," Docket No. EPA-HQ-OW-2018-0149-11574, at 5.1.2.3(b), 8.3.3, 8.2.5.4 (April 21, 2020), https://beta.regulations.gov/document/EPA-HQ-OW-2018-0149-11574 (acknowledging the ecological importance of various waters on downstream navigable waters and choosing to apply the connectivity gradient test to balance "ecological objective with jurisdictional concerns"); *id.* at 5.4.2 (acknowledging the significance of the watershed area but finding other factors, including climate, geology, soil type, vegetation, slope, and land use better metrics in a flow regime); *id.* at 8.7.3 (acknowledging that water connectivity changes over time and accommodates this using the non-static 30-year typical yearly flow metric); *id.* at 5.3.1, 5.3.1.1, 5.3.6.1, 5.4.3.1, 5.4.3.2, 9.1.1 (explaining that the typical yearly flow metric is used by scientists and environmental professionals as well as other "government climate data programs," that this new rule does not eliminate banks and banks as "one line of evidence" to determine the existence of tributaries, and that the "ordinary high water mark" remains the determining factor for the "later limits of jurisdiction for a tributary"); *id.* at

5.1.2.3(a), 5.1.2.3(b) (exclusion of ephemeral waters based on jurisdictional concerns and the Connectivity Report's "Gradient of connectivity" analysis to determine which waters were the most consequential for downstream waters); *id.* at 8.3.3, 8.3.5, 8.3.5.2 (acknowledging concerns over the "ecological connections and functions of wetlands" not sharing a "direct hydrologic surface connection," and adjusting the rule to include wetlands with natural and artificial barriers based on the agencies' "technical and scientific expertise … over nearly five decades"). There is no serious argument that the agencies "entirely failed to consider" these points, so the rule cannot be deemed arbitrary and capricious on that ground. *Managed Pharmacy Care*, 716 F.3d at 1244.

What the plaintiffs really object to is not that the agencies failed to consider how various waters and wetlands are functionally connected (because they plainly did), but rather that the agencies weighed these findings differently than the prior Administration. The agencies under the prior Administration thought the findings of the Connectivity Report—essentially, that all manner of waters and wetlands share chemical, physical, or biological connections that affect the quality of downstream waters—gave them license to expand their regulatory jurisdiction to cover virtually all of the nation's waters and wetlands. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,065 (June 29, 2015) (preamble to 2015 Rule explaining that "the agencies interpret the scope of 'waters of the United States' protected under the CWA based on the information and conclusions in the [Connectivity] Report"); *id.* at 37,067 (preamble to 2015 Rule noting that "[t]he [Connectivity] Report provides much of the technical basis for the rule"); 85 Fed. Reg. at 22,258 (explaining that the functional approach of 2015 Rule "meant that the vast majority of water features in the United States may have come within the jurisdictional purview of the Federal government"). The agencies now have concluded that an "everything is connected" understanding of water quality does not mean that "everything is regulated" under the federal CWA. *Id.* at 22,309–10. This shift in approach is the basis of the plaintiffs' arbitrary-and-capricious claim. *See* Doc. 30 at 29.

As an initial matter, the mere fact that the agencies shifted their approach does not ease the plaintiffs' burden. Agency action that "changes prior policy" does not get "heightened review." *California v. Azar*, 950 F.3d at 1096 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,

514 (2009)). An agency must "display awareness that it *is* changing position" and explain why. *Id.* at 1097. But it "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; 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, which the conscious change of course adequately indicates." *Id.* In short, the ordinary APA standard applies. *Id.*

And here, the agencies have articulated a satisfactory explanation for their law-based approach to determining their regulatory jurisdiction under the CWA. Responding to the Science Abvisory Board's ("SAB") draft comment that the proposed rule failed to "fully incorporate" the Connectivity Report, 85 Fed. Reg. at 22,261, the agencies explained that although they "used the Connectivity Report to inform certain aspects of the definition of 'waters of the United States,'" they "recognize that science cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the CWA." *Id.*[5] And in answering commenters who complained that the proposed rule "failed to incorporate scientific and ecological principles into the definition," they explained further that "[t]he definition of 'waters of the United States' must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law," and that they cannot "exceed their authority under the CWA to achieve specific scientific, policy, or other outcomes." 85 Fed. Reg. at 22,271; *see also id.* at 22,257, 22,261, 22,288–89, 22,308–311, 22,314, 22,318. Put simply: the outer bounds of the "waters of the United States" are determined by statutory construction, not hydrological connectivity.

The Supreme Court agrees. Although the dissent in *Rapanos* was willing to let the agencies define "waters of the United States" by resort to ecological considerations unmoored from the statutory text, both the plurality and Justice Kennedy rejected that approach. *Rapanos*, 547 U.S. at 749 (plurality op.) (rejecting "[t]he dissent's exclusive focus on ecological factors" which,

[5] The SAB conceded, however, that the Report was a "science, not policy, document," *see* Letter from SAB to Gina McCarthy, EPA-HQ-OW-2018-0149-0386 (Oct. 17, 2014), which did not purport to define the "legal term" "significant nexus" or the set of waters that have that legally relevant connection to navigable waters. 80 Fed. Reg. at 37,065.

"combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters of the United States'"); *id.* at 778 (Kennedy, J., concurring) (rejecting the dissent because it "reads … out" of the Act the "central requirement … that the word 'navigable' in 'navigable waters' be given some importance").[6] And the Court rebuffed the agencies' attempt to assert jurisdiction over the isolated ponds in *SWANCC* based on only an ecological connection to navigable waters. 531 U.S. at 172. The agencies reasonably followed the Court's guidance in treating their jurisdiction as a legal determination.

An interpretation grounded in legal analysis is further justified in light of the difficulties the agencies had defending the 2015 Rule, which took the plaintiffs' preferred approach. Unlike with the 2020 Rule, the agencies tried to ground the expansive jurisdictional reach of the 2015 Rule in the Connectivity Report's "everything is connected" findings. 80 Fed. at 37,057, 37,065. Federal courts across the country rejected that approach. A North Dakota court enjoined the rule on a preliminary basis because it asserted jurisdiction over "vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term." *North Dakota v. EPA*, 127 F. Supp. 3d at 1056. A Georgia court followed, first enjoining the rule for the same reason, *Georgia v. Pruitt*, 326 F. Supp. 3d at 1364, and later issuing a final judgment that the rule exceeded the agencies' statutory authority. *Georgia v. Wheeler*, 418 F. Supp. 3d at 1367 (reasoning in summary judgment order that "merely stating that the agencies have decided that a significant nexus exists based on 'science' and their 'expertise' is not sufficient" to demonstrate that the rule properly interpreted the agencies' authority under the Act). And an Oregon court also issued a preliminary injunction against the 2015 Rule after dismissing the "science behind the idea of drawing broadly the circle of waters that impact admittedly navigable waters" as "almost certainly correct, but not particularly helpful to the question I have in front of me today, which is how much of what Congress could do to protect waters did it do, and that's not a

[6] Justice Kennedy's "significant nexus" test puts some weight on ecological considerations, but as explained above, that test is not controlling, and the plurality explained persuasively that it is not consistent with controlling Supreme Court precedent or the statutory text. *Rapanos*, 547 U.S. at 753.

scientific question." *Or. Cattlemen's Ass'n v. EPA*, No. 19-564, Doc. 54 at 8–9.[7] Especially once multiple federal courts had concluded that agencies had overreached in trying to justify an expansive view of jurisdiction based almost entirely on ecological considerations, the agencies were justified in setting a different course.[8]

2. The agencies considered the CWA's goal to protect water quality in the 2020 Rule and reasonably chose to advance it through cooperative federalism.

The plaintiffs also contend that, in promulgating the 2020 Rule, the agencies disregarded the CWA's objective to protect water quality. They point out that the agencies acknowledged that the CWA's regulatory programs would no longer apply to the waters and wetlands excluded from federal jurisdiction under the Rule, and they claim that the agencies therefore "ignored" or were "indifferen[t]" to the resulting "water quality degradation." Doc. 30 at 24–27. But in fact, the agencies considered the Act's objective to protect water quality and reasonably concluded that the Rule properly advances that objective through cooperative federalism.

The CWA is not the top-down federal regulatory regime the plaintiffs imagine it to be. Keep reading just past the provision plaintiffs cite for its objective: the Act declares it "the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States*" to protect their "land and water resources." 33 U.S.C. § 1251(b) (emphasis added). And that policy finds purchase in every part of the Act, from its direct regulatory programs (states may assume some of those permitting programs) and supplementary regime of water quality standards (states develop those standards for the waters within their borders), *see id.* §§ 1313, 1315, to its numerous non-regulatory programs that support the States in their efforts to protect their sovereign lands and waters. The Act even includes an express *anti*-preemption provision to

[7] The Sixth Circuit had doubts, too, about the agencies' authority to assert such sweeping jurisdiction, but the Supreme Court later determined that circuit courts lacked original jurisdiction over challenges to the rule. *See In re EPA*, 803 F.3d at 807, *vacated sub nom. for lack of original jurisdiction In re United States Dep't of Def.*, 713 F. App'x 489.

[8] The plaintiffs' related argument that the agencies failed to consider the States' "reliance interests" in the prior regime fails for the above reasons, and also because (1) they do not point to anything specific about these interests in the record that the agencies "ignored," *see* Doc. 30 at 30 and (2) many states encouraged the agencies to revise the prior rules precisely because they needed clearer, more predictable standards, *see* 85 Fed. Reg, at 22,272; *infra* section II.B.,

ensure that the States can do what is needed to fully protect their own waters. *See id.* § 1370. A federal-state partnership is built into the Act's DNA, with an emphasis on the state side of the balance.

Recognizing the primary role the CWA contemplates for the States, the agencies reasonably relied on the States (as well as Tribes with respect to tribal land and resources) in advancing the Act's objective to protect water quality. Responding to the very concern the plaintiffs raise here—that making "fewer waters … jurisdictional" would not further the Act's objective to restore and maintain the integrity of the nation's waters—the agencies explained that they "disagreed." 85 Fed. Reg. at 22,269. In their view, that objective would "continue" to be advanced through "[t]he CWA's longstanding regulatory permitting programs" and "non-regulatory measures" "coupled with the controls that States, Tribes, and local entities choose to exercise over their land and water resources." *Id.*; *see also id.* ("Ensuring that States and Tribes retain authority over their land and water resources … helps carry out the overall objective of the CWA."). As the agencies acknowledged, "States and Tribes retain authority to protect and manage the use of those waters that are not navigable waters under the CWA." *Id.* at 22,254 (citing 33 U.S.C. §§ 1251(b), 1251(g), 1370, 1377(a)). And the agencies identified the various waters not regulated under the 2020 Rule as "more appropriately regulated by the States and Tribes under their sovereign authorities," which makes clear that the agencies specifically considered the States' and Tribes' role in protecting water quality in connection with these waters. 85 Fed. Reg. at 22,278 ("[R]elatively permanent bodies of water that are connected to downstream jurisdictional waters only via groundwater are not jurisdictional and are more appropriately regulated by the States and Tribes."); *see also id.* at 22,279 (same conclusion for "waters that do not contribute surface water to a downstream [jurisdictional] water in a typical year"); *id.* at 22,284 (same for "interstate waters without any surface connection to traditional navigable waters"); *id.* at 22,310 (same for certain wetlands not covered by the Rule). The agencies did not "disregard" the Act's objective to protect water quality. Rather, in keeping with the CWA's animating policy "to preserve the primary State responsibility for ordinary land-use

decisions," they relied on the States doing their statutorily preserved part to meet that objective. 85 Fed. Reg. at 22,269.

That reliance is well placed. Consistent with its state-focused approach to protecting the nation's waters, the CWA expressly preserves the States' authority to protect and manage waters not subject to federal jurisdiction. 33 U.S.C. § 1370. And the States use that authority. As shown in detail below, numerous states define "state waters" subject to their regulatory jurisdiction much more broadly than the 2020 Rule (or even any prior rule) defines "waters of the United States," and these waters, including wetlands, are protected by a variety of state-law programs independent of or supplementary to federal regulatory programs, including monitoring programs, permitting programs, and various programs specific to wetlands like water quality standards, mitigation requirements, and state dredge-and-fill programs. *See infra* section II.A.2. And even if faced with a new gap in protection as a result of the 2020 Rule, it should not be assumed that states would not take steps to fill the gap as needed rather than take seriously their responsibility to be good stewards of their sovereign lands and waters. In short, the agencies reasonably relied on the capacity and willingness of the States to do their part to protect the nation's waters.

3. The 2020 Rule's "typical year" requirement is reasonable.

The plaintiffs' argument that the 2020 Rule's "typical year" requirement is arbitrary and capricious fails for similar reasons. The agencies reasonably concluded that the CWA and judicial precedent construing it required limiting tributaries that qualify as "waters of the United States" to those relatively permanent waters that contribute surface water flow to traditionally navigable waters. 85 Fed. Reg. at 22,267–69. That meant drawing a line somewhere between waters that are "relatively permanent" and those that are not, and the agencies adequately explained why requiring sufficient surface flow in a "typical year" was a good way to do that. *Id.* at 22,271, 22,274–75. The plaintiffs complain that not counting waters which do not even contribute surface flow at times during an entire *year* eliminates waters that flow only during extreme precipitation events, but that consequence is consistent with, if not required by, the statutory text. *See Rapanos*, 547 U.S. at 733–34 (giving effect to statutory term "navigable waters" means requiring "at bare minimum, the ordinary presence of water") (plurality op.). And

the plaintiffs' argument that it is "unworkable" to identify a "typical" year calls for impermissible flyspecking, particularly given the agencies' detailed guidance, *see, e.g.*, 85 Fed. Reg. at 22,274; *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017).

II. The other injunction factors cut against granting a preliminary injunction.

A. The plaintiffs have failed to demonstrate a likelihood of imminent irreparable harm.

Plaintiffs "may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). It is not enough to suggest that harm is "possible"—it must be both "likely" and "irreparable." *Winter*, 555 U.S. at 22. And, importantly, to support a preliminary injunction, plaintiffs must show that this harm is likely to occur between the ruling on the motion and final judgment. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018).

The plaintiffs here have a special problem of proof. They seek an injunction against the 2020 Rule based on assertions that it will cause them immediate and irreparable environmental and economic harm. But the 2020 Rule, at least with respect to the effects they challenge, is deregulatory action: it merely withdraws federal regulatory jurisdiction over some waters. *See, e.g.*, Doc. 30 at 40 (arguing that "the Rule will immediately remove the Act's longstanding protections" over certain waters and wetlands). Deregulation is not itself an environmental harm—any such harm would have to come from further action or inaction by third parties. And when "[m]ultiple contingencies must occur before [alleged] injuries would ripen into concrete harms," the "injur[ies are] too speculative to constitute an irreparable harm justifying injunctive relief." *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988); *see also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1173 (9th Cir. 2011) (vacating preliminary injunction because the record contained examples of past genetic contamination, but no examples of contamination under the present circumstances); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (holding that although speculative allegations of immediate harm might create standing, plaintiffs must factually show

an immediate threat of a "real and concrete injury" for a preliminary injunction). So, to show irreparable harm, the plaintiffs must establish a non-speculative chain of causation between the 2020 Rule's withdrawal of federal jurisdiction and the various environmental and economic harms they fear.

But the plaintiffs fail to establish either of two necessary links in that causative chain. First, for all of their concern about potential environmental harm, the plaintiffs offer little more than speculation and assumptions that environmental damage is actually poised to occur as soon as the 2020 Rule goes into effect and while this case is pending (and much less the second-order economic harms they allege). Second, even assuming that some such harm is a threat during the relevant timeframe, the plaintiffs have not provided good reasons to conclude that the States generally cannot or will not prevent such harms through their own independent protections of their own sovereign lands and waters.

1. The plaintiffs offer only speculation and assumptions that environmental harm will occur when the 2020 Rule goes into effect.

The plaintiffs focus on the deregulatory effects of the 2020 Rule and the abstract "threats" of pollution or other harms they say will occur in absence of federal jurisdiction. *See, e.g.*, Doc. 30 at 40 (arguing that "the Rule will immediately remove the Act's longstanding protections" over certain waters and wetlands); *id.* at 41 (same); *id.* at 43 (arguing that "the Rule threatens" pollution); *id.* at 44 (same); *id.* at 45 (contending that many waters will "lose protection"); *id.* at 46 (same); *id.* (asserting that "the Rule threaten[s] flooding"); *id.* at 47–48 (asserting that "[t]he Rule's reduced federal protections imperil" state economic interests). But they fail to connect the withdrawal of federal jurisdiction with any particular concrete, non-speculative threat of actual pollution. This is a necessary showing: when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," the plaintiff bears the burden of showing that "those choices [causing the injury] have been or will be made" by the third parties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992); *see also id.* at 570 (finding no standing because "it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve"); *San*

Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1170 (9th Cir. 2011) (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)); *St. John's United Church of Christ v. F.A.A.*, 520 F.3d 460, 463 (D.C. Cir. 2008); *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 238 (9th Cir. 1980); *Sierra Club v. Hawaii Tourism Auth. ex rel. Bd. of Directors*, 100 Haw. 242, 253 (2002).[9] Yet neither the plaintiffs' motion nor their complaint identifies likely polluters that are poised to exploit the marginal withdrawal of federal regulation and cause the plaintiffs' feared environmental damage. Nor do they offer examples of past harm to provide a baseline, much less a basis for concluding that the 2020 Rule will trigger increased injury. Without any concrete substantiation of their generalized allegations of harm, they cannot establish the likelihood of irreparable harm necessary to support injunctive relief. *See Ctr. for Food Safety*, 636 F.3d at 1173; *Caribbean Marine Servs.*, 844 F.2d at 675; *Los Angeles Mem'l Coliseum Comm'n*, 634 F.2d at 1201.

The plaintiffs' assertions of "proprietary and economic" harm from hypothetical increased flooding and loss of wildlife fare even worse. Doc. 30 at 46. These are simply second-order implications of their alleged environmental harms. But just as with the environmental harms, the plaintiffs equate a change in the scope of federal regulatory jurisdiction with economic harm, yet fail to establish any concrete causative links between them. *Lujan*, 504 U.S. at 570–71; *Ctr. for Food Safety*, 636 F.3d at 1173; *City of S. Lake Tahoe*, 625 F.2d at 238.[10]

In addition to resting on speculation, these various harms do not support *preliminary* injunctive relief because the plaintiffs have not shown that these harms are likely to occur immediately, or at least while this case is pending. *See Nat'l Wildlife Fed'n*, 886 F.3d at 817. Nor is there any obvious reason to anticipate immediate increases in pollution or wetland destruction

[9] Some of these are standing cases, but the Ninth Circuit recognizes that the standing analysis is "similar" to and "persuasive" for the irreparable-harm analysis. *See Caribbean Marine Servs.*, 844 F.2d at 675; *see also Los Angeles Mem'l Coliseum Comm'n*, 634 F.2d at 1201.

[10] Even if they were non-speculative, these economic harms would not support injunctive relief because they are compensable. Although "[e]nvironmental injury … can seldom be adequately remedied by money damages," *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987), "monetary injury is not normally considered irreparable." *Los Angeles Mem'l Coliseum Comm'n*, 634 F.2d at 1202. And since these hypothetical economic harms would be traceable (albeit perhaps with difficulty) to private parties, it is no answer to say that sovereign immunity prevents recovery and thus makes their harms "irreparable."

at the moment the 2020 Rule goes into effect. *See* Capps Decl. ¶ 8 ("I am not aware of any immediate or imminent risks of harm or pollution to Georgia's waters that would result from the implementation of the Rule."); Macy Decl. ¶ 10 (same for Nebraska); Mettler Decl. ¶ 9 (same for Indiana); Roberts Decl. ¶¶ 6–9 (same for South Dakota); Savage Decl. ¶¶ 12–13 (same for Texas); Parfitt Decl. ¶¶ 10–12 (same for Wyoming). So, even if the plaintiffs' feared harms might hypothetically manifest someday, a preliminary injunction is not needed to prevent them.

2. Even assuming a potential risk of environmental harm resulting from marginally fewer waters falling under federal protection, the plaintiffs have not shown that the States generally cannot or will not prevent that harm through their own independent protections of their sovereign lands and waters.

a. In our federalist system, the States retain the sovereign authority to look out for their own citizens and interests. As the CWA recognizes, that authority extends to protecting their sovereign lands and waters. *See, e.g.*, 33 U.S.C. §§ 1251(g), 1370; *see generally* section I.B.2.

The protections States already have in place for their waters may well suffice to prevent any threatened environmental harm resulting from the 2020 Rule's withdrawal of federal regulatory jurisdiction. States typically define the "state waters" over which they assert regulatory jurisdiction much more broadly than "waters of the United States,"[11] often expressly including ephemeral and intermittent waters and wetlands.[12] And the States independently enforce their own water-quality laws, including with respect to construction that may impact state waters,[13] as well as water-purity and pollution standards.[14] States also administer

[11] *See, e.g.*, Iowa Code Ann. § 455B.171(41); Md. Code. Ann., Envir. § 5-101(l); Minn. Stat. Ann. § 115.01(22); Neb. Rev. Stat. Ann. § 81-1502(21); N.D. Cent. Code Ann. § 61-01-01; Or. Rev. Stat. Ann. § 536.007(12); Tex. Water Code Ann. §§ 26.001(5), 26.023.

[12] *See, e.g.,* Ariz. Rev. Stat. Ann. § 49-201(41); 45-101(9); 7 Del. Admin. Code § 74012.0; Minn. Stat. Ann. § 103G.005(15),(17); Or. Rev. Stat. Ann. § 196.800(15); Tenn. Code Ann. § 69-3-103(46); Tex. Water Code Ann. § 11.021; Wyo. Stat. Ann. § 35-11-103(c)(vi).

[13] *See, e.g.,* Fla. Stat. Ann. § 403.088; Iowa Code Ann. § 455B.173; Md. Code Ann., Envir. § 5-502; Minn. Stat. Ann. § 103G.301; Neb. Rev. Stat. Ann. § 81-1506(2)(f); Or. Rev. Stat. Ann. § 390.835.

[14] *See, e.g.,* Ariz. Rev. Stat. Ann. §§ 45-401–45-704; Ark. Code Ann. §§ 15-22-906, 915; Ky. Rev. Stat. Ann. §§ 224.70-100–150; Fla. Stat. Ann. § 403.062–623; Iowa Code Ann. §§ 455B.176A, 455B.186, 455B.263, 455B.267; Md. Code Ann., Envir., § 9-314; Minn. Stat. Ann. § 115.03; Mo. Rev. Stat. §§ 644.006–150; Mont. Code Ann. §§ 75-5-101–641; Neb. Rev.

comprehensive wetland-protection programs that include dredge-and-fill programs and prohibitions, mitigation requirements, and water quality monitoring.[15]

Take Georgia as just one example. Georgia law defines "waters of the state" as "any and all rivers, streams, creeks, branches, lakes, reservoirs, ponds, drainage systems, springs, wells, and all other bodies of surface or subsurface water, natural or artificial." O.C.G.A. § 12-5-22(13). Georgia regulates the discharge of pollutants in waters of the state, *id.* §§ 12-5-29, -30, and authorizes penalties for violations. *Id.* §§ 12-5-25, -53. Another Georgia statute requires permits for "land-disturbing activities" that could lead to erosion into state waters or cause sediment to build up in state waters, O.C.G.A. §§ 12-7-7, -9, -11, and penalizes violations, *id.* § 12-7-15. Thus, Georgia's waters will not be any less protected under the 2020 Rule. Capp Decl. ¶¶3, 7.

There are many other examples of States protecting waters beyond those subject to federal regulatory jurisdiction. Here are just a few:

- West Virginia defines "waters" of the State to include essentially all wetlands and all water, on or beneath the earth's surface, W. Va. Code § 22-11-3(23), and makes it unlawful to pollute waters of the State. *Id.* §§ 22-11-8(b)(1), 22-12-4(b), (c).
- The Alabama Department of Environmental Management has authority over water quality for "[a]ll waters of any river, stream, watercourse, pond, lake, coastal, ground or surface water, wholly or partially within the state, natural or artificial," Ala. Code §§ 22-22-1(b)(2), and it uses this authority to set water quality standards to protect water quality independent of shifting federal standards. Kitchens Decl. ¶ 2.
- Texas defines "water in the state" very broadly, including: "all … bodies or surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable." Tex. Water Code § 26.001(5); Galindo Decl. ¶ 5. Texas regulates pollution and water quality for all of its waters, including wetlands. 30 Tex. Admin. Code Ch. 307; Galindo

Stat. Ann. § 81-1504; N.M. Stat. Ann. §§ 74-6-1–17; N.D. Cent. Code §§ 61-28-01–09; Or. Rev. Stat. Ann. §§ 448.265, 468B.020; Wyo. Stat. Ann. § 35-11-301.

[15] *See, e.g.,* Ark. Code Ann. § 15-22-1007; Ind. Code Ann. §§ 13-18-22-1–11; Fla. Stat. Ann. §§ 373.019(27), 373.414; Md. Code Ann., Envir. §§ 5-903–911; Minn. Stat. Ann. §§ 103G.221–2375; N.Y. Envtl. Conserv. Law §§ 24-0101–1305; Or. Rev. Stat. Ann. §§ 196.674, 196.678; Tex. Water Code Ann. § 11.502.

Decl. ¶ 6–10. And Texas regulates ephemeral water features, like stormwater runoff. Savage Decl. ¶ 6.

- Pennsylvania law protects "all … bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial," 35 Pa. Stat. § 691.1, and it requires a permit for activities that create even a risk of pollution into the State's waters. *Id.* § 691.402.
- Wyoming defines "waters of the state" to include all surface or ground water, including wetlands and perennial or ephemeral flow, Wyo. Stat. Ann. § 35-11-103(c)(vi), and the State runs its own permitting system to prevent discharge or pollutants or alteration of the physical properties of the waters of the State. Wyo. Stat. Ann. § 35-11-301; Parfitt Decl. ¶¶ 3–4.
- Ohio and Wisconsin similarly define "waters of the state" as all accumulated waters, above or below ground, within the State, Ohio Rev. Code Ann. § 6111.01(H); Wis. Stat. § 281.01(18), they prohibit pollution with detailed regulatory schemes, Ohio Rev. Code Ann. § 6111.04(A)(1); Wis. Admin. Code NR ch. 102, and they protect wetlands with permitting requirements, Ohio Rev. Code Ann. §§ 6111.022, 6111.024, 6111.028; Wis. Stat. § 281.36(3b)(b), (3g), (3m).

The plaintiffs have not demonstrated that these existing laws and many others like them could not prevent their feared environmental harms.

In the unlikely event that existing state protections prove inadequate, the plaintiffs offer no real basis for their assumption that the States will sit idly by while their waters and wildlife are damaged. States are best positioned to address local threats as they manifest. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631–32 (2013). That is why the CWA anticipates and requires state leadership in this area and expressly avoids preempting state laws. *See* 33 U.S.C. § 1370; *see also, e.g.*, *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984) (finding no federal preemption of state regulation over "waters within the states' jurisdiction"); *United States v. Cooper*, 173 F.3d 1192, 1200 (9th Cir. 1999) (federal regulations under the CWA "do not usurp

local control over the disposal of sewage sludge"). If States uncover specific threats to their waters, they can and will address them.[16]

It is no answer to say, as the plaintiffs do, that they have no time to update their regulations before the 2020 Rule goes into effect. The likelihood of a deregulatory replacement for the beleaguered 2015 Rule was apparent at least as early as February 28, 2017, when President Trump signed Executive Order 13778, which directed the agencies to review and revise the WOTUS regulations. Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12,497, 12,497–98 (Feb. 28, 2017). And planning could have certainly begun in earnest by December 2018, when the EPA announced what would become the 2020 Rule. The proposed rule was posted for public comment on February 14, 2019; the 2015 Rule was repealed on October 22, 2019, Definition of "Waters of the United States" — Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019); and the 2020 Rule was finalized on January 23, 2020. In short, the plaintiffs have had years to prepare for something like the 2020 Rule going into effect on June 22, 2020.[17]

b. The plaintiffs also contend that "upstream" states will send them pollution downstream, which they are powerless to stop because they have no "direct regulatory authority" over other states' sovereign lands and waters. They are right about not being allowed to regulate within

[16] The plaintiffs note that some states have laws that prevent state laws from imposing water regulations more stringent than federal requirements. Sullivan Decl. ¶23, Doc. 30-18 (citing *State Constraints*, Environmental Law Institute, 8–9 (May 2013), https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf (identifying, in 2013, thirteen States with laws that prevent water regulation more stringent than the federal standard). But many of those prohibitions apply only to certain areas of water regulation (like agricultural-related discharges). And, more importantly, the plaintiffs' concern in this suit is not over the *level* of regulation, but over the *scope* of the "waters of the United States." A "no more stringent" law typically prevents imposing more demanding standards than federal law, but does not prohibit states from asserting regulatory jurisdiction beyond the "waters of the United States" subject to federal regulation. For example, Arizona and Wisconsin are both among those thirteen states, *id.* at 12, but they define state waters much more broadly than the 2020 Rule defines federal waters. *See*, *e.g.*, Ariz. Rev. Stat. Ann. §§ 49-201(41), 45-101(9); Wis. Stat. § 281.01(18); Idaho Code § 39-103(18).

[17] The plaintiffs also note that there may be "political obstacles" to expanded water regulation in their States. Doc. 30 at 45. But the possibility that the people of a state may, through the political process, decide against increased water regulation directly undercuts the plaintiffs' assertion of irreparable harm and favors the Court staying its hand to allow the political process to work.

other states' borders—this is a feature, not a bug, of our constitutional structure—but their concern is nonetheless speculative and overblown.

First, as just explained, using these harms as a basis for a preliminary injunction depends on multiple speculative contingencies: that unidentified third parties will immediately begin polluting waters; that upstream states will not act to prevent the pollution; that the pollution will make its way to the plaintiffs in concentrations significant enough to matter; and (last but not least) that any resulting harm will occur before this suit can be litigated to finality. The plaintiffs have corroborated none of these mostly implicit assumptions. For example, Maryland's claim that the Chesapeake Bay will be harmed by upstream pollution is supported by nothing more than a bare assertion that removing CWA protections "will make it easier for developers to develop [] wetland resources," and development, in turn, "will likely remove the flood protection service those wetlands provide." Currey Decl. ¶7, Doc. 30-14; *see also* Doc. 30 at 43. Yet this claim assumes that developers are going to start work in this area right after the 2020 Rule's effective date, that state and local regulations have nothing to say about this conduct, and that the (hypothetical and unspecified) development is likely to somehow cause enough degradation quickly enough that the Chesapeake Bay will then be damaged.

The same weaknesses infect the plaintiffs' other examples. Maine asserts that it "is less protected and is thus harmed" simply because "the 2020 Rule is less protective," Witherhill Decl. ¶9, Doc. 30-8, yet fails to discuss any specific water sources or potentially polluting activities. The motion likewise refers to Michigan's reliance on "other Great Lake States" to protect its water resources, without describing what conduct it fears the 2020 Rule will allow—and that those other Great Lake States will permit. Seidel Decl. ¶¶4-5, Doc. 30-21. And Rhode Island not only makes similar unsupported assumptions, but also claims harm based on an *additional* layer of speculation that other States will "reduce their regulatory jurisdiction" in response to the 2020 Rule. Horbert Decl. ¶¶8–9, Doc. 30-3.

Second, the examples of harm that the plaintiffs give ignore alternative remedies or protections. Indeed, some of the examples involve feared upstream pollution from fellow state plaintiffs in this very case. So if, taking one of plaintiffs' examples, New Jersey receives

upstream pollution from New York, the two States should be able to collaborate on a solution. Dow Decl. ¶¶13–14, Doc. 30-7. Likewise for the Chesapeake Bay, which borders Maryland, Virginia, and D.C.—all members of the plaintiffs' coalition. Currey Decl. ¶7, Doc. 30-14; *see also* Md. Code. Ann., Envir., § 9-321 (directing the state environmental department to "[c]ooperate with other states in the Chesapeake Bay region" to protect the Bay). And so too for the Potomac River watershed, most of which Maryland and Virginia—plaintiff States—share. Doc. 30 at 44. Power to avoid these harms thus lies with the plaintiffs themselves—and such harms are certainly no basis for injunctive relief within the boundaries of the State Intervenors and others.

The plaintiffs also make no attempt to explain why the existing water protections in the upstream states they identify are inadequate. The plaintiffs single out New Hampshire, for instance, Doc. 30 at 43, but that State extensively regulates both "surface waters of the state" (which include perennial and seasonal waters) and "wetlands" (which include areas saturated by either "surface water or groundwater"). N.H. Rev. Stat. Ann. §§ 485-A:2(XIV), (X); N.H. Code Admin. R. Env-Wq 1701.01–52. And New Hampshire requires permits for any person to discharge sewage or waste into "surface water or groundwater of the state," N.H. Rev. Stat. Ann. § 485-A:13, or to alter terrain around a surface water of the State, *id.* § 485-A:17. Delaware likewise defines "waters of the state" to include ephemeral streams and wetlands adjacent to waters, *see* 7 Del. Admin. Code § 7401-2.0, and requires permits for activities that discharge pollutants or "cause or contribute to withdrawal of ground water or surface water." 7 Del. C. § 6003. Nevada's definition of "waters of the state" is similarly broad: "All bodies or accumulations of water, surface and underground, natural or artificial." Nev. Rev. Stat. § 445A.415. And Nevada, too, heavily regulates discharge of pollutants in state waters. *Id.* §§ 445A.490; 445A.520.

In short, the plaintiffs have done no more than identify "upstream" states and speculate that they will allow pollution which may reach the plaintiffs at some point in the future. But the mere existence of upstream states is not enough. Rather, the plaintiffs must identify imminent, concrete risks to their own waters. Their failure to engage with the existing regulatory

protections in these upstream states underscores that the plaintiffs have not shown a likelihood of imminent and concrete irreparable harm.

B. A preliminary injunction is not in the public interest.

The plaintiffs identify two public interests: protecting the integrity of the nation's waters and "maintaining the ability of the agencies and the States and Cities to operate programs to achieve the CWA's water quality objective." Doc. 30 at 48–49. But a preliminary injunction would not serve either interest. The first interest fails at the outset: the plaintiffs have only speculated but not demonstrated that any State's waters will be degraded because of the 2020 Rule. And the second weighs *against* a preliminary injunction: The States have a sovereign interest in protecting their waters, *see Tarrant*, 569 U.S. at 631; *United States v. Alaska*, 521 U.S. 1, 5 (1997), and the public has a strong interest in preserving that sovereignty (which the CWA itself respects), *see New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). The "prospect of significant interference with … self-government" weighs against injunctive relief. *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989); *see also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). There are clear and immediate benefits to freeing the States from redundant federal requirements. *See* Capp Decl. ¶ 10 (explaining that the 2020 Rule will expedite the permitting process by eliminating redundant regulation) Parfitt Decl. ¶ 11 (same). Thus, a preliminary injunction would just as likely impede the States' stewardship of their natural resources.

The public also has strong interests in preserving the clarity and predictability that the 2020 Rule brings. The 2015 Rule triggered a years-long period of patchwork, shifting regulation. *See supra* II.A.2.a. That "status quo," which the plaintiffs seek to preserve, was inherently unstable. Doc 30 at 49; Swonke Decl. ¶ 7. The 2020 Rule will restore a single, clear standard so that states, businesses, and environmental organizations can operate under a static, predictable regulatory regime. *See* Macy Decl. ¶ 8; Mettler Decl. ¶ 6; Savage Decl. ¶¶ 11–12; Singletary Decl. ¶ 4;

Swonke Decl. ¶¶ 7–8. A preliminary injunction would undo this advantage of the 2020 Rule and is therefore counter to the public interest for that reason as well.

III. A universal injunction is not warranted.

As explained above, the plaintiffs have not established that they are entitled to a preliminary injunction of any kind. Their request for a "nationwide injunction" applying to themselves and all other States—including the 23 State Intervenors who affirmatively oppose this relief—stands on even shakier ground. To begin with, courts and commentators nationwide are engaged in a vibrant and hotly contested debate over the extent to which the Constitution confers on district courts the power to enter universal injunctive relief. The difficult constitutional questions that debate poses are reason enough to limit any relief this Court might grant to the plaintiffs' States.

But even assuming this Court has the power to entertain the plaintiffs' request, universal relief is also unwarranted because the plaintiffs' isolated, speculative claims about releases in "upstream" states affecting downstream water quality do not meet the high bar required to justify the extraordinary remedy of a universal injunction. At the least, it is the plaintiffs' burden to show that a universal injunction is "necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). But the need to make that difficult showing magnifies the deficiencies in plaintiffs' attempted showing of irreparable harm. As explained above, the plaintiffs have failed even to adequately connect the 2020 Rule's withdrawal of jurisdiction over some waters and wetlands to *any* concrete and imminent environmental harm, because they neither identify concrete sources of potential harm nor establish that the States will not prevent that harm from occurring while this case is pending. Much less have they established a causal chain between their asserted harms and some action in *every state in the country* that is likely to cause that harm absent a preliminary injunction. (The 2020 Rule's effects in Georgia or Alabama, for instance, seem quite unlikely to cause any ill effects for any of the plaintiffs—the closest of which are Virginia and Illinois, several states away and decidedly *up*stream.) Indeed, the plaintiffs do not even try, instead asserting only that "the Nation's waters are highly interconnected." Doc. 30 at 50. Surely more is needed to justify the strong medicine of a

universal injunction, especially with almost half the states in the country intervening to oppose having that "relief" imposed within their sovereign borders. *See Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) (noting courts' duty to ensure that injunctive relief is not "more burdensome than necessary to redress the complaining parties" (quoting *Califano*, 442 U.S. at 702–03)).

As for the plaintiffs' appeal to "practicality and workability," the litigation history of the 2015 Rule undercuts their suggestion that only a universal injunction is workable. Doc. 30 at 50. In lawsuits challenging the 2015 Rule, a number of courts issued preliminary injunctions blocking the 2015 Rule only in those States appearing as plaintiffs before those courts.[18] There is even less reason for the Court to issue a universal injunction here, where staying its hand would only allow a withdrawal of federal jurisdiction instead of its expansion—with its attendant regulatory and administrative costs. In short, if the Court finds it necessary to enjoin the implementation of the 2020 Rule, it should do so only within the plaintiffs' geographic borders.[19]

CONCLUSION

For the reasons set out above, this Court should deny the plaintiffs' motion for a preliminary injunction.

[18] *See* Order, *North Dakota v. U.S. Envtl. Prot. Agency*, Case No. 3:15-cv-59 (N.D. Aug. 27, 2015 (ECF No. 70) (enjoining 2015 Rule in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming); Order, *id.* (Sept. 18, 2018) (clarifying that previous injunction also applied to Iowa); Order, *Georgia v. McCarthy*, Case No. 2:15-cv-79 (S.D. Ga. June 8, 2018) (ECF No. 174) (enjoining the 2015 Rule in Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin); Order, *Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex. Sept. 12, 2018) (ECF No. 140) (enjoining the 2015 Rule in Louisiana, Mississippi, and Texas).

[19] Because the State Intervenors are not yet parties to this action, they were unable to seek leave in advance of filing this proposed opposition (attached to their motion for intervention) to file an opposition in excess of 25 pages, *see* Local Rule 7-4(b). The State Intervenors have complied with the stipulated page limits for the original parties to the action, *see* Doc. 12 (permitting 40 pages), and they request that, if permitted to file an opposition, they be permitted to file this opposition not exceeding 35 pages.

Respectfully submitted.

/s/ *Bradley A. Benbrook*
Bradley A. Benbrook (SBN 177786)
Benbrook Law Group
400 Capitol Mall, Ste 2530
Sacramento, CA 95814
Tel: (916) 447-4900
Fax: (916) 447-4904
Email: brad@benbrooklawgroup.com
Counsel for State Intervenors

PATRICK MORRISEY
West Virginia Attorney General

/s/ Lindsay S. See
Lindsay S. See*
Solicitor General
Benjamin E. Fischer*
Thomas T. Lampman*
Assistant Solicitors General
West Virginia Office of the Attorney General
1900 Kanawha Blvd. East
Building 1, Room E-26
Tel: (304) 558-2021
Fax: (304) 558-0140
Email: lindsay.s.see@wvago.gov
Counsel for Intervenor State of West Virginia

KEVIN G. CLARKSON
Attorney General of Alaska

/s/ Jennifer Currie
Jennifer Currie
Senior Assistant Attorney General
Alaska Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, AK 99501-1994
Tel: (907) 269-5100
Fax: (907) 276-3697
Email: Jennifer.currie@alaska.gov
Counsel for Intervenor State of Alaska

CHRISTOPHER M. CARR
Attorney General of Georgia

/s/ Andrew A. Pinson
Andrew A. Pinson
Solicitor General
Ross W. Bergethon*
Deputy Solicitor General
Drew F. Waldbeser*
Assistant Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Tel: (404) 651-9453
Fax: (404) 656-2199
Email: apinson@law.ga.gov
Counsel for Intervenor State of Georgia

STEVE MARSHALL
Attorney General of Alabama

/s/ A. Barrett Bowdre
A. Barrett Bowdre
Deputy Solicitor General
Office of the Attorney General
501 Washington Ave.
P.O. Box 300152
Montgomery, AL 36130
Telephone: (334) 353-8892
Fax: (334) 353-8400
E-mail: barrett.bowdre@AlabamaAG.gov
Counsel for Intervenor State of Alabama

LESLIE RUTLEDGE
Attorney General of Arkansas

/s/ Dylan L. Jacobs
Dylan L. Jacobs*
Assistant Solicitor General
Office of the Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
Tel: (501) 682-3661
Fax: (501) 682-2591
Email: Dylan.Jacobs@ArkansasAG.gov
Counsel for Intervenor State of Arkansas

LAWRENCE WASDEN
Attorney General of Idaho

/s/ Mark Cecchini-Beaver (with permission)
Mark Cecchini-Beaver
Deputy Attorney General
Office of the Attorney General
Environmental Quality Section
1410 N. Hilton, 2nd Floor
Boise, ID 83706
Tel: (208) 373-0494
Fax: (208) 373-0481
Email: Mark.Cecchini-Beaver@deq.idaho.gov
Counsel for Intervenor State of Idaho

DEREK SCHMIDT
Attorney General of Kansas

/s/ Jeffrey A. Chanay
Jeffrey A. Chanay*
Chief Deputy Attorney General
Office of the Attorney General
120 SW 10th Ave., 3rd Floor
Topeka, Kansas 66612
Tel: (785) 368-8435
Email: jeff.chanay@ag.ks.gov
Counsel for Intervenor State of Kansas

JEFF LANDRY
Attorney General of Louisiana

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill*
Solicitor General
Joseph Scott St. John*
Deputy Attorney General
Louisiana Department of Justice
1885 N. 3rd St.
Baton Rouge, LA 70802
Tel: (225) 456-7544
Email: MurrillE@ag.louisiana.gov
Counsel for Intervenor State of Louisiana

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General of Indiana
Office of the Indiana Attorney General
302 W. Washington Street, IGCS, 5th Floor
Indianapolis, Indiana
Tel: (317) 233-8292
Fax: (317) 233-8292
Email: tom.fisher@atg.in.gov
Counsel for Intervenor State of Indiana

DANIEL CAMERON
Attorney General of Kentucky

/s/ Carmine Iaccarino
Carmine Iaccarino*
Executive Director, Office of Civil & Environmental Law
Office of the Attorney General
700 Capitol Avenue
Frankfort, Kentucky 40601
Tel: (502) 696-5650
Email: Carmine.Iaccarino@ky.gov
Counsel for Intervenor Commonwealth of Kentucky

LYNN FITCH
Attorney General of Mississippi

/s/ Kristi H. Johnson
Kristi H. Johnson
Solicitor General
Office of the Attorney General
P.O. Box 220
Jackson, Mississippi 39205
Tel: (601) 359-5563
Email: Kristi.Johnson@ago.ms.gov
Counsel for Intervenor State of Mississippi

TIMOTHY C. FOX
Attorney General of Montana

/s/ Melissa Schlichting
Melissa Schlichting
Deputy Attorney General
Office of the Attorney General
215 North Sanders / P.O. Box 201401
Helena, MT 59620-1401
Tel: (406) 444-3602
Email: MSchlichting@mt.gov

Counsel for Intervenor State of Montana

ERIC S. SCHMITT
Attorney General of Missouri

/s/ Julie Marie Blake
Julie Marie Blake*
Deputy Solicitor General
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102
Tel: (573) 751-3321
Fax: (573) 751-0774
Email: Julie.Blake@ago.mo.gov
Counsel for Intervenor State of Missouri

DOUGLAS J. PETERSON
Attorney General

/s/ James A. Campbell
James A. Campbell*
Solicitor General
Justin D. Lavene*
Assistant Attorney General
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
Email: justin.lavene@nebraska.gov
Email: jim.campbell@nebraska.gov
Tel: (402) 471-2682
Counsel for Intervenor State of Nebraska

DAVE YOST
Attorney General of Ohio

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General
Office of Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215
Tel: (614) 728-7511
Email: bflowers@ohioattorneygeneral.gov
Counsel for Intervenor State of Ohio

ALAN WILSON
Attorney General

/s/ James Emory Smith, Jr.
James Emory Smith, Jr.*
Deputy Solicitor General
Office of the Attorney General
1000 Assembly Street, Room 519
Columbia, South Carolina 29201
Tel: (803) 734-3680

WAYNE STENEHJEM
Attorney General of North Dakota

/s/ Margaret I. Olson
Margaret I. Olson*
Assistant Attorney General
North Dakota Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501
Tel: (701) 328-3640
Fax: (701) 328-4300
Email: maiolson@nd.gov
Counsel for Intervenor State of North Dakota

MIKE HUNTER
Attorney General of Oklahoma

/s/ Mithun Mansinghani
Mithun Mansinghani
Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Phone: (405) 522-4392
Fax: (405) 521-4518
Email: Mithun.Mansinghani@oag.ok.gov
Counsel for Intervenor State of Oklahoma

JASON R. RAVNSBORG
Attorney General

/s/ Ann F. Mines Bailey
Ann F. Mines Bailey*
Assistant Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Tel: (605) 773-3215
Fax: (605)773-4106
Email: ann.mines@state.sd.us
Counsel for Intervenor State of South Dakota

KEN PAXTON
Attorney General of Texas

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
Office of the Attorney General

Email: esmith@scag.gov
Counsel for Intervenor State of South Carolina

HERBERT H. SLATERY III
Attorney General and Reporter of Tennessee

/s/ Elizabeth P. McCarter
Elizabeth P. McCarter
Senior Assistant Attorney General
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
Tel: (515) 532-2582
Email: lisa.mccarter@ag.tn.gov
Counsel for Intervenor State of Tennessee

SEAN D. REYES
Attorney General of Utah

/s/ Daniel Burton
Daniel Burton*
Chief Policy Counsel
Office of the Attorney General
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, Utah 84114-2320
Tel: (801) 538-9600
Email: danburton@agutah.gov
Counsel for Intervenor State of Utah

P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 936-1700
Fax: (512) 474-2697
Email: Kyle.Hawkins@oag.texas.gov
Counsel for Intervenor State of Texas

BRIDGET HILL
Attorney General of Wyoming

/s/ James C. Kaste
James C. Kaste
Deputy Attorney General
Office of the Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
Tel: (307) 777-6946
Fax: (307) 777-3542
Email: james.kaste@wyo.gov
Counsel for Intervenor State of Wyoming

*Application for Admission Pro Hac Vice Pending or Forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I served this opposition to plaintiffs' motion for a preliminary injunction by filing it with this Court's ECF system.

/s/ *Andrew A. Pinson*
Andrew A. Pinson