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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 State of California, *et al.*,  
16 *Plaintiffs,*  
17 v.  
18 Andrew Wheeler, *et al.*,  
19 *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, 17<sup>th</sup> Floor  
Judge: Honorable Richard Seeborg  
Action Filed: May 1, 2020

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## 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

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

13 *Second*, the plaintiffs have not demonstrated the other factors required for a preliminary  
14 injunction. They have not shown that irreparable harm is likely to result from implementing the  
15 2020 Rule, especially not while this action is pending. The 2020 Rule is a withdrawal of federal  
16 jurisdiction, and the plaintiffs fail to connect that deregulatory action to concrete harms. They  
17 fail to show with any specificity how or when environmental damage will occur, and they all but  
18 dismiss the reality that states—including the state plaintiffs themselves—can and in many ways  
19 already do protect their sovereign lands and waters without depending on a federal regulatory  
20 scheme. Absent these showings, their alleged harms are too speculative to support preliminary  
21 injunctive relief. As for the public interest, a preliminary injunction would just as likely impede  
22 the States' stewardship of their natural resources, and the public has strong interests in preserving  
23 the clarity and predictability that the 2020 Rule brings.

24 *And third*, even if the plaintiffs could show some imminent and concrete harm, they  
25 certainly have not shown that a universal injunction is appropriate. Assuming such relief is  
26 within the power of a federal court to grant, injunctive relief must sweep no further than what is  
27 necessary to provide complete relief to the plaintiffs. The plaintiffs have not come close to  
28

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

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

### 5 STATEMENT

6 The statutory term “waters of the United States” limits the geographic reach of federal  
7 regulatory jurisdiction under the Clean Water Act (“CWA” or “Act”). Most notably, the Act’s key  
8 permitting programs for discharges of pollutants, 33 U.S.C. § 1342 (section 402), and “dredged  
9 or fill material,” *id.* § 1344 (section 404), require permits for discharges into “navigable waters,”  
10 which the Act defines as “the waters of the United States, including the territorial seas,” *Id.*  
11 § 1362(7). And the Act requires states to develop water quality standards—which designate the  
12 use for which a given body of water is to be protected, and then set criteria that must be met to  
13 safely allow that use—for “waters of the United States” within their borders. *See id.* § 1313. That  
14 term is not used to limit the reach of the Act’s many non-regulatory programs, including grant,  
15 research, and planning programs that support the States’ efforts to control pollution and protect  
16 water quality. *See, e.g., id.* § 1255(a)(1) (providing grants to states for researching ways to  
17 combat pollution in “any waters”). Nor does the CWA limit the States’ sovereign authority to  
18 regulate other waters or wetlands beyond those considered “waters of the United States. *See id.* §  
19 1370 (declaring that “[e]xcept as expressly provided in this chapter, nothing in this chapter shall  
20 ... be construed as impairing or in any manner affecting any right or jurisdiction of the States  
21 with respect to the waters (including boundary waters) of such States”).

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

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

13         Nonetheless, in 2015, the agencies published a new rule interpreting "waters of the United  
14 States" in a way that rendered the "vast majority of the nation's water features" jurisdictional.  
15 U.S. EPA & Department of the Army, *Economic Analysis of the EPA-Army Clean Water*, at 11  
16 (May 20, 2015) ("2015 Rule Economic Analysis") (Docket ID: EPA-HQ-OW-2011-0880-  
17 20866), <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866>. As a  
18 consequence, many States, including most of the State Intervenors here, challenged the 2015  
19 Rule. By September of 2019, the 2015 Rule had been enjoined in more than half of the States—  
20 in several cases, based on the conclusion that the agencies had again exceeded their statutory  
21 authority. 85 Fed. Reg. at 22,259; *see Or. Cattlemen's Ass'n v. EPA*, No. 19-00564 (D. Or. July  
22 26, 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1367, 1381–83 (S.D. Ga. 2019); *Georgia v.*  
23 *Pruitt*, 326 F. Supp. 3d 1356, 1364 (S.D. Ga. 2018); *Texas v. EPA*, No. 3:15-cv-162, 2018 WL  
24 4518230, at \*1 (S.D. Tex. Sept. 12, 2018); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056  
25 (D.N.D. 2015); *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015), *vacated sub nom. In re United*  
26 *States Dep't of Def.*, 713 F. App'x 489 (6th Cir. 2018).

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

1 of the United States” the kinds of waters and wetlands the Supreme Court had indicated were  
 2 permissibly included (relatively permanent waters that contribute surface flow to traditionally  
 3 navigable waters, and wetlands adjacent to those waters), and they left out those waters about  
 4 which the Court had expressed doubt (ephemeral waters and isolated wetlands). *See* 85 Fed. Reg.  
 5 22,250, 22,251–52. The result was an interpretation of “waters of the United States” that left  
 6 fewer waters subject to federal jurisdiction.

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

## 14 LEGAL STANDARD

15 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on  
 16 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
 17 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat.*  
 18 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The likelihood of success is the most important  
 19 factor, *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017), but “[a]ll  
 20 four elements must be satisfied.” *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir.  
 21 2019).

## 22 ARGUMENT

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

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

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

1 (1984), but they do not even argue that the agencies’ interpretation fails at step one of that  
 2 analysis—i.e., that Congress has directly spoken to the precise question at issue. *Id.* at 842–43.  
 3 Rather, they contend that the rule is not even a *permissible* or *reasonable* interpretation of the  
 4 CWA under step two. *See id.* at 843 (“[I]f the statute is silent or ambiguous with respect to the  
 5 specific issue, the question for the court is whether the agency’s answer is based on a permissible  
 6 construction of the statute.”). That is a difficult standard to meet. *See id.* at 844 (“[L]egislative  
 7 regulations are given controlling weight unless they are arbitrary, capricious, or manifestly  
 8 contrary to the statute.”); *Hawaii ex. rel. Atty. Gen. v. Fed. Emergency Mgmt. Agency*, 294 F.3d  
 9 1152, 1159 (9th Cir. 2002) (explaining that when an agency’s interpretation is reasonable, it must  
 10 prevail, even if the court disagrees with it). And the plaintiffs have not met it here. The 2020  
 11 Rule’s exclusion of “ephemeral features” and isolated wetlands from the definition of “waters of  
 12 the United States” is consistent with both precedential and persuasive caselaw addressing the  
 13 interpretation of that term. And the agencies’ elimination of “interstate waters” as a standalone  
 14 category is not just a permissible interpretation of “waters of the United States,” but also  
 15 necessary to ensure that the Rule does not sweep in waters with no connection to navigable  
 16 waters.

17 **1. The CWA does not require the agencies to assert federal jurisdiction over**  
 18 **“ephemeral streams” or physically isolated wetlands.**

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

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

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

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

10 The plaintiffs challenge as contrary to the CWA the 2020 Rule’s exclusion of both  
11 “ephemeral” waters and wetlands that are not physically connected to jurisdictional waters. Doc.  
12 30 at 22–23. But the agencies’ interpretation is consistent with the only binding precedent that  
13 speaks to the issue and with persuasive authority around the country. By contrast, the opinion the  
14 plaintiffs depend on, Justice Kennedy’s concurring opinion in *Rapanos*, is not precedential, and  
15 even if it were, it would not make the agencies’ interpretation unreasonable.

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

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

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

1 the 2020 Rule nonetheless maintains that interpretation in keeping with *Riverside Bayview*. See  
2 85 Fed. Reg. at 22,251 (including as jurisdictional “adjacent wetlands,” defined as “wetlands that  
3 abut a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment  
4 of a jurisdictional water”).

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

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

1 ditches or drains, eventually connected to navigable waters a mile or more away. 547 U.S. at  
2 757.

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

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

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

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

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

21 \_\_\_\_\_  
 22 <sup>1</sup> That measured approach stands in stark contrast to the agencies’ prior attempt. By the agencies’  
 23 own admission, the 2015 Rule rendered the “vast majority of the nation’s water features  
 24 jurisdictional.” 2015 Rule Economic Analysis, at 11, [https://www.regulations.gov/document?](https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866)  
 25 [D=EPA-HQ-OW-2011-0880-20866](https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866). Unsurprisingly, numerous federal courts enjoined or  
 26 remanded the 2015 Rule on the ground that it exceeded the agencies’ authority under the CWA,  
 27 including for flouting some of the limitations from the decisions described above. The District  
 28 of North Dakota, for instance, enjoined the agencies’ 2015 Rule after expressing concern that  
 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

1           b. The agencies’ interpretation is not foreclosed by a *Rapanos* “majority” made  
2 up of Justice Kennedy’s concurrence and four dissenters.

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

7           This argument badly distorts the law of judicial precedent. To find their “majority” that  
8 rejects the plurality’s standard, the plaintiffs count Justice Kennedy’s concurring opinion and the  
9 four *dissenting* votes in *Rapanos*. But dissenting opinions have no precedential value.  
10 “Comments in a dissenting opinion about legal principles and precedents are just that: comments  
11 in a dissenting opinion.” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1511 (2020)  
12 (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177, n. 10 (1980)). Indeed, the Supreme  
13 Court instructs lower courts deriving a rule from a fractured decision “to consider the opinions  
14 only of ‘those Members who *concurred* in the judgments on the narrowest grounds.’” *United*  
15 *States v. Davis*, 825 F.3d 1014, 1024 (9th Cir. 2016) (en banc) (quoting *Marks v. United States*,  
16 430 U.S. 188, 193 (1977) (citation omitted). The plaintiffs’ five-Justice “majority” that “rejected”  
17 the agencies’ interpretation is not a “majority” in the precedential sense of the term. *See, e.g.*,  
18 *Davis*, 825 F.3d at 1025 (assuming but not deciding that “dissenting opinions may be considered  
19 in a *Marks* analysis,” but acknowledging that *Marks* suggests otherwise); *Gibson v. Am.*  
20 *Cyanamid Co.*, 760 F.3d 600, 620–21 (7th Cir. 2014) (holding that “dissenting opinions cannot  
21 be counted under *Marks* to create binding precedent” where district court had counted the views  
22 of four dissenting justices, along with Justice Kennedy’s position in a concurring opinion, as  
23 controlling); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (“In our view, *Marks*  
24 does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the  
25 positions of those who dissented. *Marks* talks about those who ‘concurred in the judgment[,]’ not  
26 those who did not join the judgment.”) (citation omitted); *King v. Palmer*, 950 F.2d 771, 783  
27 (D.C. Cir. 1991) (en banc) (“[W]e do not think we are free to combine a dissent with a

28 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).

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

6 Nor is Justice Kennedy’s concurring opinion, taken alone, controlling. *Marks* directs that  
 7 “[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the  
 8 result enjoys the assent of five Justices, the holding ... may be viewed as that position taken by  
 9 those Members who concurred in the judgment[] on the narrowest grounds.” *Marks*, 430 U.S. at  
 10 193 (quotation and citation omitted). That “narrowest grounds” test has been applied in a number  
 11 of different ways by lower courts, but the Ninth Circuit recently adopted what it calls “the  
 12 reasoning-based approach.” *Davis*, 825 F.3d at 1021. Under that approach, “[a] fractured  
 13 Supreme Court decision should only bind the federal courts of appeal when a majority of the  
 14 Justices agree upon a single underlying rationale and one opinion can reasonably be described as  
 15 a logical subset of the other.” *Id.* at 1021–22. Put another way, the question is “whether the  
 16 reasoning of a narrower opinion fit[s] entirely into the circle drawn by a broader opinion.” *Id.* at  
 17 1021. If not, “only the specific result is binding on lower federal courts.” *Id.* at 1022.

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

23  
 24 <sup>2</sup> Even if it were appropriate to count dissenting votes in some cases, such an approach would  
 25 still be unsuitable to *Rapanos*, where Justice Kennedy made clear that he disagreed  
 26 fundamentally with the dissenters’ conception of jurisdiction under the Act. *See* 547 U.S. at 778  
 27 (Kennedy, J., concurring) (“While the plurality reads nonexistent requirements into the Act, the  
 28 dissent reads a central requirement out—namely, the requirement that the word ‘navigable’ in  
 ‘navigable waters’ be given some importance.”).

<sup>3</sup> 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*).

1 825 F.3d at 1021. Indeed, the *reasoning* of the two approaches is apples and oranges, as the  
2 opinions acknowledge. The plurality’s reasoning employs traditional principles of statutory  
3 construction and looks to whether the waters in question are “waters” as that term is traditionally  
4 understood, or wetlands with a continuous surface connection to those waters. *See, e.g.,*  
5 *Rapanos*, 547 U.S. at 757 (asking “whether the ditches or drains near each wetland are ‘waters’  
6 in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the  
7 wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous  
8 surface connection that creates the boundary-drawing problem we addressed in *Riverside*  
9 *Bayview*”). Justice Kennedy’s opinion focuses on the statute’s purpose and looks to whether  
10 wetlands have a “significant nexus” to navigable waters, which he defines by reference to  
11 ecological considerations. *See, e.g., id.* at 780 (“[W]etlands possess the requisite nexus, and thus  
12 come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in  
13 combination with similarly situated lands in the region, significantly affect the chemical,  
14 physical, and biological integrity of other covered waters more readily understood as  
15 ‘navigable.’”). And each opinion squarely rejects the other’s reasoning as incompatible with their  
16 own. *See id.* at 754–56 (plurality op.) (rejecting Justice Kennedy’s “significant nexus” test as a  
17 reading “in utter isolation from the text of the Act” that improperly adopts a “case-by-case test of  
18 ecological significance”); *id.* at 769 (Kennedy, J., concurring) (rejecting plurality’s “relatively  
19 permanent” waters limitation for failing to address the statute’s “concern[] with downstream  
20 water quality” and its “continuous surface connection” limitation on wetlands because a rule  
21 based on ecological considerations was a permissible interpretation of the CWA); *id.* at 776–77  
22 (Kennedy, J., concurring) (“[B]y saying the Act covers wetlands (however remote) possessing a  
23 surface-water connection with a continuously flowing stream (however small), the plurality’s  
24 reading would permit applications of the statute as far from traditional federal authority as are  
25 the waters it deems beyond the statute’s reach.”). Because the reasoning of Justice Kennedy’s  
26 concurring opinion does not “fit entirely into the circle drawn by” the plurality’s reasoning, it is  
27 not binding precedent under *Davis*. 825 F.3d at 1021.  
28

1 The Ninth Circuit’s decisions in *City of Healdsburg* and *Robertson* do not call for a  
2 different conclusion. Before the en banc Ninth Circuit decided *Davis*, a panel in *City of*  
3 *Healdsburg* had held that Justice Kennedy’s *Rapanos* opinion controlled because it was “the  
4 narrowest ground to which a majority of the justices would assent if forced to choose in almost  
5 all cases.” *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007). But  
6 *Davis* expressly rejected this “results-based” approach. *Davis*, 825 F.3d at 1021 (describing and  
7 rejecting alternative approach that “defines the narrowest ground as the rule that ‘would  
8 necessarily produce results with which a majority of the Justices from the controlling case would  
9 agree’”) (citation omitted). And although a panel later held in *Robertson* that *City of Healdsburg*  
10 was not “clearly irreconcilable” with *Davis* and thus remained circuit precedent, *Robertson* (1)  
11 impermissibly relied on the *dissent* in reaching that conclusion, and (2) was then vacated by the  
12 Supreme Court’s grant of certiorari. *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir.  
13 2017) (reasoning that Justice Kennedy’s opinion was a logical subset of the dissent), *cert.*  
14 *granted, judgment vacated*, 139 S.Ct. 1543 (2019). In short, *City of Healdsburg* applied a test  
15 that was overruled, and *Robertson* applied the new test incorrectly. Applied properly, the Ninth  
16 Circuit’s version of the *Marks* analysis does not permit the conclusion that Justice Kennedy’s  
17 opinion in *Rapanos* is binding.

18 At best, then, the *Rapanos* plurality and concurring opinions are persuasive authority in  
19 the Ninth Circuit. That the agencies’ interpretation here more closely resembles a standard  
20 articulated in a non-binding plurality than one from a non-binding concurrence does not render it  
21 unreasonable, as the plaintiffs contend.<sup>4</sup>

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23 <sup>4</sup> Even if Justice Kennedy’s *Rapanos* opinion *were* binding, that would not render the agencies’  
24 interpretation unreasonable, because Justice Kennedy did not purport to hold that the statute  
25 *required* his reading. “A court’s choice of one reasonable reading of an ambiguous statute does  
26 not preclude an implementing agency from later adopting a different reasonable  
27 interpretation.” *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009). For *Chevron* purposes,  
28 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.*

1                   **2. The CWA does not authorize jurisdiction over “interstate waters” that**  
 2                   **have no connection to navigable waters.**

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

18                   The plaintiffs are wrong that *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317  
 19 (1981), *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 486, 492 (1987), or *Arkansas v. Oklahoma*,  
 20 503 U.S. 91, 110 (1991), interpret the CWA as applying to interstate waters regardless of  
 21 navigability. *See Doc. 30 at 39.* All of these cases addressed disputes that arose in the CWA  
 22 permitting context for waters that would otherwise be jurisdictional—Lake Michigan, Lake  
 23 Champlain, and the Illinois River. *City of Milwaukee*, 451 U.S. at 307; *Ouellette*, 479 U.S. at  
 24 483–84; *Arkansas v. Oklahoma*, 503 U.S. at 95. Those decisions do not address non-navigable  
 25 interstate waters, and the Court never concluded that the CWA authorized (much less requires)  
 26 federal jurisdiction over such waters. *City of Milwaukee*, 451 U.S. at 350 (“[B]oth the Court and  
 27 Congress fully expected that neighboring States might differ in their approaches to the regulation  
 28 of the discharge of pollutants into their *navigable* waters.”) (emphasis added); *Ouellette*, 479

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

5 **B. The 2020 Rule is not arbitrary or capricious.**

6 Judicial review of a claim that a rule is arbitrary and capricious in violation of the APA is  
7 “narrow and deferential.” *California by & through Becerra v. Azar*, 950 F.3d 1067, 1096 (9th Cir.  
8 2020) (en banc) (citing *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019)). In  
9 undertaking such review, “[a] court is not to ask whether a [rule] is the best one possible or even  
10 whether it is better than the alternatives.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782  
11 (2016), *as revised* (Jan. 28, 2016). Nor may the court “second-guess[] the agency’s weighing of  
12 risks and benefits and penaliz[e] it for departing from the inferences and assumptions of others.”  
13 *California v. Azar*, 950 F.3d at 1096 (cleaned up). Instead, the court’s role is merely to check that  
14 the agency has “examined the relevant considerations and articulated a satisfactory explanation  
15 for its action.” *Id.* And the challengers bear the “heavy burden” to demonstrate otherwise: they  
16 must show “that ‘the agency has relied on factors which Congress has not intended it to consider,  
17 entirely failed to consider an important aspect of the problem, offered an explanation for its  
18 decision that runs counter to the evidence before the agency, or is so implausible that it could not  
19 be ascribed to a difference in view or the product of agency expertise.’” *Managed Pharmacy*  
20 *Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass’n v. State*  
21 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Absent that showing, the claim must fail.

22 The plaintiffs have not met their heavy burden here. Although they express strong  
23 disagreement with the agencies’ choices in approaching the interpretive question before them, the  
24 plaintiffs have not established that the agencies failed to adequately explain the reasons for those  
25 choices. In fact, the agencies articulated good reasons for each of the features of the rule the  
26 plaintiffs attack: taking a law-based approach to defining the statutory term “waters of the United  
27 States,” advancing the CWA’s goal to protect water quality through cooperative federalism, and  
28

1 applying a “typical year” approach to ensuring that waters are sufficiently permanent to qualify  
2 as “waters of the United States.”

3 **1. The agencies articulated a satisfactory explanation for their law-based**  
4 **approach to defining the statutory term “waters of the United States.”**

5 The plaintiffs contend that the agencies “ignored” or “disregarded” certain findings about  
6 the connections between tributaries, wetlands, and other waters from the “Connectivity Report,”  
7 which EPA published during the prior Administration and then heavily relied on to support the  
8 2015 Rule’s unprecedented assertion of federal jurisdiction. Doc. 30 at 19–22. The plaintiffs  
9 cannot mean to suggest that the agencies actually failed to review or consider this report or the  
10 points they highlight. After all, the plaintiffs offer no support for that proposition. *See id.* (citing  
11 only the Connectivity Report itself and a technical support document from the 2015 Rule to  
12 support assertions that the agencies “ignored” findings from the report). And the record shows  
13 that the agencies *did* consider the report and each of the points the plaintiffs raise. *See* 85 Fed.  
14 Reg. at 22,261 (“[T]he agencies used the Connectivity Report to inform certain aspects of the  
15 definition of ‘waters of the United States.’”); EPA, “The Navigable Waters Protection Rule –  
16 Public Commentary Summary Document,” Docket No. EPA-HQ-OW-2018-0149-11574, at  
17 5.1.2.3(b), 8.3.3, 8.2.5.4 (April 21, 2020), [https://beta.regulations.gov/document/EPA-HQ-OW-](https://beta.regulations.gov/document/EPA-HQ-OW-2018-0149-11574)  
18 [2018-0149-11574](https://beta.regulations.gov/document/EPA-HQ-OW-2018-0149-11574) (acknowledging the ecological importance of various waters on downstream  
19 navigable waters and choosing to apply the connectivity gradient test to balance “ecological  
20 objective with jurisdictional concerns”); *id.* at 5.4.2 (acknowledging the significance of the  
21 watershed area but finding other factors, including climate, geology, soil type, vegetation, slope,  
22 and land use better metrics in a flow regime); *id.* at 8.7.3 (acknowledging that water connectivity  
23 changes over time and accommodates this using the non-static 30-year typical yearly flow  
24 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  
25 metric is used by scientists and environmental professionals as well as other “government  
26 climate data programs,” that this new rule does not eliminate banks and banks as “one line of  
27 evidence” to determine the existence of tributaries, and that the “ordinary high water mark”  
28 remains the determining factor for the “later limits of jurisdiction for a tributary”); *id.* at

1 5.1.2.3(a), 5.1.2.3(b) (exclusion of ephemeral waters based on jurisdictional concerns and the  
2 Connectivity Report’s “Gradient of connectivity” analysis to determine which waters were the  
3 most consequential for downstream waters); *id.* at 8.3.3, 8.3.5, 8.3.5.2 (acknowledging concerns  
4 over the “ecological connections and functions of wetlands” not sharing a “direct hydrologic  
5 surface connection,” and adjusting the rule to include wetlands with natural and artificial barriers  
6 based on the agencies’ “technical and scientific expertise ... over nearly five decades”). There is  
7 no serious argument that the agencies “entirely failed to consider” these points, so the rule cannot  
8 be deemed arbitrary and capricious on that ground. *Managed Pharmacy Care*, 716 F.3d at 1244.

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

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

1 514 (2009)). An agency must “display awareness that it *is* changing position” and explain why.  
2 *Id.* at 1097. But it “need not demonstrate to a court’s satisfaction that the reasons for the new  
3 policy are better than the reasons for the old one; it suffices that the new policy is permissible  
4 under the statute, that there are good reasons for it, and that the agency *believes* it to be better,  
5 which the conscious change of course adequately indicates.” *Id.* In short, the ordinary APA  
6 standard applies. *Id.*

7 And here, the agencies have articulated a satisfactory explanation for their law-based  
8 approach to determining their regulatory jurisdiction under the CWA. Responding to the Science  
9 Advisory Board’s (“SAB”) draft comment that the proposed rule failed to “fully incorporate” the  
10 Connectivity Report, 85 Fed. Reg. at 22,261, the agencies explained that although they “used the  
11 Connectivity Report to inform certain aspects of the definition of ‘waters of the United States,’”  
12 they “recognize that science cannot dictate where to draw the line between Federal and State  
13 waters, as this is a legal question that must be answered based on the overall framework and  
14 construct of the CWA.” *Id.*<sup>5</sup> And in answering commenters who complained that the proposed  
15 rule “failed to incorporate scientific and ecological principles into the definition,” they explained  
16 further that “[t]he definition of ‘waters of the United States’ must be grounded in a legal analysis  
17 of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law,” and that  
18 they cannot “exceed their authority under the CWA to achieve specific scientific, policy, or other  
19 outcomes.” 85 Fed. Reg. at 22,271; *see also id.* at 22,257, 22,261, 22,288–89, 22,308–311,  
20 22,314, 22,318. Put simply: the outer bounds of the “waters of the United States” are determined  
21 by statutory construction, not hydrological connectivity.

22 The Supreme Court agrees. Although the dissent in *Rapanos* was willing to let the agencies  
23 define “waters of the United States” by resort to ecological considerations unmoored from the  
24 statutory text, both the plurality and Justice Kennedy rejected that approach. *Rapanos*, 547 U.S.  
25 at 749 (plurality op.) (rejecting “[t]he dissent’s exclusive focus on ecological factors” which,  
26

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27 <sup>5</sup> The SAB conceded, however, that the Report was a “science, not policy, document,” *see* Letter  
28 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.

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

8 An interpretation grounded in legal analysis is further justified in light of the difficulties the  
9 agencies had defending the 2015 Rule, which took the plaintiffs’ preferred approach. Unlike with  
10 the 2020 Rule, the agencies tried to ground the expansive jurisdictional reach of the 2015 Rule in  
11 the Connectivity Report’s “everything is connected” findings. 80 Fed. at 37,057, 37,065. Federal  
12 courts across the country rejected that approach. A North Dakota court enjoined the rule on a  
13 preliminary basis because it asserted jurisdiction over “vast numbers of waters that are unlikely  
14 to have a nexus to navigable waters within any reasonable understanding of the term.” *North*  
15 *Dakota v. EPA*, 127 F. Supp. 3d at 1056. A Georgia court followed, first enjoining the rule for the  
16 same reason, *Georgia v. Pruitt*, 326 F. Supp. 3d at 1364, and later issuing a final judgment that  
17 the rule exceeded the agencies’ statutory authority. *Georgia v. Wheeler*, 418 F. Supp. 3d at 1367  
18 (reasoning in summary judgment order that “merely stating that the agencies have decided that a  
19 significant nexus exists based on ‘science’ and their ‘expertise’ is not sufficient” to demonstrate  
20 that the rule properly interpreted the agencies’ authority under the Act). And an Oregon court  
21 also issued a preliminary injunction against the 2015 Rule after dismissing the “science behind  
22 the idea of drawing broadly the circle of waters that impact admittedly navigable waters” as  
23 “almost certainly correct, but not particularly helpful to the question I have in front of me today,  
24 which is how much of what Congress could do to protect waters did it do, and that’s not a  
25

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26 <sup>6</sup> Justice Kennedy’s “significant nexus” test puts some weight on ecological considerations, but  
27 as explained above, that test is not controlling, and the plurality explained persuasively that it is  
28 not consistent with controlling Supreme Court precedent or the statutory text. *Rapanos*, 547  
U.S. at 753.

1 scientific question.” *Or. Cattlemen’s Ass’n v. EPA*, No. 19-564, Doc. 54 at 8–9.<sup>7</sup> Especially once  
 2 multiple federal courts had concluded that agencies had overreached in trying to justify an  
 3 expansive view of jurisdiction based almost entirely on ecological considerations, the agencies  
 4 were justified in setting a different course.<sup>8</sup>

5 **2. The agencies considered the CWA’s goal to protect water quality in the**  
 6 **2020 Rule and reasonably chose to advance it through cooperative**  
 7 **federalism.**

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

15 The CWA is not the top-down federal regulatory regime the plaintiffs imagine it to be.  
 16 Keep reading just past the provision plaintiffs cite for its objective: the Act declares it “the policy  
 17 of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of*  
 18 *States*” to protect their “land and water resources.” 33 U.S.C. § 1251(b) (emphasis added). And  
 19 that policy finds purchase in every part of the Act, from its direct regulatory programs (states  
 20 may assume some of those permitting programs) and supplementary regime of water quality  
 21 standards (states develop those standards for the waters within their borders), *see id.* §§ 1313,  
 22 1315, to its numerous non-regulatory programs that support the States in their efforts to protect  
 23 their sovereign lands and waters. The Act even includes an express *anti*-preemption provision to

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

28 <sup>8</sup> 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.,

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

4 Recognizing the primary role the CWA contemplates for the States, the agencies reasonably  
5 relied on the States (as well as Tribes with respect to tribal land and resources) in advancing the  
6 Act’s objective to protect water quality. Responding to the very concern the plaintiffs raise  
7 here—that making “fewer waters . . . jurisdictional” would not further the Act’s objective to  
8 restore and maintain the integrity of the nation’s waters—the agencies explained that they  
9 “disagreed.” 85 Fed. Reg. at 22,269. In their view, that objective would “continue” to be  
10 advanced through “[t]he CWA’s longstanding regulatory permitting programs” and “non-  
11 regulatory measures” “coupled with the controls that States, Tribes, and local entities choose to  
12 exercise over their land and water resources.” *Id.*; *see also id.* (“Ensuring that States and Tribes  
13 retain authority over their land and water resources . . . helps carry out the overall objective of the  
14 CWA.”). As the agencies acknowledged, “States and Tribes retain authority to protect and  
15 manage the use of those waters that are not navigable waters under the CWA.” *Id.* at 22,254  
16 (citing 33 U.S.C. §§ 1251(b), 1251(g), 1370, 1377(a)). And the agencies identified the various  
17 waters not regulated under the 2020 Rule as “more appropriately regulated by the States and  
18 Tribes under their sovereign authorities,” which makes clear that the agencies specifically  
19 considered the States’ and Tribes’ role in protecting water quality in connection with these  
20 waters. 85 Fed. Reg. at 22,278 (“[R]elatively permanent bodies of water that are connected to  
21 downstream jurisdictional waters only via groundwater are not jurisdictional and are more  
22 appropriately regulated by the States and Tribes.”); *see also id.* at 22,279 (same conclusion for  
23 “waters that do not contribute surface water to a downstream [jurisdictional] water in a typical  
24 year”); *id.* at 22,284 (same for “interstate waters without any surface connection to traditional  
25 navigable waters”); *id.* at 22,310 (same for certain wetlands not covered by the Rule). The  
26 agencies did not “disregard” the Act’s objective to protect water quality. Rather, in keeping with  
27 the CWA’s animating policy “to preserve the primary State responsibility for ordinary land-use  
28

1 decisions,” they relied on the States doing their statutorily preserved part to meet that objective.  
2 85 Fed. Reg. at 22,269.

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

16 **3. The 2020 Rule’s “typical year” requirement is reasonable.**

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

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

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

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

7 Plaintiffs “may not obtain a preliminary injunction unless they can show that irreparable  
 8 harm is likely to result in the absence of the injunction.” *All. for the Wild Rockies v. Cottrell*, 632  
 9 F.3d 1127, 1135 (9th Cir. 2011). It is not enough to suggest that harm is “possible”—it must be  
 10 both “likely” and “irreparable.” *Winter*, 555 U.S. at 22. And, importantly, to support a  
 11 preliminary injunction, plaintiffs must show that this harm is likely to occur between the ruling  
 12 on the motion and final judgment. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d  
 13 803, 817 (9th Cir. 2018).

14 The plaintiffs here have a special problem of proof. They seek an injunction against the  
 15 2020 Rule based on assertions that it will cause them immediate and irreparable environmental  
 16 and economic harm. But the 2020 Rule, at least with respect to the effects they challenge, is  
 17 deregulatory action: it merely withdraws federal regulatory jurisdiction over some waters. *See,*  
 18 *e.g.*, Doc. 30 at 40 (arguing that “the Rule will immediately remove the Act’s longstanding  
 19 protections” over certain waters and wetlands). Deregulation is not itself an environmental  
 20 harm—any such harm would have to come from further action or inaction by third parties. And  
 21 when “[m]ultiple contingencies must occur before [alleged] injuries would ripen into concrete  
 22 harms,” the “injur[ies are] too speculative to constitute an irreparable harm justifying injunctive  
 23 relief.” *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988); *see*  
 24 *also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1173 (9th Cir. 2011) (vacating preliminary  
 25 injunction because the record contained examples of past genetic contamination, but no  
 26 examples of contamination under the present circumstances); *Los Angeles Mem’l Coliseum*  
 27 *Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (holding that although  
 28 speculative allegations of immediate harm might create standing, plaintiffs must factually show

1 an immediate threat of a “real and concrete injury” for a preliminary injunction). So, to show  
2 irreparable harm, the plaintiffs must establish a non-speculative chain of causation between the  
3 2020 Rule’s withdrawal of federal jurisdiction and the various environmental and economic  
4 harms they fear.

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

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

15 The plaintiffs focus on the deregulatory effects of the 2020 Rule and the abstract “threats”  
16 of pollution or other harms they say will occur in absence of federal jurisdiction. *See, e.g.*, Doc.  
17 30 at 40 (arguing that “the Rule will immediately remove the Act’s longstanding protections”  
18 over certain waters and wetlands); *id.* at 41 (same); *id.* at 43 (arguing that “the Rule threatens”  
19 pollution); *id.* at 44 (same); *id.* at 45 (contending that many waters will “lose protection”); *id.* at  
20 46 (same); *id.* (asserting that “the Rule threaten[s] flooding”); *id.* at 47–48 (asserting that “[t]he  
21 Rule’s reduced federal protections imperil” state economic interests). But they fail to connect the  
22 withdrawal of federal jurisdiction with any particular concrete, non-speculative threat of actual  
23 pollution. This is a necessary showing: when “a plaintiff’s asserted injury arises from the  
24 government’s allegedly unlawful regulation (or lack of regulation) of *someone else*,” the plaintiff  
25 bears the burden of showing that “those choices [causing the injury] have been or will be made”  
26 by the third parties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992); *see also id.* at 570  
27 (finding no standing because “it is entirely conjectural whether the nonagency activity that  
28 affects respondents will be altered or affected by the agency activity they seek to achieve”); *San*

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

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

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

23 \_\_\_\_\_  
 24 <sup>9</sup> 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.

25 <sup>10</sup> Even if they were non-speculative, these economic harms would not support injunctive relief  
 26 because they are compensable. Although “[e]nvironmental injury ... can seldom be adequately  
 27 remedied by money damages,” *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545  
 28 (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.”

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

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

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

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

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

24 <sup>12</sup> *See, e.g.*, Ariz. Rev. Stat. Ann. § 49-201(41); 45-101(9); 7 Del. Admin. Code § 74012.0; Minn.  
 25 Stat. Ann. § 103G.005(15),(17); Or. Rev. Stat. Ann. § 196.800(15); Tenn. Code Ann. § 69-3-  
 26 103(46); Tex. Water Code Ann. § 11.021; Wyo. Stat. Ann. § 35-11-103(c)(vi).

27 <sup>13</sup> *See, e.g.*, Fla. Stat. Ann. § 403.088; Iowa Code Ann. § 455B.173; Md. Code Ann., Envir. § 5-  
 28 502; Minn. Stat. Ann. § 103G.301; Neb. Rev. Stat. Ann. § 81-1506(2)(f); Or. Rev. Stat. Ann.  
 § 390.835.

<sup>14</sup> *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.

1 comprehensive wetland-protection programs that include dredge-and-fill programs and  
2 prohibitions, mitigation requirements, and water quality monitoring.<sup>15</sup>

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

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

- 13 • West Virginia defines “waters” of the State to include essentially all wetlands and all  
14 water, on or beneath the earth’s surface, W. Va. Code § 22-11-3(23), and makes it  
15 unlawful to pollute waters of the State. *Id.* §§ 22-11-8(b)(1), 22-12-4(b), (c).
- 16 • The Alabama Department of Environmental Management has authority over water  
17 quality for “[a]ll waters of any river, stream, watercourse, pond, lake, coastal, ground or  
18 surface water, wholly or partially within the state, natural or artificial,” Ala. Code  
19 §§ 22-22-1(b)(2), and it uses this authority to set water quality standards to protect  
20 water quality independent of shifting federal standards. Kitchens Decl. ¶ 2.
- 21 • Texas defines “water in the state” very broadly, including: “all ... bodies or surface  
22 water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable.”  
23 Tex. Water Code § 26.001(5); Galindo Decl. ¶ 5. Texas regulates pollution and water  
24 quality for all of its waters, including wetlands. 30 Tex. Admin. Code Ch. 307; Galindo

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

27 <sup>15</sup> See, e.g., Ark. Code Ann. § 15-22-1007; Ind. Code Ann. §§ 13-18-22-1–11; Fla. Stat. Ann.  
28 §§ 373.019(27), 373.414; Md. Code Ann., Envir. §§ 5-903–911; Minn. Stat. Ann.  
§§ 103G.221–2375; N.Y. Env’tl. Conserv. Law §§ 24-0101–1305; Or. Rev. Stat. Ann.  
§§ 196.674, 196.678; Tex. Water Code Ann. § 11.502.

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

- 3 • Pennsylvania law protects “all ... bodies or channels of conveyance of surface and  
4 underground water, or parts thereof, whether natural or artificial,” 35 Pa. Stat. § 691.1,  
5 and it requires a permit for activities that create even a risk of pollution into the State’s  
6 waters. *Id.* § 691.402.
- 7 • Wyoming defines “waters of the state” to include all surface or ground water, including  
8 wetlands and perennial or ephemeral flow, Wyo. Stat. Ann. § 35-11-103(c)(vi), and the  
9 State runs its own permitting system to prevent discharge or pollutants or alteration of  
10 the physical properties of the waters of the State. Wyo. Stat. Ann. § 35-11-301; Parfitt  
11 Decl. ¶¶ 3–4.
- 12 • Ohio and Wisconsin similarly define “waters of the state” as all accumulated waters,  
13 above or below ground, within the State, Ohio Rev. Code Ann. § 6111.01(H); Wis. Stat.  
14 § 281.01(18), they prohibit pollution with detailed regulatory schemes, Ohio Rev. Code  
15 Ann. § 6111.04(A)(1); Wis. Admin. Code NR ch. 102, and they protect wetlands with  
16 permitting requirements, Ohio Rev. Code Ann. §§ 6111.022, 6111.024, 6111.028; Wis.  
17 Stat. § 281.36(3b)(b), (3g), (3m).

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

20 In the unlikely event that existing state protections prove inadequate, the plaintiffs offer no  
21 real basis for their assumption that the States will sit idly by while their waters and wildlife are  
22 damaged. States are best positioned to address local threats as they manifest. *Tarrant Reg’l Water*  
23 *Dist. v. Herrmann*, 569 U.S. 614, 631–32 (2013). That is why the CWA anticipates and requires  
24 state leadership in this area and expressly avoids preempting state laws. *See* 33 U.S.C. § 1370;  
25 *see also, e.g., Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984) (finding no  
26 federal preemption of state regulation over “waters within the states’ jurisdiction”); *United States*  
27 *v. Cooper*, 173 F.3d 1192, 1200 (9th Cir. 1999) (federal regulations under the CWA “do not usurp  
28

1 local control over the disposal of sewage sludge”). If States uncover specific threats to their  
2 waters, they can and will address them.<sup>16</sup>

3 It is no answer to say, as the plaintiffs do, that they have no time to update their regulations  
4 before the 2020 Rule goes into effect. The likelihood of a deregulatory replacement for the  
5 beleaguered 2015 Rule was apparent at least as early as February 28, 2017, when President  
6 Trump signed Executive Order 13778, which directed the agencies to review and revise the  
7 WOTUS regulations. Restoring the Rule of Law, Federalism, and Economic Growth by  
8 Reviewing the “Waters of the United States” Rule, 82 Fed. Reg. 12,497, 12,497–98 (Feb. 28,  
9 2017). And planning could have certainly begun in earnest by December 2018, when the EPA  
10 announced what would become the 2020 Rule. The proposed rule was posted for public  
11 comment on February 14, 2019; the 2015 Rule was repealed on October 22, 2019, Definition of  
12 “Waters of the United States” — Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct.  
13 22, 2019); and the 2020 Rule was finalized on January 23, 2020. In short, the plaintiffs have had  
14 years to prepare for something like the 2020 Rule going into effect on June 22, 2020.<sup>17</sup>

15 **b.** The plaintiffs also contend that “upstream” states will send them pollution downstream,  
16 which they are powerless to stop because they have no “direct regulatory authority” over other  
17 states’ sovereign lands and waters. They are right about not being allowed to regulate within  
18

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19 <sup>16</sup> The plaintiffs note that some states have laws that prevent state laws from imposing water  
20 regulations more stringent than federal requirements. Sullivan Decl. ¶23, Doc. 30-18 (citing  
21 *State Constraints*, Environmental Law Institute, 8–9 (May 2013),  
22 <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf> (identifying, in 2013, thirteen States  
23 with laws that prevent water regulation more stringent than the federal standard). But many of  
24 those prohibitions apply only to certain areas of water regulation (like agricultural-related  
25 discharges). And, more importantly, the plaintiffs’ concern in this suit is not over the *level* of  
26 regulation, but over the *scope* of the “waters of the United States.” A “no more stringent” law  
27 typically prevents imposing more demanding standards than federal law, but does not prohibit  
28 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).

<sup>17</sup> 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.

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

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

17 The same weaknesses infect the plaintiffs’ other examples. Maine asserts that it “is less  
18 protected and is thus harmed” simply because “the 2020 Rule is less protective,” Witherhill Decl.  
19 ¶9, Doc. 30-8, yet fails to discuss any specific water sources or potentially polluting activities.  
20 The motion likewise refers to Michigan’s reliance on “other Great Lake States” to protect its  
21 water resources, without describing what conduct it fears the 2020 Rule will allow—and that  
22 those other Great Lake States will permit. Seidel Decl. ¶¶4-5, Doc. 30-21. And Rhode Island not  
23 only makes similar unsupported assumptions, but also claims harm based on an *additional* layer  
24 of speculation that other States will “reduce their regulatory jurisdiction” in response to the 2020  
25 Rule. Horbert Decl. ¶¶8–9, Doc. 30-3.

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

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

10         The plaintiffs also make no attempt to explain why the existing water protections in the  
11 upstream states they identify are inadequate. The plaintiffs single out New Hampshire, for  
12 instance, Doc. 30 at 43, but that State extensively regulates both “surface waters of the state”  
13 (which include perennial and seasonal waters) and “wetlands” (which include areas saturated by  
14 either “surface water or groundwater”). N.H. Rev. Stat. Ann. §§ 485-A:2(XIV), (X); N.H. Code  
15 Admin. R. Env-Wq 1701.01–52. And New Hampshire requires permits for any person to  
16 discharge sewage or waste into “surface water or groundwater of the state,” N.H. Rev. Stat.  
17 Ann. § 485-A:13, or to alter terrain around a surface water of the State, *id.* § 485-A:17. Delaware  
18 likewise defines “waters of the state” to include ephemeral streams and wetlands adjacent to  
19 waters, *see* 7 Del. Admin. Code § 7401-2.0, and requires permits for activities that discharge  
20 pollutants or “cause or contribute to withdrawal of ground water or surface water.” 7 Del. C.  
21 § 6003. Nevada’s definition of “waters of the state” is similarly broad: “All bodies or  
22 accumulations of water, surface and underground, natural or artificial.” Nev. Rev. Stat.  
23 § 445A.415. And Nevada, too, heavily regulates discharge of pollutants in state waters. *Id.*  
24 §§ 445A.490; 445A.520.

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

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

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

4 The plaintiffs identify two public interests: protecting the integrity of the nation’s waters  
5 and “maintaining the ability of the agencies and the States and Cities to operate programs to  
6 achieve the CWA’s water quality objective.” Doc. 30 at 48–49. But a preliminary injunction  
7 would not serve either interest. The first interest fails at the outset: the plaintiffs have only  
8 speculated but not demonstrated that any State’s waters will be degraded because of the 2020  
9 Rule. And the second weighs *against* a preliminary injunction: The States have a sovereign  
10 interest in protecting their waters, *see Tarrant*, 569 U.S. at 631; *United States v. Alaska*, 521 U.S.  
11 1, 5 (1997), and the public has a strong interest in preserving that sovereignty (which the CWA  
12 itself respects), *see New York v. United States*, 505 U.S. 144, 181 (1992) (“State sovereignty is  
13 not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the  
14 diffusion of sovereign power.’”) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991)  
15 (Blackmun, J., dissenting)). The “prospect of significant interference with ... self-government”  
16 weighs against injunctive relief. *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716  
17 (10th Cir. 1989); *see also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006);  
18 *Kansas v. United States*, 249 F.3d 1213, 1227 (10<sup>th</sup> Cir. 2001). There are clear and immediate  
19 benefits to freeing the States from redundant federal requirements. *See* Capp Decl. ¶ 10  
20 (explaining that the 2020 Rule will expedite the permitting process by eliminating redundant  
21 regulation) Parfitt Decl. ¶ 11 (same). Thus, a preliminary injunction would just as likely impede  
22 the States’ stewardship of their natural resources.

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

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

3 **III. A universal injunction is not warranted.**

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

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

1 universal injunction, especially with almost half the states in the country intervening to oppose  
 2 having that “relief” imposed within their sovereign borders. *See Bresgal v. Brock*, 843 F.2d 1163,  
 3 1170 (9th Cir. 1987) (noting courts’ duty to ensure that injunctive relief is not “more burdensome  
 4 than necessary to redress the complaining parties” (quoting *Califano*, 442 U.S. at 702–03)).

5 As for the plaintiffs’ appeal to “practicality and workability,” the litigation history of the  
 6 2015 Rule undercuts their suggestion that only a universal injunction is workable. Doc. 30 at 50.  
 7 In lawsuits challenging the 2015 Rule, a number of courts issued preliminary injunctions  
 8 blocking the 2015 Rule only in those States appearing as plaintiffs before those courts.<sup>18</sup> There is  
 9 even less reason for the Court to issue a universal injunction here, where staying its hand would  
 10 only allow a withdrawal of federal jurisdiction instead of its expansion—with its attendant  
 11 regulatory and administrative costs. In short, if the Court finds it necessary to enjoin the  
 12 implementation of the 2020 Rule, it should do so only within the plaintiffs’ geographic borders.<sup>19</sup>

### 13 CONCLUSION

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

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 22 <sup>18</sup> *See* Order, *North Dakota v. U.S. Evtl. Prot. Agency*, Case No. 3:15-cv-59 (N.D. Aug. 27, 2015  
 23 (ECF No. 70) (enjoining 2015 Rule in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri,  
 24 Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming); Order,  
 25 *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).

26 <sup>19</sup> Because the State Intervenors are not yet parties to this action, they were unable to seek leave  
 27 in advance of filing this proposed opposition (attached to their motion for intervention) to file  
 28 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.

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26 \*Application for Admission Pro Hac Vice Pending or Forthcoming  
27  
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**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

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