

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,
Plaintiffs,
v.
ANDREW WHEELER, et al.,
Defendants.

Case No. [20-cv-03005-RS](#)

**ORDER DENYING MOTION FOR
PRELIMINARY RELIEF**

I. INTRODUCTION

This case is a challenge to a new rule that will substantially narrow the definition of what are “waters of the United States” subject to federal regulation under the Clean Water Act. Plaintiffs seek a court order preventing the new rule from taking effect, pending a determination on the merits of the case. Plaintiffs point to significant irreparable harms that will occur before the litigation is resolved, if the rule is legally invalid but allowed to go into operation now. Were the court tasked with the question of whether the new rule represents wise environmental policy or the best approach to protecting water resources that could be supported by scientific data, the result might be different. The court’s narrow role, however, is only to evaluate whether the rule has been adopted in compliance with the requirements of the Administrative Procedure Act. In that context, plaintiffs have not made a sufficient showing to support an injunction or an order delaying the effective date of the new rule.

1 II. BACKGROUND

2 Congress enacted the Clean Water Act (CWA or Act) in 1972. The Act’s stated objective
 3 is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
 4 86 Stat. 816, 33 U.S.C. § 1251(a). The Act further declares, “[i]t is the policy of Congress to
 5 recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce,
 6 and eliminate pollution, to plan the development and use (including restoration, preservation, and
 7 enhancement) of land and water resources, and to consult with the Administrator in the exercise of
 8 his authority under this chapter.” § 1251(b). By its terms, the Act applies only to “the waters of the
 9 United States, including the territorial seas.”¹ The Environmental Protection Agency and the Army
 10 Corps of Engineers (the Agencies or defendants) both have responsibilities under the Act for
 11 regulating activities that may affect the waters of the United States.

12 The rule being challenged in this litigation is The Navigable Waters Protection Rule:
 13 Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (April 21, 2020) (2020 Rule or
 14 Rule), which is scheduled to take effect on June 22, 2020. While the parties dispute how much
 15 acreage of wetlands and how many miles of waterways will be removed from regulation under the
 16 CWA by adoption of the 2020 Rule, there is no quarrel that it represents a substantial pullback
 17 from the scope of jurisdiction the Agencies have historically asserted.

18
 19 *The 1980s Rule*

20 The Corps first promulgated regulations defining “waters of the United States” in the
 21 1970s. *See, e.g.*, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). In the late 1980s, the Agencies
 22 adopted regulatory definitions of that statutory phrase substantially similar to the 1977 definition.
 23 *See* 51 Fed. Reg. 41,251 (Nov. 13, 1986) (Corps regulations); *see also* 53 Fed. Reg. 20,764 (June
 24 6, 1988) (EPA’s codification of nearly identical regulatory text). The parties refer to this as the

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 26 ¹ More specifically the Act prohibits discharge of pollutants into “navigable waters,” which are
 27 then defined as “the waters of the United States, including the territorial seas.” The import of the
 28 word “navigable” is discussed further below.

1 1980s Rule.

2 The Agencies' application of the 1980s rule came under Supreme Court scrutiny three
 3 times. First, in *United States v. Riverside Bayview*, 474 U.S. 121 (1985), the Court deferred to the
 4 Corps' assertion of jurisdiction over wetlands "actually abut[ing]" a traditional navigable water.
 5 *Id.* at 131-35 & n.9 (1985). Several years later, in *Solid Waste Agency of Northern Cook County v.*
 6 *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), the Court rejected the Corps'
 7 assertion of jurisdiction over non-navigable, isolated, intrastate waters. It held that the term
 8 "navigable" must be given meaning within the context and application of the CWA. *Id.* at 171-72;
 9 *see also id.* at 167-68 ("[T]o rule for [the Corps], we would have to hold that the jurisdiction of the
 10 Corps extends to ponds that are not adjacent to open water . . . [T]he text of the statute will not
 11 allow this."). In 2003, the Agencies issued guidance for applying the 1980s Rule in light of the
 12 limitations imposed by SWANCC (the SWANCC Guidance).

13 Most recently, in *Rapanos v. United States*, 547 U.S. 715 (2006), a fractured court
 14 produced three separate articulations of the outer limits of the Corp's jurisdiction over wetlands. A
 15 four-justice plurality held that the consolidated cases before the Court should be remanded for
 16 failure to establish jurisdiction. *See id.* at 757 (Scalia, J., plurality). Applying a different test,
 17 Justice Kennedy also concluded remand was appropriate, and he therefore concurred in the
 18 judgment. *See id.* at 786-87 (Kennedy, J., concurring). The dissent would have upheld the Corps'
 19 finding of jurisdiction. *See id.* at 810 (Stevens, J., dissenting). The Agencies subsequently issued
 20 guidance instructing that the 1980s Rule should be applied in light of *Rapanos* by adhering to
 21 Justice Kennedy's approach (the *Rapanos* Guidance).

22
 23 *The 2015 Rule*

24 In 2015, the Agencies revised the regulatory definition of "waters of the United States."
 25 *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29,
 26 2015) (2015 Rule). When promulgating the 2015 Rule, the Agencies stated an intent to adopt the
 27 test set out in Justice Kennedy's *Rapanos* concurrence, which permitted jurisdiction over wetlands

1 and waters that were not navigable in the traditional sense only where they had a “significant
2 nexus” to waters that are or were navigable in fact, or that could reasonably be made navigable.
3 Therefore, to establish that waters and wetlands covered by the scope of the Rule’s text would
4 have such a “nexus,” the Agencies prepared a scientific literature review. The EPA’s Office of
5 Research and Development produced a report entitled “Connectivity of Streams and Wetlands to
6 Downstream Waters: A Review and Synthesis of the Scientific Evidence” (the Connectivity
7 Report) which considered over 1200 peer-reviewed publications. The Agencies also relied on an
8 independent review of the Connectivity Report by EPA’s Science Advisory Board (SAB). The
9 Connectivity Report made a case for the importance of upstream non-navigable waters and
10 wetlands, and described how they impact downstream navigable waters.

11 Multiple parties sought judicial review of the 2015 Rule in courts across the country. One
12 court of appeals and multiple district courts stayed or enjoined the 2015 Rule, concluding
13 plaintiffs established a likelihood of successfully invalidating the rule. *See In re EPA & DOD*
14 *Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated by* 713 F. App’x 489 (2018)²; *Oregon*
15 *Cattlemen’s Ass’n v. EPA*, No. 3:19-cv-564, Dkt. No. 58 (July 26, 2019), *vacated as moot*, Dkt.
16 No. 81 (D. Or. Mar. 2, 2020); *Texas v. EPA*, No. 3:15-cv-00162, 2018 WL 4518230 (S.D. Tex.
17 Sept. 12, 2018); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *North Dakota v. EPA*,
18 127 F. Supp. 3d 1047 (D.N.D. 2015); *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 250
19 (D.N.D. Sept. 18, 2018). Two courts eventually ruled on summary judgment that the 2015 Rule
20 was “unlawful” and remanded it to the Agencies. *Georgia v. Wheeler*, 418 F. Supp. 3d at 1372;
21 *Texas v. EPA*, 389 F. Supp. 3d 497, 504-06 (S.D. Tex. 2019).

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² The Supreme Court reversed the Sixth Circuit’s jurisdictional determination, holding that challenges must be brought in district courts. *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 624 (2018).

1 *The Repeal Rule*

2 In 2017, the Agencies began reconsidering the 2015 Rule, which was stayed at the time.
3 They conducted a notice-and-comment rulemaking process. Before issuing a new rule, however,
4 the Agencies issued a rule repealing the 2015 Rule and reinstating the pre-2015 Rule regulatory
5 definition of “waters of the United States.” 84 Fed. Reg. 56,626 (Oct. 22, 2019) (“Repeal Rule”).
6 The Repeal Rule went into effect on December 23, 2019. *Id.* Although multiple parties sought
7 judicial review of the Repeal Rule in various district courts, it and its reinstatement of the earlier
8 regulations, remains in force pending the 2020 Rule taking effect. As such, the current governing
9 regime is essentially the 1980s Rule as modified by the *SWANCC* Guidance and the *Rapanos*
10 Guidance.

11
12 *The 2020 Rule*

13 On January 23, 2020, the Agencies signed the final 2020 Rule revising the definition of
14 “waters of the United States.” The Agencies contend the Rule is intended “to end the decades of
15 disputes and uncertainty surrounding the scope of these terms and to provide more administrable
16 rules.” They insist the Rule defines the limits of federal jurisdiction “consistent with the
17 Constitution, CWA, and case law,” and that it “establishes categorical bright lines to improve
18 regulatory clarity.”

19 The 2020 Rule defines the “waters of the United States” as: “(1) The territorial seas and
20 traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and
21 impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters
22 (other than waters that are themselves wetlands).” 85 Fed. Reg. at 22,273. The Rule also specifies
23 “exclusions for many water features that traditionally have not been regulated, and define[s] the
24 operative terms used in the regulatory text.” *Id.* at 22,270; *see also id.* at 22,340-41 (regulatory
25 text to be codified). “Ephemeral features” are categorically excluded under the 2020 Rule. *Id.*
26 at 22,340. Discharges of pollutants to such non-jurisdictional waters, however, remain regulated
27 under the Rule if those discharges are conveyed to downstream navigable waters. *Id.* at 22,297.

1 The Agencies contend that in developing the new definition they were “guided by the
2 Act’s policies and objectives; case law, including both the plurality and concurring opinions in
3 *Rapanos*; scientific principles; and administrability.” The Agencies claim they have balanced
4 Congress’ goal “to restore and maintain the integrity of the Nation’s waters while maintaining the
5 states’ primary responsibilities and rights to prevent, reduce, and eliminate pollution and to plan
6 the development and use of their land and water resources.” The Agencies point to “technical
7 analyses and legal discussion” in some 1,500 pages of the Rule preamble, a Resource and
8 Programmatic Assessment (“RPA”), an Economic Analysis, and a Response to Comments
9 document, to argue they adequately explained and justified the basis of the 2020 Rule and its
10 departure from prior policy.

11 Plaintiffs in this action are seventeen states, the North Carolina Department of
12 Environmental Quality, the District of Columbia, and the City of New York. Twenty-three other
13 states have been permitted to intervene in this action in support of the 2020 Rule.³

14 As noted, plaintiffs seek declaratory and injunctive relief under the Administrative
15 Procedures Act (APA). Their complaint asserts the 2020 Rule is arbitrarily inconsistent with the
16 Agencies’ prior findings, and contrary to the meaning and objectives of the CWA.⁴

17 18 III. LEGAL STANDARDS

19 A. Injunctions

20 An application for preliminary injunctive relief requires the plaintiff to “establish that he is
21 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
22 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
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24 ³ Motions for leave to intervene brought by other interested parties remain under submission and
25 will be decided in due course. In the interim, briefs of those proposed intervenors have been
26 considered in the nature of *amicus* briefs.

27 ⁴ Other challenges to the 2020 Rule have been filed in a number of district courts, and at least one
28 other motion for a preliminary injunction is pending.

1 public interest.” *Winter v. N.R.D.C., Inc.*, 555 U.S. 7, 21-22 (2008). The Ninth Circuit has
 2 clarified, however, that courts in this Circuit should still evaluate the likelihood of success on a
 3 “sliding scale.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (“[T]he
 4 ‘serious questions’ version of the sliding scale test for preliminary injunctions remains viable after
 5 the Supreme Court’s decision in *Winter*.”). As quoted in *Cottrell*, that test provides that, “[a]
 6 preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions
 7 going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor,”
 8 provided, of course, that “plaintiffs must also satisfy the other [*Winter*] factors” including the
 9 likelihood of irreparable harm. *Id.* at 1135.

10 Here, defendants note their disagreement with the *Cottrell* “sliding scale” standard,
 11 although they do not argue this court is free to disregard it. As will appear, the determination here
 12 is that plaintiffs have not shown a likelihood of success and that to the extent they arguably have
 13 shown serious questions going to the merits, the balance of hardships does not tip so strongly to
 14 one side as to warrant preliminary relief. Accordingly, defendants will not have been prejudiced
 15 by application of the *Cottrell* standard.

16 17 B. Section 705

18 As an alternative to their request for a traditional injunction precluding the Agencies from
 19 implementing the 2020 Rule, plaintiffs also seek an order under section 705 of the APA. That
 20 section authorizes a court “[o]n such conditions as may be required and to the extent necessary to
 21 prevent irreparable injury” to “issue all necessary and appropriate process to postpone the
 22 effective date of an agency action or to preserve status or rights pending conclusion of the review
 23 proceedings.” As suggested by the text of the statute and conceded by plaintiffs, the prerequisites
 24 for issuance of an order under section 705 are substantively identical to those for issuance of a
 25 preliminary injunction. The parties were asked to provide supplemental briefing, however, on the
 26 question of whether the concerns that apply when a court is considering issuing a so-called
 27 “nationwide injunction” apply equally to an order issued under the express statutory authority of
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1 section 705 to “postpone the effective date of an agency action.” While plaintiffs have presented
 2 some compelling arguments that an order under section 705 properly stays agency action as a
 3 whole, without regard to geography or the identity of the particular plaintiffs, ultimately this case
 4 does not require resolution of that question.

5
 6 C. The APA

7 Under section 706 of the APA, a reviewing court must “hold unlawful and set aside agency
 8 action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or
 9 otherwise not in accordance with law; contrary to constitutional right, power, privilege, or
 10 immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 11 [or] without observance of procedure required by law.” 5 U.S.C. § 706(2)(A)-(D). Accordingly,
 12 the decision-making process that ultimately leads to the agency action must be “logical and
 13 rational.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Courts should
 14 be careful, however, not to substitute their own judgment for that of the agency. *Suffolk Cty. v.*
 15 *Sec’y of Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977). Ultimately, a reviewing court may uphold
 16 agency action “only on the grounds that the agency invoked when it took the action.” *Michigan v.*
 17 *EPA*, 135 S. Ct. 2699, 2710 (2015). Post hoc rationalizations may not be considered. *American*
 18 *Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981). In evaluating APA claims, courts
 19 typically limit their review to the administrative record existing at the time of the decision. *Sw.*
 20 *Ctr. for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996); *accord*
 21 *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499
 22 F.3d 1108, 1117 (9th Cir. 2007).

23
 24 IV. DISCUSSION

25 A. Success on the merits

26 As noted above, agency rules are subject to being set aside under the APA if they are found
 27 to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Here,
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1 plaintiffs contend the 2020 rule is “arbitrary and capricious” because in their view the Agencies
2 lacked an adequate scientific and factual basis for changing their policy so dramatically. Plaintiffs
3 also point to various specific aspects of the rule that they contend are not rational or reasonable.
4 Plaintiffs separately argue the 2020 rule is otherwise “not in accordance with the law” because,
5 they insist, it is inconsistent with the “text, structure, and purpose” of the Clean Water Act. The
6 latter point will be addressed first, because it implicates the available guidance from the Supreme
7 Court, which then indirectly bears on the issues of “arbitrary and capricious.”

8
9 1. *Accordance with the law*

10 Although the meaning of “waters of the United States” in the Clean Water Act has been
11 extensively addressed in no fewer than three Supreme Court cases, the validity of the 2020 rule
12 presents a completely new question. In the prior cases, the issue was always whether the agencies
13 had gone *too far* in extending the scope of federal regulation. Now, the question is whether the
14 agencies have not gone far enough. So, while some guiding principles may be distilled from
15 existing precedents, this is largely a blank slate.

16 The one point on which everyone agrees—“everyone” meaning the parties in this case and
17 all of supreme court justices who have written or joined opinions on the issue—is that “navigable
18 waters” does not in fact mean navigable waters in the ordinary sense a layperson might expect.
19 “[T]he Act’s term ‘navigable waters’ includes something more than traditional navigable waters.
20 We have twice stated that the meaning of ‘navigable waters’ in the Act is broader than the
21 traditional understanding of that term.” *Rapanos*, 547 U.S. at 731. As a result, the challenge in
22 interpreting the meaning of “waters of the United States” lies in reconciling the fact that it must
23 consist of something more than just waters that are navigable or could reasonably be made so,
24 with the fact that it must have *some* limitations.

25 The phrase, therefore, is indisputably ambiguous. As a result, the court is compelled to
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United States District Court
Northern District of California

1 apply *Chevron* deference when evaluating whether the Agencies’ interpretation of it is lawful.⁵

2 The Supreme Court has explained *Chevron* deference as follows:

3 In *Chevron*, this Court held that ambiguities in statutes within an
4 agency’s jurisdiction to administer are delegations of authority to the
5 agency to fill the statutory gap in reasonable fashion. Filling these
6 gaps, the Court explained, involves difficult policy choices that
7 agencies are better equipped to make than courts If a statute is
8 ambiguous, and if the implementing agency’s construction is
reasonable, *Chevron* requires a federal court to accept the agency’s
construction of the statute, even if the agency’s reading differs from
what the court believes is the best statutory interpretation.

9 *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

10 Furthermore, and of particular relevance here, *Brand X* explained “[a]gency inconsistency
11 is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”

12 *Id.* At 981. The Court elaborated:

13 Unexplained inconsistency is, at most, a reason for holding an
14 interpretation to be an arbitrary and capricious change from agency
15 practice under the Administrative Procedure Act For if the
16 agency adequately explains the reasons for a reversal of policy,
17 change is not invalidating, since the whole point of *Chevron* is to
18 leave the discretion provided by the ambiguities of a statute with the
19 implementing agency An initial agency interpretation is not
20 instantly carved in stone. On the contrary, the agency . . . must
21 consider varying interpretations and the wisdom of its policy on a
22 continuing basis . . . for example, in response to changed factual
23 circumstances, or a change in administrations That is no doubt
24 why in *Chevron* itself, this Court deferred to an agency
25 interpretation that was a recent reversal of agency policy.

26 *Brand X*, 545 U.S. at 981–82 (quotes and citations omitted).

27 Finally, one more important principle emerges from *Brand X*. “A court’s prior judicial
28 construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference
only if the prior court decision holds that its construction follows from the unambiguous terms of

⁵ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1 the statute and thus leaves no room for agency discretion.” *Id.* at 982.

2 Here, plaintiffs acknowledge that *Chevron* deference applies. They then argue, however,
3 that the 2020 Rule does not survive review even under *Chevron* because, in their view, it is not a
4 *reasonable* interpretation of the statute. Plaintiffs’ argument rests heavily on the notion that the
5 2020 Rule largely adopts the position of the *Rapanos* plurality, and that the other five justices
6 agreed the plurality’s standard was not appropriately grounded in the statute.

7 Plaintiffs’ argument fails for multiple reasons. First, it is suspect to attempt to cobble together a
8 holding from the concurrence and the dissent. *See generally Marks v. United States*, 430 U.S. 188,
9 193 (1977), (“When a fragmented Court decides a case and no single rationale explaining the
10 result enjoys the assent of five Justices, the holding of the Court may be viewed as that position
11 taken by those Members who concurred in the judgments on the narrowest grounds.” (quotation
12 and citation omitted)).

13 More fundamentally, even if the concurrence and the dissent can be read together to stand
14 for the proposition that the *Rapanos* plurality’s articulation of the maximum permissible reach of
15 the statute is an improper construction, a holding that the Agencies *must* construe the statute more
16 broadly is a bridge too far. Finally, nothing in either the *Rapanos* concurrence or the dissent—or
17 in the two read together—can be characterized as a holding “that its construction follows from the
18 unambiguous terms of the statute and thus leaves no room for agency discretion.” *Brand X*, 545
19 U.S. at 982.

20 In the absence of precedent construing what *must* be included as “waters of the United
21 States,” plaintiffs are left with little more than policy arguments that the narrowness of the 2020
22 Rule serves poorly to carry out the objectives of the CWA. As compelling as those arguments may
23 be, they do not provide a sufficient basis for a court to substitute its judgment for the policy
24 choices of the Agency. Had Congress chosen to speak more clearly about how broadly CWA
25 jurisdiction was to extend, or if the CWA did not contemplate the balancing of interests in pursuit
26 of its ultimate goals, it might be possible to characterize the 2020 Rule as an “unreasonable”
27 interpretation. At least at this juncture and on the current record, however, plaintiffs have not
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1 shown they are likely to succeed in making that claim.

2 Finally, plaintiffs contend the 2020 Rule is contrary to law insofar as it excludes from its
3 scope interstate waters that do not otherwise qualify for protection.⁶ Plaintiffs insist that waters or
4 wetlands that cross state lines have always been subject to federal jurisdiction. While that may
5 otherwise be so, the CWA did not employ “interstate” in its definition of “navigable waters” or to
6 describe “waters of the United States.” Accordingly, plaintiffs have not shown a likelihood of
7 success on the merits of their claim that the 2020 Rule is “otherwise contrary to law.”

8
9 *2. Arbitrary and capricious*

10 Plaintiffs present four basic arguments that the 2020 Rule is arbitrary and capricious. First,
11 plaintiffs contend the Agencies have not adequately justified the fundamental change in policy and
12 their discounting of the scientific evidence they previously marshalled in support of the 2015 Rule.
13 As set out above, Agencies are not precluded from reversing course “since the whole point of
14 *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing
15 agency.” *Brand X*, 545 U.S. at 982. Indeed, a policy change may be permissible simply because
16 there has been a “change in administrations.”

17 The requirement is only that agencies must *explain* the basis for their change, and
18 defendants have adequately done so here. The need for a new rule was manifest, and had been for
19 decades. The 1980s rule had been cut back by the courts, leaving a patchwork of regulations and
20 “guidance” documents. The 2015 Rule had been rejected by courts. Certainly, the Agencies could
21 have promulgated a new rule that remained expansive while attempting to address the concerns
22 courts had raised about the outer limits of jurisdiction under the CWA. It is no secret that a
23 motivating factor in choosing to go the opposite direction was a “change in administrations,” but
24 that does not make it improper.⁷

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26 ⁶ Although plaintiffs present this as an issue of potentially great effect, the Agencies contend it
actually would apply in very few instances.

27 ⁷ The Supreme Court’s decision yesterday in *Department of Homeland Security v. Regents of the*

1 Plaintiffs' arguments that the Agencies disregarded the scientific evidence they previously
2 had gathered is ultimately a policy disagreement as well. The Agencies have articulated reasons
3 they contend the science does not compel a different result, but the real difference in opinion is
4 whether the statute clearly compels the Agencies to extend federal regulation to the broadest
5 permissible extent under the Commerce Clause, in the name of providing *all* of the benefits for
6 water quality the science suggests might be achievable. Because the Agencies may reasonably
7 conclude they have no such statutory duty, discounting evidence of possible benefits is not plainly
8 arbitrary or capricious.

9 Second, plaintiffs contend the 2020 Rule "disregards" the primary objective of the CWA to
10 protect water quality. This, however, adds little to the arguments they have already made. That the
11 Agencies now choose a different approach, and a different balance between federal and state
12 responsibilities does not mean they have disregarded the primary objective of the statute in an
13 arbitrary or capricious manner that is likely to warrant setting aside the Rule.

14 Third, plaintiffs take issue with two specific aspects of the 2020 rule. They complain the
15 requirement that a non-navigable water source must contribute surface water flow to a
16 jurisdictional water in a "typical year" irrationally excludes wetlands that flood in periodic events,
17 and that the term "typical year" is inadequately defined in any event. Similarly, plaintiffs contend
18 the Rule provides no workable methodology to distinguish between "ephemeral" streams, which
19 are categorically excluded from coverage, and "intermittent" streams, which are not. Plaintiffs
20 have made some showing that these provisions of the 2020 Rule may lack clarity and present

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22 *Univ. of California*, 2020 WL 3271746, at *5 (U.S. June 18, 2020) provides an instructive
23 contrast. There, the Court found an agency failed adequately to explain and justify a policy change
24 in a brief memorandum issued by the director. Here, the agencies engaged in a full notice and
25 comment rulemaking process, generating a fulsome record of the basis for the policy change.
26 Another aspect of the *DHS v Regents* decision is also relevant here. The Court stated: "We do not
27 decide whether DACA or its rescission are sound policies. The wisdom of those decisions is none
28 of our concern We address only whether the agency complied with the procedural
requirement that it provide a reasoned explanation for its action." 2020 WL 3271746, at *17
(quotations and citations omitted). Likewise, the wisdom of the 2020 Rule, and whether it is a
sound policy, is not the subject of review here.

1 some administrability challenges. Those potential issues, however, are not sufficient to conclude
2 the Rule should be preliminarily enjoined as arbitrary and capricious.

3 Finally, plaintiffs fault the Agencies for not addressing “reliance interests” that may have
4 arisen under their prior policy approach. Although it may not have been anticipated that the
5 Agencies would reverse course to the degree they have, given the long uncertainty about the
6 permissible scope of federal regulation under the CWA, it is difficult to see how significant
7 cognizable reliance interests would have arisen. In any event, to the extent some such interests did
8 arise, plaintiffs have not shown how they would invalidate the 2020 Rule.

9
10 **B. Irreparable harm and other factors**

11 Had plaintiffs made a stronger showing on the merits, the interest in preserving the status
12 quo would count heavily towards providing preliminary relief, either as a traditional injunction or
13 as a stay order under section 705. Although substantial environmental harm might only
14 accumulate over a period of time, it is reasonable to assume that some of the effects of
15 withdrawing federal protection for some waters and wetlands will begin to manifest immediately,
16 and certainly over the course of time this action is likely to be pending. That said, the agencies and
17 the intervenor states, have raised substantial challenges to the adequacy of the showing of
18 irreparable harm, particularly insofar as it rests on a number of speculative assumptions.
19 Additionally, unless section 705 is read to permit a stay of the rule without regard to particular
20 geographic impacts, plaintiffs likely have failed to show that the harms to which they point apply
21 with equal force in all parts of the country, which could have a bearing on the propriety of a so-
22 called “nationwide injunction.”

23 The balance of equities or hardships may also lean somewhat in plaintiffs’ favor, given the
24 interest in maintaining the status quo, and the lack of any special urgency necessitating immediate
25 implementation of the 2020 Rule. That does not weigh so heavily, however, as to overcome the
26 lack of a stronger showing on the merits.

27 Finally, under the circumstances of this case, the question of whether an injunction would
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United States District Court
Northern District of California

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be “in the public interest” is subsumed in the other factors. This is because even though an invalid rule would not serve the public interest, a valid rule could not be enjoined based only on a court’s assessment that it was not good public policy.

V. CONCLUSION

The motion for a preliminary injunction or an order staying the effective date of the 2020 Rule is denied.

IT IS SO ORDERED.

Dated: June 19, 2020


RICHARD SEEBORG
United States District Judge