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

14 **STATE OF CALIFORNIA, BY AND THROUGH**
 15 **ATTORNEY GENERAL XAVIER BECERRA AND**
 16 **CALIFORNIA STATE WATER RESOURCES**
 17 **CONTROL BOARD, STATE OF NEW YORK,**
 18 **STATE OF CONNECTICUT, STATE OF ILLINOIS,**
 19 **STATE OF MAINE, STATE OF MARYLAND,**
 20 **STATE OF MICHIGAN, STATE OF NEW JERSEY,**
 21 **STATE OF NEW MEXICO, STATE OF NORTH**
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MASSACHUSETTS AND VIRGINIA, THE NORTH
CAROLINA DEPARTMENT OF ENVIRONMENTAL
QUALITY, THE DISTRICT OF COLUMBIA, AND
THE CITY OF NEW YORK,

23 Plaintiffs,

24 v.

25 **ANDREW R. WHEELER, AS ADMINISTRATOR**
OF THE UNITED STATES ENVIRONMENTAL
 26 **PROTECTION AGENCY; UNITED STATES**
ENVIRONMENTAL PROTECTION AGENCY; R.
 27 **D. JAMES, AS ASSISTANT SECRETARY OF THE**
ARMY FOR CIVIL WORKS; AND UNITED
 28 **STATES ARMY CORPS OF ENGINEERS,**

Defendants.

Case No. 3:20-cv-03005-RS

**PLAINTIFFS' REPLY IN SUPPORT OF
 MOTION FOR A PRELIMINARY
 INJUNCTION OR STAY**

Date: June 18, 2020
 Time: 1:30 pm
 Dept: San Francisco Courthouse,
 Courtroom 3 – 17th Floor
 Judge: The Honorable Richard
 Seeborg

Action Filed: 5/1/2020

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INTRODUCTION

1
2 This Court should grant the States’ and Cities’ Motion (ECF No. 30) and stay the effective
3 date of the 2020 Rule or enjoin its implementation during this litigation. The States and Cities are
4 likely to succeed on the merits of their claims, because the 2020 Rule is arbitrary and capricious
5 and not in accordance with law. Even though the primary objective of the Clean Water Act (CWA
6 or Act) is to restore and maintain water quality, the Agencies disregarded their previous factual
7 findings, which demonstrated the critical need to protect categories of waters that the 2020 Rule
8 excludes from the Act’s scope. The science previously developed by the Agencies should have
9 been central to any reasoned determination of how to attain the Act’s objective, yet—with the
10 exception of a few self-serving references—the Agencies instead ignored that body of science.

11 The Rule’s interpretation of “waters of the United States” is also a flatly unreasonable
12 construction of the Act as found by a majority of the Justices in *Rapanos v. United States*, 547
13 U.S. 715 (2006). In their Opposition, the Agencies focus on a straw man argument—that the Act
14 is purportedly unambiguous—that the States and Cities did not make. Rather, the States and Cities
15 argue the Agencies have adopted an unreasonable interpretation of an ambiguous statutory phrase
16 and that Supreme Court caselaw proves that conclusion. The Agencies also irrationally adopted
17 vague and unworkable terminology for assessing a water’s jurisdictional status that will cause
18 confusion, contrary to the Agencies’ stated objective of increasing predictability.

19 The States and Cities have also demonstrated that the 2020 Rule will cause imminent,
20 significant and irreparable harm to the States’ and Cities’ environmental, programmatic,
21 proprietary and economic interests during this litigation, if not stayed or otherwise preliminarily
22 enjoined. In attempting to contest this extensive evidence of harm, the Agencies argue that this
23 Court should evaluate the States’ and Cities’ irreparable harm based on a standard that does not
24 apply to preliminary injunctions, mount improper hearsay objections, and attempt to recast their
25 own equivocal statements. Nor have the Agencies refuted the States’ and Cities’ demonstration
26 that the balance of equities weighs in their favor and that a nationwide injunction is necessary to
27 prevent widespread degradation of the Nation’s waters. The Court should thus grant a preliminary
28 injunction or stay of the 2020 Rule.

ARGUMENT

With un rebutted evidence, the States and Cities met the requirements for a preliminary injunction or a stay: (1) “serious questions going to the merits;” (2) “balance of hardships that tips sharply towards the plaintiff;” (3) “likelihood of irreparable injury” absent injunctive relief; and (4) “the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

I. THE STATES AND CITIES ARE LIKELY TO SUCCEED ON THE MERITS

A. The 2020 Rule Is Arbitrary and Capricious

1. The 2020 Rule Disregards the Clean Water Act’s Primary Objective to Protect Water Quality.

Protection of water quality is the key directive of Congress to the Agencies in the CWA. 33 U.S.C. § 1251(a); *see Env’tl Def. Ctr., Inc. v. EPA*, 344 F. 3d 832, 877 (9th Cir. 2003). Yet, contrary to that clear mandate, the Agencies failed to address the abundant evidence before them, including scientific evidence developed since 2015, demonstrating that the 2020 Rule will do the opposite: it will degrade rather than protect water quality. Mot. at 14-17; ECF No. 30-18 (Sullivan Decl.) ¶¶ 21-51. That error represents a paradigmatic example of the type of arbitrary and capricious rulemaking the APA forbids. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (*State Farm*); *Mercy Catholic Med. Ctr v. Thompson*, 380 F.3d 142, 158 (3d Cir. 2004); *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985).

In particular, the Agencies disregarded and countermanded their extensive prior factual findings in the 2015 Connectivity Report, which (contrary to the Agencies’ current effort) sought to further the Act’s primary purpose by examining “the connectivity and mechanisms by which streams and wetlands, singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters.” Connectivity Report at ES-1. The Agencies claim that they “considered and discussed” the Connectivity Report and “scientific information” but their conclusory, misleading references to that information in the Rule’s preamble (*see Opp.* at 18-19) show their failure to meaningfully consider the information that should have been most critical to

1 determining the CWA’s proper scope of coverage. The Agencies also attempt to support the 2020
 2 Rule by citing to portions of their “Resource and Programmatic Assessment” (RPA) and
 3 “Economic Analysis” (EA) for the Rule, but they expressly disavowed the RPA and EA as bases
 4 for the Rule. 85 Fed. Reg. at 22,332.

5 **a. The Rule’s Elimination of CWA Protection for Many**
 6 **Tributaries and Wetlands Is Contrary to the CWA’s Objective.**

7 The Agencies previously determined that tributary streams—the great majority of which
 8 are headwater streams—as well as wetlands, are functionally connected to and combine to strongly
 9 affect the chemical, physical, and biological integrity of downstream navigable waters. Mot. at
 10 10-12 (citing to Connectivity Report at ES-2 to ES-3, ES-5, ES-13); *see* 80 Fed. Reg. at 37,057-
 11 58; 2015 TSD at 164-171. But, contrary to the Act’s objective, the 2020 Rule ignores those key
 12 findings and eliminates CWA protection for entire categories of upstream waters without reasoned
 13 explanation. *See* Sullivan Decl. ¶¶ 2, 5-7, 11, 17-19, 24, 34, 50; *F.C.C. v. Fox Television Stations,*
 14 *Inc.*, 556 U.S. 502, 537 (2009) (agencies cannot disregard or countermand their previous factual
 15 determinations without reasoned explanation); *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d
 16 1160, 1163 (9th Cir. 2010) (court “need not defer to the agency when the agency’s decision is
 17 without a substantial basis in fact”) The Agencies seek to omit that decisive fact by arguing that
 18 they “never said that *all* upstream waters and wetlands are ‘vital,’” just “that ‘upstream waters’ of
 19 ‘downstream’ waters are *as a category* ‘vital.’” Opp. at 21 (emphasis in original). In fact, the
 20 2020 Rule removes from the Act’s protections *entire categories* of waters, namely all ephemeral
 21 streams and all non-floodplain wetlands. Sullivan Decl. ¶¶ 4-5, 24, 34.

22 The Agencies also argue that their prior findings and science informed the 2020 Rule’s
 23 severely restrictive definition of “tributary” (Opp. at 19) but that is belied by the Rule’s
 24 elimination of CWA protections for all ephemeral streams “despite their importance and the risks
 25 associated with their impairment that have been widely recognized, including by EPA.” Sullivan
 26 Decl. ¶ 24. The Agencies claim that they eliminated ephemeral streams from their new definition
 27 of “tributary” based on the “connectivity gradient.” Opp. at 19. The connectivity gradient to
 28 which the Agencies refer, however, was a single Science Advisor Board hypothetical illustration,

1 which the Agencies misrepresented (*see* Sullivan Decl. ¶ 7) to justify eliminating CWA
2 protections for all ephemeral streams and all non-floodplain wetlands. And, as explained in
3 Section I.A.2, the Agencies have abandoned their prior evidentiary findings in favor of difficult-to-
4 measure flow requirements in a “typical year” that are inconsistent with established science
5 regarding waters’ functional connectivity.

6 The 2020 Rule also imposes surface water flow requirements for streams that
7 fundamentally conflict with the CWA’s objective and the Agencies’ prior findings. The Rule will
8 eliminate CWA protections for 4.8 million miles of streams and millions of acres of wetlands
9 nationwide. Mot. at 1, 30-31. Far from being “unfounded” or “wild speculation,” as the Agencies
10 claim (Opp. at 20), these expected impacts are based on expert studies, including studies that
11 enhance the National Hydrography Dataset and the National Wetlands Inventory. *See* Sullivan
12 Decl. ¶¶ 3, 21-22, 24, 38-39, 44-46; ECF No. 68 (American Fisheries Society *et al.* Amicus Brief).
13 The Agencies fail to explain in their Opposition how the 2020 Rule’s exclusion of these waters
14 squares with the Act’s objective and the Agencies’ prior findings detailing the importance of those
15 waters, including how they significantly affect downstream rivers by minimizing downstream
16 flooding or by contributing flow. 2015 TSD at 246-47; Connectivity Report at 1-10, 3-5, 3-7, 3-
17 23, 3-28.

18 The 2020 Rule also requires that, to receive the Act’s protection, a wetland must touch a
19 downstream water, or have a direct surface water connection to it. This restriction is directly
20 contradicted by the Agencies’ prior findings that many non-abutting and otherwise functionally
21 connected wetlands significantly affect the integrity of downstream waters. Connectivity Report
22 at 4-2, 4-5, 6-6 to 6-7; Sullivan Decl. ¶¶ 11, 13, 15-16, 18, 34, 41. The Agencies reveal in their
23 Opposition the alarming position that many wetlands are little more than pits in the ground,
24 suitable for filling without the necessity of a CWA permit. Opp. at 26. The Agencies also claim
25 that they considered “inundation by flooding” to “establish[] jurisdiction.” *Id.* at 19. But, contrary
26 to the Act’s objective, the Rule makes non-jurisdictional millions of acres of wetlands whose
27 critical flood mitigation functions will be lost as these newly unprotected wetlands are filled,
28 putting people and property across the nation at increased risk of flooding. Sullivan Decl. ¶¶ 15,

1 34, 48, 50; Mot. at 36-37.

2 **b. The Agencies May Not Rely on the RPA or EA to Support the**
 3 **2020 Rule.**

4 The Agencies also attempt to support the 2020 Rule by citing to portions of their RPA and
 5 EA for the Rule. Opp. at 20. But the Agencies expressly disavowed the EA and RPA as bases for
 6 the Rule. 85 Fed. Reg. at 22,332 (“the final rule is not based on the information in the agencies’
 7 [EA] or [RPA]”); 22,335 (“the agencies are not relying on the [EA] . . . as a basis for this final
 8 rule”); RPA at 6 (“[t]he agencies have not relied on the information presented in the RPA and EA
 9 as an independent basis” for the Rule). Accordingly, the Agencies’ prior contemporaneous
 10 rulemaking statements foreclose their post-hoc attempt to use the RPA or EA to justify the Rule.
 11 *State Farm*, 463 U.S. at 50 (“[A]n agency’s action must be upheld, if at all, on the basis articulated
 12 by the agency itself”); *NRDC v. EPA*, 735 F.3d 873, 877 (9th Cir. 2013) (court’s review must
 13 “begin[] and end[] with the reasoning that the agency relied upon in making th[e] decision”); *New*
 14 *Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (a court
 15 must “exclude post-hoc rationalizations concocted by counsel in briefs or argument”).¹

16 **2. The 2020 Rule’s “Typical Year” Requirement and Distinction**
 17 **Between Intermittent and Ephemeral Streams Are Arbitrary and**
 18 **Capricious**

19 The Agencies have not rebutted the States’ and Cities’ argument that the use of “typical
 20 year” to define jurisdictional waters is arbitrary and unworkable. Mot. at 18-19. They identify no
 21 reason in the record why limiting protected waters to conditions that are not too dry or too wet
 22 serves the Act’s objective, nor do the Agencies evaluate whether those limitations would cause
 23 adverse impacts to downstream waters. The Agencies state that “typical year” is determined based
 24 on precipitation data (Opp. at 22), but the final Rule changed the definition to include unspecified

25 ¹ The Agencies’ unlawful attempt to rely on the RPA is particularly curious since it, in fact,
 26 reveals that the Rule will harm water quality and will undermine major CWA programs for
 27 protecting water quality by drastically reducing the jurisdictional “waters of the United States” and
 28 reducing water quality protections provided by the Act’s permitting, water quality certification and
 oil spill control programs. Mot. at 14-17; RPA at 59 (“many CWA programs—including water
 quality standards, state and tribal [Section] 401 certification programs, discharge permits, and oil
 spill prevention and planning programs—apply only to waters subject to CWA jurisdiction”).

1 “other climatic variables” as well. 85 Fed. Reg. at 22,274. The Agencies provide no methodology
2 for incorporating such ill-defined variables into the calculation of the typical year. Instead they
3 offer only vague assertions that they “will consider and use the best available data and
4 information, which provides the most accurate and reliable representative information for the
5 aquatic resource in question, to determine ‘typical year.’” *Id.* at 22,275. As a result, the typical
6 year requirement is helplessly vague and will thus yield arbitrary and capricious decision-making.
7 *See Bark v. United States Forest Service*, 958 F.3d 865, 872 (9th Cir. 2020) (vague and uncertain
8 environmental analysis held arbitrary and capricious).

9 Nor can the Agencies’ decision to rely on the typical year concept be rationalized on the
10 basis that NOAA has been collecting climate data for 30-year time frames. *See Opp.* at 22. There
11 is nothing to suggest that NOAA developed its database to be used by the Agencies to define
12 protected waters under the Act. And nothing in the 2019 Rule and all prior regulations defining
13 waters of the United States has employed the typical year concept.

14 The Agencies claim that distinctions between ephemeral and intermittent streams would
15 give “further clarity” to defining streams (*Opp.* at 23), but they have provided no evidence to
16 support that argument. Instead, in the Rule’s preamble, the Agencies list a hodgepodge of tools to
17 identify ephemeral and intermittent streams without explaining how and whether any of these tools
18 should be used. 85 Fed. Reg. at 22,292-94 (providing a long list of tools). The Rule sets forth no
19 objective methodology for determining whether a stream is ephemeral or intermittent and is
20 therefore unlawfully vague and arbitrary and capricious. *See Bark*, 958 F.3d at 872.

21 **3. The Agencies Failed to Consider the Significant Reliance Interests**
22 **Engendered by Their Long-Standing Implementation of the**
23 **Significant Nexus Standard.**

24 The Agencies fail to demonstrate in their Opposition that they have considered the States’
25 and Cities’ reliance on the Agencies’ long-standing use of the significant nexus standard. Instead,
26 the Agencies assert that reliance was not justified because the regulations defining “waters of the
27 United States” were “notoriously unclear” and the Agencies planned to revise them. *Opp.* at 17-
28 18. A general statement in 2008 that “the agencies were considering rewriting the regulations”
(*Opp.* at 18 n.7) hardly insulates the Agencies from engendering reliance interests generated over a

1 decade of implementation. In fact, the Agencies concede that they have used the significant nexus
 2 standard to make jurisdictional determinations since *Rapanos* in 2006. *Id.* at 18. Indeed, under the
 3 Agencies’ 2019 Rule, which is currently in effect, the significant nexus standard is still used. 80
 4 Fed. Reg. 37,054, 37,057 (June 29, 2015); 84 Fed. Reg. 4154, 4197-98 (Feb. 14, 2019). Given the
 5 Agencies’ long-standing use of the significant nexus standard, reliance by the States and Cities on
 6 it is unquestionably reasonable. *See Nat’l Ass’n. for the Advancement of Colored People v.*
 7 *Trump*, 298 F. Supp. 3d 209, 240 (D.D.C. 2018) (beneficiaries had significant reliance interests
 8 based on a five-year-old government program).

9 The Agencies arguments that the States and Cities could not have relied on the significant
 10 nexus standard because it was not included in regulations until the 2015 Rule have no merit. *Opp.*
 11 at 18. While the codification date is correct, the Agencies established the significant nexus
 12 standard as their lodestar in their 2008 *Rapanos* Guidance, and reliance interests that agencies
 13 must address can be engendered by agency policies or regulations alike. *See Encino Motorcars,*
 14 *LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

15 The Agencies’ claim that they only needed to “thoroughly explain[] the reasons for
 16 abandoning the significant nexus standard” to address reliance interests is also wrong. *Opp.* at 18.
 17 An agency must provide its reasons for promulgating a rule *and* acknowledge and evaluate
 18 reliance interests based on its prior position. *See California v. Azar*, 950 F.3d 1067, 1113 (9th Cir.
 19 2020) (citing *Encino Motorcars*, 136 S. Ct. at 2126); *S.A. v. Trump*, 363 F. Supp. 3d 1048 (N.D.
 20 Cal. 2018). The Agencies failed to do so here. Rather, the Agencies simply state that they
 21 “disagree ... that states have reliance interests,” thereby conceding they did not consider those
 22 interests. *Opp.* at 18. Since that position is unquestionably refuted by the record, this concession
 23 establishes yet another way in which the Agencies acted arbitrarily and capriciously.

24 **B. The 2020 Rule Is Unlawful Because the Agencies’ Interpretation of**
 25 **“Waters of the United States” Is Contrary to the CWA.**

26 **1. As Found by a Majority of the Justices in *Rapanos*, the Interpretation**
 27 **of “Waters of the United States” in the 2020 Rule Is Impermissible.**

28 The Agencies fare no better in their attempt to justify their distorted interpretation of the
 Act. To begin, they argue that *National Cable & Telecommunications Ass’n v. Brand X Internet*

1 *Services.*, 545 U.S. 967 (2005) (*Brand X*), precludes the States and Cities from relying on
2 *Rapanos*, Opp. at 11-12, but that misconstrues the States’ and Cities’ argument. The Agencies
3 contend that the States and Cities have run afoul of *Brand X* by arguing that the Agencies may not
4 adopt a new regulatory definition and that the Agencies are bound by the significant nexus
5 standard in Justice Kennedy’s concurring opinion. See Opp. at 11-12. But the States and Cities do
6 not ask the Court to set aside the 2020 Rule because it is a new interpretation or because it fails to
7 adopt the significant nexus standard. Instead they ask the Court to invalidate the Rule because it is
8 based on the interpretation of “waters of the United States” in the plurality opinion in *Rapanos* that
9 was rejected by a majority of the Justices as inconsistent with the Act’s text, structure, and
10 purpose. Mot. at 21. *Brand X* did *not* give an agency license to adopt an interpretation of a statute
11 that a court—especially the Supreme Court—has already found to be an impermissible
12 construction.

13 The question at *Chevron*’s second step is whether the Agencies’ interpretation of “waters
14 of the United States” is reasonable. Mot. at 20; Opp. at 11. Here, that question was answered by
15 the majority of the Justices in *Rapanos*: Justice Kennedy’s concurrence found that the plurality’s
16 test was “inconsistent with the Act’s text, structure, and purpose,” 547 U.S. at 776, and Justice
17 Stevens’ four-person dissent found that that test was “without support in the language and
18 purposes of the Act or in our cases interpreting it.” *Id.* at 800 (quoting Kennedy concurrence).

19 While it is true that “[n]o member of the Supreme Court expressed the view that the CWA
20 leaves no room to carve out a new rule” (Opp. at 12), the Agencies did not carve out a *new* rule
21 here. Instead, they adopted the *Rapanos* plurality’s test. And while they also argue at length why
22 that test is consistent with the CWA (Opp. at 13-15), they fail to acknowledge that a majority of
23 the Justices of the Supreme Court have found that it is not. Because the 2020 Agencies’
24 construction of “waters of the United States” is inconsistent with the CWA, it is invalid under
25 *Chevron*’s second step.

1 **2. The 2020 Rule Is Not Justified on the Basis of Constitutional**
 2 **Concerns and Is Unsupported by the CWA’s Text, Structure and**
 3 **Purpose.**

4 Because a majority of the Justices in *Rapanos* found impermissible the interpretation of
 5 “waters of the United States” the Agencies now adopt, the Court need not conduct any further
 6 analysis under *Chevron*. Even if the Court does so, the Agencies’ new interpretation is “‘entitled
 7 to considerably less deference’” because it departs radically from their prior “consistently held
 8 agency view.” *Nat. Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 602–03 (9th Cir. 2008)
 9 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n. 30 (1987)). In any case, as the States and
 10 Cities have shown, the Agencies’ reasons for changing their interpretation are not supported by the
 11 Act’s text, structure, or purpose. Mot. at 24-28.

12 The Agencies argue that the “sufficient surface water connection” required by the 2020
 13 Rule reflects the limits of the Commerce Clause. Opp. at 13. That argument was rejected in
 14 Justice Kennedy’s concurrence and Justice Stevens’ dissent in *Rapanos*. 547 U.S. at 782-83
 15 (compliance with the “significant nexus” standard “will raise no serious constitutional or
 16 federalism difficulty” and “prevents problematic applications of the statute” that could raise such
 17 concerns) (Kennedy, J.), 803 (“the plurality suggests that the canon of constitutional avoidance
 18 applies because the Corps’ approach might exceed the limits of our Commerce Clause authority”
 19 but that concern “is plainly not warranted here”) (Stevens, J.); *see also* Mot. at 37-38.

20 The Agencies also argue, without any citation to the administrative record, that they gave
 21 “extensive consideration to the ‘objective’ of the Act to ‘restore and maintain the chemical,
 22 physical, and biological integrity of the Nation’s waters.’” Opp. at 13-14 (quoting 33 U.S.C.
 23 § 1251(a)). As discussed above in Section I.A.1, they did not. Instead, they simply and repeatedly
 24 stated in a conclusory fashion that the Rule balances the integrity of the Nation’s waters with the
 25 rights of States, as required by Section 101(b) of the Act, 33 U.S.C. § 1251(b). *See* 85 Fed. Reg. at
 26 22,250, 22,262, 22,269, 22,271, 22,272, 22,283, 22,285, 22,287, 22,308.

27 Section 101(b)—which sets forth a “policy,” not the Act’s “objective,” § 101(a), 33
 28 U.S.C. § 1251(a)—does *not* limit the scope of “waters of the United States” based on states’ rights.
 Mot. at 24-26. The Supreme Court’s recent decision in *County of Maui v. Hawaii Wildlife Fund*,

1 140 S. Ct. 1462 (2020) makes that point too. The Court recognized, citing Section 101(b), that
2 “Congress intended to leave substantial responsibility and *autonomy* to the States” with regard to
3 “land,” “groundwater,” and “nonpoint source[] pollution.” *Id.* at 1471, 1476 (emphasis in
4 original). Thus, *County of Maui* makes clear that Section 101(b) refers to the rights of states to
5 regulate groundwater, land, and nonpoint source pollution, not the “regulation of identifiable
6 sources of pollutants entering navigable waters” addressed by the 2020 Rule. *See id.*

7 Finally, the Agencies claim that the States and Cities argue that “the general water quality
8 objectives of the CWA in § 1251(a) *unambiguously* override the Agencies’ discretion to otherwise
9 balance and interpret the definition of ‘navigable waters.’” *Opp.* at 15 (emphasis in original). The
10 States and Cities have made no such argument. Instead, as discussed in Section I.A.1, they argue
11 that Agencies were required to consider protection of water quality and did not do so.²

12 Thus, even if the Court considers the Agencies’ reasons for changing their interpretation of
13 “waters of the United States,” those reasons do not justify the 2020 Rule.

14 **3. The Rule’s Exclusion of Interstate Waters Is Contrary to Law.**

15 The Agencies fail to rebut the States’ and Cities’ argument that the removal of interstate
16 waters as a category of jurisdictional waters is contrary to law.

17 The Agencies first contend they were required to remove interstate waters because the
18 Southern District of Georgia found the interstate waters provisions of the 2015 Rule unlawful.
19 *Opp.* at 23; *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358-60 (S.D. Ga. 2019). But the
20 Agencies’ decision to propose the removal of interstate waters *pre-dated* the Southern District of
21 Georgia’s remand by more than 6 months, *see* 84 Fed. Reg. 4154, 4171 (Feb. 14, 2019) (proposing
22 to remove the interstate waters category), demonstrating that the Agencies were not motivated by
23 that court’s ruling. Further, *Georgia* is neither correct nor binding. *See United States v.*

24 _____
25 ² The Agencies argue that they relied on both the plurality opinion and Justice Kennedy’s
26 concurrence in *Rapanos* to exclude ephemeral streams. *Opp.* at 14-15. But, while they refer to
27 observations made by Justice Kennedy in their discussion of those streams, the test they used was
28 the plurality’s test. *See Mot.* at 23. The Agencies’ contentions that states, tribes, and local
entities can protect those streams also misses the mark. *Opp.* at 15. Even if true, that does not
relieve the Agencies of their obligation to interpret the Act consistent with its text and purpose,
nor does it address the irreparable harm that the States and Cities will suffer due to pollution from
upstream states or from in-state pollution while they are establishing new regulatory programs.

1 *Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) (“a district court opinion does not have binding
2 precedential effect,’ especially one from another federal circuit”) (citations omitted).

3 The Agencies’ attempt to misconstrue Section 303(a) of the Act to justify their exclusion of
4 interstate waters similarly misses the mark. The Agencies argue that Section 303(a)’s reference to
5 “water quality standard in place before 1972” precludes the protection of interstate waters as a
6 category because, starting in 1972, Congress defined the scope of CWA jurisdiction with the term
7 “navigable waters.” Opp. at 24. But Section 303(a), which was added in 1972, did not indicate
8 congressional intent to cease protecting interstate waters under the CWA but, rather, extended
9 those protections by requiring that water quality standards for interstate waters prior to 1972
10 remain in effect. 33 U.S.C. § 1313(a); Mot. at 28-29.

11 Indeed, the protection of interstate waters as a category is mandated by the Act’s text,
12 structure, and purpose, and by controlling caselaw. Mot. at 28-29. Save for their argument about
13 Section 303(a), refuted above, the Agencies failed to address the States’ and Cities’ legal
14 arguments. Indeed, the Agencies’ other justifications for the exclusion of interstate waters,
15 including the decision not to rely on “congressional acquiescence” and the concern that regulating
16 interstate waterbodies as a category will protect some smaller waterbodies, are irrelevant because
17 they do not address the key issue here—whether the exclusion of interstate waters as a category
18 was contrary to the law.

19 **II. THE STATES AND CITIES ESTABLISHED THAT THE 2020 RULE THREATENS** 20 **IMMINENT AND IRREPARABLE HARM**

21 Under the Ninth Circuit’s “serious questions” test, the States and Cities need only
22 demonstrate a *likelihood* of irreparable injury at *any point* prior to resolution of the merits to obtain
23 a preliminary injunction to preserve the status quo until adjudication of the merits. *All. for the*
24 *Wild Rockies*, 632 F.3d at 1131-32. Contrary to the Agencies’ assertions (Opp. at 26, 28), the
25 injury need not occur immediately upon the 2020 Rule’s effective date nor must the injury be
26 “permanent”; “[e]nvironmental injury, by its nature” is often “irreparable” and is therefore
27 sufficient for a preliminary injunction. *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d
28 999, 1020 (9th Cir. 2009) (quotation omitted); *Nat’l Wildlife Fed’n v. Burford*, 835 F.2d 305, 323-

1 324 (D.C. Cir. 1987) (affirming preliminary injunction where agency action did “not immediately
2 open the lands to exploitation”) (*Burford*).

3 Here, the States and Cities identified four types of irreparable injuries they will suffer prior
4 to adjudication of the merits: environmental, programmatic, proprietary, and economic interests.
5 Mot. at 29-38.

6 As to the States’ and Cities’ environmental and economic injuries, the Agencies do not
7 seriously engage with the evidence supporting the Motion, but rather urge the Court to ignore
8 some or all of it as hearsay, lacking personal knowledge, or outside the administrative record. The
9 Agencies’ hearsay and personal knowledge arguments (Opp. at 28-30) lack merit because
10 irreparable harm may be shown by “expert declarations” and even inadmissible evidence. *Nat’l*
11 *Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 823 (9th Cir. 2018) (affirming grant
12 of preliminary injunction); *Herb Reed Enterprises, LLC v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239,
13 1250 n.5 (9th Cir. 2013) (“reject[ing]” argument that “irreparable harm” can be shown only by
14 “admissible evidence” because “the rules of evidence do not apply strictly to preliminary
15 injunction proceedings”). As to the Agencies’ administrative record arguments (Opp. at 3; Opp. to
16 Pls’ Req. for Judicial Notice), this Court is not limited to the administrative record and may
17 consider properly submitted³ non-record evidence in assessing the propriety of injunctive relief.
18 *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1074 n.7 (N.D. Cal. 2018). Accordingly,
19 this Court should consider all 21 declarations submitted by the States and Cities.

20 **A. The 2020 Rule Threatens to Cause Immediate and Irreparable**
21 **Environmental Harm**

22 The Agencies offer no declarations or arguments to rebut the detailed scientific analysis by
23 Dr. Sullivan establishing the widespread and serious environmental harm that the Rule threatens to
24

25 ³ In contrast, the Agencies fail to properly submit any non-record evidence to support their
26 claim that unspecified “state laws or continuing obligations” might mitigate the States’ and
27 Cities’ harms. Opp. at 31-32. The Agencies’ unexplained citations to two states’ websites
28 expressing their “commitments” to restoring two watersheds fail to show that those two states
have the authority or capacity to prevent all the harms to those watersheds that the 2020 Rule will
cause. See, e.g., Opp. at 32 nn.14 & 15 (citations to the websites of state agencies).

1 cause during the pendency of this case. Mot. at 30-31.⁴ Instead they offer meritless assertions that
2 various provisions of the CWA and other laws will be instantly triggered to prevent the harm.

3 **1. The Agencies Have Not Demonstrated that CWA Permits Will**
4 **Continue to Protect Water Quality**

5 The Agencies assert that environmental injury will be avoided because newly-allowed
6 pollution of upstream waters will “remain regulated” if those pollutants travel to downstream
7 waters. Opp., 7, 25. But the Rule’s preamble provides no such certainty; there, the Agencies state
8 that permits for pollution discharges to non-jurisdictional waters “*may* no longer be required . . .
9 [or] *may* still be required if the non-jurisdictional feature conveys a discharge of pollutants from a
10 point source” to downstream jurisdictional waters. 85 Fed. Reg. at 22,297 (emphasis added). This
11 equivocal statement, underscored by the practical difficulties associated with tracing pollution
12 back to upstream sources to establish the basis for a CWA permit, shows that the Agencies’
13 assurance of continued regulation of pollutants under the CWA after the 2020 Rule’s effective date
14 is unfounded.

15 Moreover, to require CWA permits for a discharge into a non-jurisdictional ephemeral
16 stream, EPA or an authorized state will need to prove the ephemeral stream is itself a “point
17 source,” 33 U.S.C. § 1362(14), and identify the source of pollutants emptying into the stream,
18 possibly far upstream. Even if a new Section 402 permit is issued, it would only protect waters
19 downstream of the point of discharge from the ephemeral stream to a jurisdictional water, leaving
20 the ephemeral stream itself unprotected. Nothing in the record suggests that EPA has even begun
21 investigation of the many current CWA permits for ephemeral streams that will no longer be
22 within the new, drastically limited jurisdiction of the Act. The observation in Justice Kavanaugh’s
23 concurrence in *County of Maui* that polluters cannot “evade the permitting requirement” for
24 “watercourses that lie upstream of covered waters” is not to the contrary. Opp. at 25. The
25 Agencies have failed to show that the EPA or an authorized state *can* impose a “permitting
26 requirement” for all waters that will lose jurisdictional status under the 2020 Rule and, given the
27 time, effort, and possible litigation involved in establishing such requirements, it is very unlikely

28 ⁴ See also ECF No. 68 (American Fisheries Society *et al.* Amicus Brief) at 14-15.

1 the responsible agency will be able to impose such permitting requirements before the 2020 Rule
2 goes into effect.

3 The Agencies acknowledge there will be more dredge and fill activities in wetlands, but
4 wrongly claim that the States and Cities can “ensure” water quality standards are met after the
5 2020 Rule becomes effective. Opp. at 26. But they ignore the fact that the Rule’s effective date
6 does not provide sufficient time and resources to fill the regulatory gap. Mot. at 35. The
7 Agencies’ claim that relatively few wetlands will be affected by the Rule (Opp. at 26) rests on the
8 EA, which is riddled with errors and biases. See ECF No. 55-1 (Institute for Policy Integrity
9 Amicus Brief). The Agencies also rely on the EA and the RPA to speculate as to how the Rule
10 will affect the States’ and Cities’ operation of their water and wetlands programs. Opp. at 25-27.
11 This speculation cannot overcome the declarations of the States and Cities about the formidable
12 difficulties they will face in filling the regulatory gap the 2020 Rule creates. Mot. at 35.

13 The Agencies’ contention that the States and Cities failed to identify a single discharger that
14 will no longer be subject to permit requirements is specious. Opp. at 26. For example, in New
15 Mexico, current Section 402 pollutant discharge controls include stormwater general permits for
16 over 1,000 facilities. ECF No. 30-16 (Roose Decl.) ¶ 9. Because of the Rule, 25 to 45 percent of
17 these stormwater general permits and 50 percent of the individual permits will no longer be in
18 force. *Id.* ¶¶ 9-10. Regardless, it is not the States’ and Cities’ burden to catalogue potential
19 dischargers; “[g]iven the breadth of the agency’s action” and “the enormity of the land affected” it
20 is enough that the Rule “leave[s] no prohibitions” to protect “water quality” on *some* lands.
21 *Burford*, 835 F.2d at 323-324.

22 2. Water Quality Standards and TMDLs Will Not Ensure Protection of 23 Water Quality After the 2020 Rule Becomes Effective

24 The Agencies incorrectly claim that water quality standards (WQS), Total Maximum Daily
25 Loads (TMDLs), and Section 402 (or NPDES) permits will address all water quality harms that
26 would be caused by the Rule. Opp. at 27-8. First, these arguments are limited to Section 402
27 programs only and have no bearing on the significant wetland destruction the Rule allows due to
28 lost protections under Section 404. Second, the Agencies offer no evidence showing that these

1 measures will be in place upon the 2020 Rule’s effective date; in fact, they frequently take years to
2 implement and achieve results. As discussed above, crafting new Section 402 permits for
3 pollutants discharging via newly non-jurisdictional waters will be at best difficult and at worst
4 impossible. Impacts on water quality could be addressed by modifying other Section 402 permits
5 in a watershed to make them more stringent, 33 U.S.C. § 1313(b)(1)(C), but permittees will resist
6 and necessary administrative proceedings will take time. Alternatively, TMDLs could be
7 developed for the impacted watershed. *See* 33 U.S.C. § 1313(d)(1)(C). But TMDLs often take
8 years to complete and implement. For example, TMDLs for phosphorus in the New York City
9 Watershed were proposed in 2002, but it took until 2009 to develop a viable implementation plan.⁵
10 Similarly, a TMDL for sediment and temperature in the Eel River in California was adopted by
11 EPA 15 years after the river was found to be impaired.⁶ Moreover, TMDLs will not address
12 upstream pollution because downstream states lack the authority to impose TMDLs on dischargers
13 in upstream states. Mot. at 34.

14 **B. The Agencies Do Not Address All the Harms the States and Cities**
15 **Identified Due to Increased Water Pollution**

16 The Agencies assert that the States and Cities must identify “specific discharges of
17 pollutants,” show that those “specific discharges would imminently cause” harm, and that “those
18 injuries will occur.” Opp. at 28-29. Controlling precedent, discussed above, holds otherwise,
19 which is why “the balance of harms will usually favor the issuance of an injunction to protect the
20 environment.” *Lockyer*, 575 F.3d at 1020 (quotation omitted). The lone case cited by the
21 Agencies is not to the contrary, as it did not discuss environmental harm and, in fact, affirmed the
22 type of *prohibitive* injunctive relief the States and Cities seek here. *Park Vill. Apartment Tenants*
23 *Ass’n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011).

24 The States’ and Cities’ Motion offered six examples of how the 2020 Rule would allow
25 upstream states to pollute their waters. Mot. at 33. The Agencies do not address each example,

26 ⁵*See* https://www.dec.ny.gov/docs/water_pdf/nycphos.pdf;
27 https://www.dec.ny.gov/docs/water_pdf/jan09crotontmdl.pdf.

28 ⁶*See* https://19january2017snapshot.epa.gov/www3/region9/water/tmdl/lower_eel/LER-TMDL-final-121807-signed.pdf.

1 but instead cherry-pick a few sentences from some of the declarations. Having failed to rebut *all*
2 of the States' and Cities' evidence, the Agencies' argument is essentially that "there are other areas
3 . . . that are not harmed," which is not a basis to dispute "irreparable injury resulting from
4 environmental harm." *All. for the Wild Rockies*, 632 F.3d at 1135. Regardless, the States and
5 Cities address each of the arguments in turn.

6 *First*, the Agencies' provide no evidence to support their claim that Dr. Sullivan relied on
7 "unreliable assumptions." *Opp.* at 29. In fact, Dr. Sullivan relied on multiple lines of evidence
8 and numerous expert studies documenting the importance of water resources and the Rule's
9 harmful impact on them, and his estimate that 4.8 million miles of streams and millions of acres of
10 wetlands will go unprotected because of the Rule is similarly documented. Sullivan Decl. ¶¶ 3,
11 24. The Agencies argue (incorrectly)⁷ that the RPA refutes that estimate but the RPA only
12 claimed that the Agencies could not quantify the Rule's impacts. *Opp.* at 29. The Agencies'
13 inability to quantify impacts that the States and Cities quantified does not rebut the States' and
14 Cities' showing.

15 *Second*, despite asserting that all 21 declarants lack "personal knowledge or other adequate
16 foundation," the Agencies only attack one. *Opp.* at 29-30. As to that one, the Agencies are
17 incorrect in asserting that the Rule will not result in increased development that would impact New
18 Hampshire wetlands that are upstream of plaintiffs Massachusetts and Maine because New
19 Hampshire will use its authority to issue dredge and fill permits to prevent harm. *Id.* at 32. The
20 Agencies' own records show otherwise, as the Governor of New Hampshire told the Agencies that
21 "[w]ith a narrower definition [of waters of the United States], citizens wanting to make alterations
22 to land and water will more often only need to apply for state permits, saving them considerable
23 cost and time. . . . The reduction in costs and time will promote business development within the
24 state and stimulate New Hampshire's economy."⁸ Thus, New Hampshire's permitting authority
25 will not prevent the Rule from increasing wetland loss in that state because the Rule facilitates
26 development activity in wetlands no longer subject to federal protections.

27 ⁷ See ECF No. 68 (American Fisheries Society *et al.* Amicus Brief) at 8-11.

28 ⁸ https://www.epa.gov/sites/production/files/2017-09/documents/nh-governor_sununu_2017-06-19_1.pdf.

1 *Third*, as explained above in the beginning of Section II.B, the States and Cities need not
2 identify “specific discharges” resulting from the 2020 Rule, much less a specific “wastewater
3 treatment plant” or “stormwater system.” Opp. at 30. The States and Cities identified pollution
4 sources in upstream states that will flow into their waters as a result of the 2020 Rule’s severe
5 reduction of CWA jurisdiction.⁹ For example, the Amargosa River that flows from Nevada into
6 California, which is ephemeral for the majority of its length, is influenced by land use activities
7 that may discharge pollutants, such as mining, Nevada’s largest working dairy farm, and toxic
8 waste disposal site leakage from the Yucca Mountain Repository.¹⁰ That is more than enough to
9 show “irreparable harm.” See *Burford*, 835 F.2d at 323-324 (plaintiffs need not “proffer specific
10 evidence as to each tract of land, detailing just how the [agency’s] action would cause” irreparable
11 harm to obtain preliminary injunction enjoining agency action that jeopardizes “water quality”).

12 Similarly, the Agencies do not dispute that, as the Bishop Declaration explained, states on
13 the Colorado River Basin—such as Arizona and Utah—have no or limited authority to impose
14 restrictions more stringent than the CWA. ECF No. 30-10 (Bishop Decl.) ¶ 21; Sullivan Decl. ¶ 8.
15 For example, Arizona’s laws and regulations can be “no more stringent than the corresponding
16 federal law that addresses the same subject matter.” Ariz. Rev. Stat. Ann. § 49-104(A)(16).
17 Likewise, Utah, absent specified conditions, may not make a rule “for the purpose of
18 administering a program under the federal Clean Water Act” that is “more stringent than the
19 corresponding federal regulations which address the same circumstances.” Utah Code Ann. § 19-
20 5-105. Over 81% of waterways in the Southwest—where Arizona and Utah are located—are
21 ephemeral or intermittent and would stand to lose coverage under the 2020 Rule. Sullivan Decl. ¶
22 3. That would impact states downstream, such as California, which rely on the Colorado River for
23 drinking water and agricultural water supplies. Bishop Decl. ¶ 21.

24
25 ⁹ In a one-sentence footnote, the Agencies attack a paragraph in the Roose Declaration for
26 providing plenty of facts about discharges from the “Ruidoso Downs Wastewater Treatment Plant
27 and Ruidoso Racetrack” but not the legal analysis explaining “why” the 2020 Rule makes it likely
28 the affected waters will no longer be subject to CWA permitting requirements. Opp. 30 n.13.
But it is not a declarant’s burden to provide legal analysis which, in any event, is in the States’
and Cities’ Motion.

¹⁰ ECF No. 30-20 (Parmenter Decl.) ¶¶ 5-6, 12-13; ECF No. 30-12 (Greene Decl.) ¶ 12.

1 Nor do the two out-of-circuit cases the Agencies cite support their claim that there is a
2 special showing required where harms result from the acts of third parties. Opp. at 31. Those
3 cases do not address injunctive relief but rather the “substantially more difficult” test for
4 “standing” where a petitioner is “not the object of an alleged government action.” *Chamber of*
5 *Commerce of U.S. v. EPA*, 642 F.3d 192, 201 (D.C. Cir. 2011). Here, standing is undisputed.
6 Moreover, in the Ninth Circuit, irreparable harm does not require a showing that the “action
7 sought to be enjoined is the exclusive cause of the injury.” *Nat’l Wildlife Fed’n*, 886 F.3d at 819.

8 *Fourth*, the Agencies mistakenly assert that plans to restore the Chesapeake Bay and
9 Nanticoke River Watershed ameliorate the harm to waters caused by wetland destruction and
10 discharges upstream that the Rule threatens. Opp. at 32. The existence of plans to improve water
11 quality does not rebut the harm additional pollution and wetland filling will have on water quality
12 during the pendency of this case. Equally unavailing is the Agencies’ reference to “CWA
13 obligations to adjust WQS, set TMDLs, and adjust waste loading impacting downstream states –
14 regardless of the definition of “waters of the United States.” *Id.* As discussed in Section II.A.2
15 above, all of these state regulatory efforts take significant time to implement. Accordingly, these
16 programs will not prevent harm to water quality during the pendency of this case.

17 *Fifth*, the Agencies erroneously criticize one of the four declarations addressing harms to
18 California’s waters as mere “speculation” because the declarant occasionally uses the terms “may”
19 or “could.” Opp. at 33. But the Agencies ignore the other declarations that both confirm the risk
20 to California’s waters from activities within its borders¹¹ and in Nevada¹² and aver that the 2020
21 Rule “will have a negative impact on water quality” on other States and Cities.¹³ Moreover, any
22 qualifiers in a declaration are due entirely to the confusion created by the 2020 Rule’s lack of
23 clarity and the Agencies’ lack of guidance on its implementation. Indeed, as explained in Section
24 II.A.1, while the Rule concedes that some waters will lose coverage, the Agencies did not identify
25 the specific waters that would not be covered but rather indicated that the CWA “may no longer”

26 _____
27 ¹¹ ECF No. 30-2 (Ferranti Decl.) ¶¶ 10, 16 (“landowners will fill and destroy” waters).

¹² ECF No. 30-12 (Greene Decl.) ¶ 12 (identifying “mining” and other pollution sources).

28 ¹³ *See, e.g.*, ECF No. 30-17 (Jacobson Decl.) ¶ 14; ECF No. 30-6 (Siebert Decl.) ¶ 7
 (“14.8 percent of wetlands in Wisconsin[] will lose federal protection”).

1 or “may still” apply based on case-specific determinations. *See* 85 Fed. Reg. at 22,297.

2 *Sixth*, the Agencies incorrectly argue that the States’ and Cities’ showing here is akin to the
3 “bald allegations of concrete injury to flora and fauna” in *Sierra Club v. U.S. Army Corps of*
4 *Eng’rs*, 990 F. Supp. 2d 9, 39 (D.D.C. 2013). *Opp.* at 34. But there, the plaintiffs failed to offer
5 *any* declarations showing injury; instead, they submitted declarations from residents who lived
6 near a pipeline indicating they were “sincerely worried about the harm that an oil spill might
7 cause.” *Sierra Club*, 990 F. Supp. 2d at 41 & n.18. In contrast, the States and Cities have offered
8 21 declarations, including expert testimony, identifying the environmental and other injuries they
9 will suffer if the Rule goes into effect.

10 **C. The 2020 Rule Harms the States and Cities by Severely Disrupting Their**
11 **Water Pollution Control Programs**

12 None of the Agencies’ arguments refutes the States’ and Cities’ evidence that the 2020 Rule
13 will immediately disrupt regulatory programs in their jurisdictions.

14 *First*, the Agencies misstate the law by claiming that the 2020 Rule’s severe disruption to the
15 States’ and Cities’ water pollution control programs is not a “cognizable, irreparable injury.” *Opp.*
16 at 34. In fact, because states cannot recover the monetary costs of regulatory gap-filling, this
17 economic harm is irreparable. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (economic
18 harm is irreparable when “states will not be able to recover monetary damages connected to” a
19 federal rule.) The Agencies concede that the 2020 Rule forces the States and Cities to choose
20 between: (1) taking no action in response to the 2020 Rule, meaning “the public would forgo water
21 quality and wetland benefits,” or (2) making regulatory changes that “will likely incur some
22 transition costs in the short run, and some of the cost of implementing programs will be transferred
23 from the federal government to the states.” *EA* at 44-45. To argue that this choice between harm
24 to the public’s water quality versus the unrecoverable economic costs of new regulatory programs
25 is a “voluntary action” is disingenuous.¹⁴

26 As to the facts, the Agencies are likewise mistaken that the regulatory upheaval and

27 ¹⁴ The Agencies cite a case that is not to the contrary, as it did not address injunctive relief
28 but simply held that standing was not shown because the harm was “non-imminent.” *Clapper v.*
Amnesty Int’l USA, 568 U.S. 398, 421 (2013). Standing here is undisputed.

1 economic costs identified in the States’ and Cities’ declarations results from “voluntary action”
 2 rather than the 2020 Rule. Opp. at 34. The Agencies ignore the harm caused by the 2020 Rule due
 3 to the States’ reliance on federal permitting. For example, because New Mexico does not operate
 4 a Section 402 program, maintaining the same level of water quality protections would require New
 5 Mexico to construct a vast regulatory program by June 22, 2020. Roose Decl., ¶¶ 6, 10, 19-22.
 6 Other States (to the extent their current laws allow it) would also likely have to create the
 7 regulatory structure necessary to fill the regulatory gap left by the 2020 Rule.¹⁵

8 *Second*, the States’ and Cities’ declarations showed that they have developed protocols with
 9 the Army Corps to efficiently process federal Section 404 permits and state Section 401
 10 certifications together, and that the Rule will impose on them additional administrative costs and
 11 burdens because they will lose Army Corps participation. Mot. at 36. The Agencies admit that
 12 “some streamlining for combined state and federal permitting may no longer occur” and assert that
 13 state and federal programs might not be “coextensive.” Opp. at 34. But the differences in
 14 program coverage “are currently very little” (ECF No. 30-3 (Horbert Decl.) ¶ 6), and the Agencies
 15 offer no competent evidence rebutting the significant overlap of state and federal programs. *See*
 16 ECF No. 30-11 (Baskin Decl.) ¶ 20. Moreover, administration costs will increase because of the
 17 expected increase in requests for jurisdictional determinations. Siebert Decl. ¶ 18.

18 *Third*, the Agencies offer no declaration to undermine the reality that more TMDLs will be
 19 needed to address water quality problems caused by the Rule. In fact, they acknowledge that the
 20 “States have an ongoing obligation to assess their water quality” under the program (Opp. at 35)
 21 and do not dispute the costliness of the TMDL process to states. *See* Baskin ¶ 16.

22 **D. The 2020 Rule Threatens Irreparable Harm to the States’ and Cities’**
 23 **Proprietary and Economic Interests**

24 The Agencies acknowledge that “wetlands generally mitigate flooding” but incorrectly
 25 dismiss the risk to state property by suggesting that state or local floodplain requirements “*may*
 26 separately prohibit filling of wetlands.” Opp. at 35 (emphasis added). They ignore the fact that

27 ¹⁵ ECF No. 30-5 (Smith Decl.) ¶ 17; Siebert Decl. ¶ 6; Bishop Decl. ¶¶ 27-29, 32-33;
 28 Baskin Decl. ¶¶ 11-14, 19-22; ECF No. 30-13 (Driscoll Decl.) ¶¶ 5-7, 11; ECF No. 30-14 (Currey
 Decl.) ¶¶ 10-11; Jacobson Decl. ¶¶ 30, 32-33; ECF No. 30-19 (Mrazik Decl.) ¶ 6.

1 the Rule will remove CWA protections for all *non-floodplain* wetlands and that these upland
 2 wetlands also protect property located within floodplains from the risk of flooding. Sullivan Decl.
 3 ¶¶ 5, 34. Moreover, under New York’s Floodplain Construction requirements (*see* Opp. at 35 n.
 4 17), development within floodplains is not generally prohibited. Rather, “[p]rivate development is
 5 subject to local floodplain development permits.” *Id.*

6 The Agencies do not dispute the harm to the States’ and Cities’ economic interests from the
 7 Rule. Mot. at 36-37. Nor do they dispute the proprietary and trustee interests the States and Cities
 8 have in their wildlife. *Id.* at 37-38. They claim that other statutes would protect wildlife from loss
 9 of habitat caused by the filling of wetlands under the Rule, but point only to the Endangered
 10 Species Act (ESA). Because most wildlife are not protected by the ESA, the Agencies have not
 11 undermined the States’ and Cities’ showing of risk of harm to their wildlife.

12 **I. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF THE**
 13 **STATES AND CITIES**

14 The Agencies provide no evidence or argument that tips the balance of the equities and
 15 public interest in their favor. As a preliminary matter, the Agencies incorrectly contest the
 16 sufficiency of support for the States and Cities’ argument that the balance of the equities and the
 17 public interest warrant the relief they seek. Opp. at 36-37.¹⁶ In fact, when the federal government
 18 is a party, courts “consider the balance of equities and the public interest together.” *California v.*
 19 *Azar*, 911 F.3d at 581 (citations omitted).

20 Substantively, the Agencies are incorrect that the balance of equities favors denial of the
 21 Motion. Opp. at 37. The Agencies assert only that it would be “burdensome” to require them to
 22 implement the Act differently in different jurisdictions, and “unfair” to “permit certain dissenter
 23 states to extinguish a years-long effort to formulate a uniform national policy that can achieve
 24 consistency and clarity for the rest of the country.” *Id.* Accordingly, the Agencies conclude, the

25 ¹⁶ The Agencies cite *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), for the proposition
 26 that the States and Cities “must carry the burden of persuasion as to each element ‘by a clear
 27 showing.’” Opp., 36 (emphasis in original). But *Mazurek* merely states that a court should not
 28 grant a preliminary injunction unless the movant carries the burden of persuasion “by a clear
 showing.” *Mazurek*, 520 U.S. at 972. A party meets the burden of persuasion if it meets the test
 set forth in *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7 (2008); *All. for the Wild*
Rockies, 632 F.3d at 1135.

1 “public interest is best served by” denial of the relief the States and Cities seek. *Id.* But
2 conspicuously absent from the Agencies’ opposition are facts to support this argument. Nor do the
3 Agencies object to, or provide any facts to contradict, the declarations submitted by the States and
4 Cities that clearly explain the immediate, irreparable harm that will occur if the 2020 Rule goes
5 into effect and the necessity of maintaining the status quo pending resolution of this action.

6 Neither of the cases cited by the Agencies to support their claim that an injunction is
7 inappropriate is instructive here. First, the Agencies rely on *East Bay Sanctuary Covenant v.*
8 *Trump*, 950 F.3d 1242, 1281-82 (9th Cir. 2020) for the assertion that courts “refuse injunctive
9 relief that would undermine ... public good.” *Opp.* at 37. But that case upheld the district court’s
10 grant of a preliminary injunction on facts analogous to those here: the Departments of Justice and
11 Homeland Security had jointly adopted a rule which, combined with a presidential proclamation,
12 stripped asylum eligibility from migrants crossing into the country between designated ports of
13 entry (i.e., changed the existing law). *East Bay Sanctuary*, 950 F. 3d, at 1259-60. The Ninth
14 Circuit found that the rule unlawfully conflicted with the text and purpose of the Immigration and
15 Nationality Act and issued an injunction. *Id.* at 1273.

16 Second, the Agencies again cite the out-of-circuit case *Sierra Club v. U.S. Army Corps of*
17 *Eng’rs*, 990 F. Supp. 2d 9, 43 (D.D.C. 2013), this time to argue that the balance of equities and
18 public interest here require denial of the preliminary injunction. *Opp.* at 37. There, the court
19 denied a request for a preliminary injunction in part because it concluded that the public interest
20 and balance of equities weighed in the agencies’ favor. The court’s decision was based on a
21 conclusion that there was no merit to plaintiffs’ underlying claims and that plaintiffs failed to
22 allege any specific harm, instead identifying likely harm based upon analogies to other pipeline
23 projects. *Sierra Club*, 990 F. Supp. 2d at 42-43. *Sierra Club* thus is distinguishable and not
24 binding.

25 Contrary to the Agencies’ assertion, the States and Cities do not disagree that the public
26 interest is relevant to the Court’s determination; rather, the disagreement is about what is in the
27 public interest. *Opp.* at 37. The Motion explains how the public interest would best be served by
28 protecting the Nation’s waters through maintaining the status quo during this litigation. *Mot.* at

1 38-39. Both the public interest and the balance of equities here tip heavily toward issuance of an
2 injunction or stay preventing implementation of the 2020 Rule.

3 Finally, to the extent the Agencies argue it is contrary to the public interest to issue an
4 injunction that would apply the 2020 Rule in some states but not others (Opp. at 37), the
5 nationwide injunction requested by the States and Cities, discussed below, addresses that concern.

6 **IV. NATIONWIDE RELIEF IS BOTH NECESSARY AND APPROPRIATE**

7 A nationwide injunction or stay is both necessary and appropriate given the immediate
8 and irreparable harm to the States and Cities and the Nation’s waters if the 2020 Rule goes into
9 effect.¹⁷ Mot. at 39-40. In response, the Agencies contend that a nationwide injunction is “not
10 appropriate,” especially on the “speculative record” here. Opp. at 37. But, as explained in Section
11 II, there is nothing speculative about the evidence of nationwide harms provided by the States and
12 Cities. And given that water and water pollution do not observe political boundaries, an injunction
13 that protects the integrity of all national waters is appropriately tailored.

14 The three cases the Agencies cite do not support their claim that “nationwide relief is
15 generally inappropriate.” Opp. at 38. The harm alleged in *California v. Azar*, 911 F.3d at 582,
16 was purely economic. Moreover, the Ninth Circuit there found that a nationwide injunction was
17 unjustified because plaintiffs provided no evidence of economic harm to other states.
18 Accordingly, “an injunction that applies only to the plaintiff states would provide complete relief
19 to them.” *Id.* at 584. In contrast, the 2020 Rule causes widespread environmental degradation in
20 every state, and it is undisputed that increased pollution in one state has downstream consequences
21 on water quality in other states. *See* Sullivan Decl. ¶ 3. Unlike in *California v. Azar*, a nationwide
22 injunction is thus required to provide complete relief to the States and Cities.

23 The Agencies’ reliance on *City & County of San Francisco v. Trump*, 897 F.3d 1225,
24 1244 (9th Cir. 2018), is similarly unavailing. While the Ninth Circuit declined to uphold a
25 nationwide permanent injunction in that case, it, too, focused on the economic nature of the harm,
26 as well as a finding that the record evidence showed only local harms and was “not sufficiently

27 _____
28 ¹⁷ The Agencies do not address the States and Cities’ alternative request for a stay under
Section 705 of the APA.

1 developed on the nationwide impact of the Executive Order.” *Id.* at 1244. Here, in contrast, the
 2 States’ and Cities’ water quality will be affected by activities in neighboring states and the relief
 3 sought is a preliminary, not a permanent injunction.

4 Moreover, while Justice Thomas questioned district courts’ authority to issue nationwide
 5 injunctions in a concurring opinion in *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018), that
 6 concurrence does not unsettle the Ninth Circuit’s rule that nationwide injunctions are appropriate
 7 when, as here, a narrower remedy would not afford complete relief.

8 The parties agree that injunctive relief should be “no more burdensome to the defendant
 9 than necessary to provide complete relief to the plaintiffs.” *Opp.* at 39; *Trump v. Int’l Refugee*
 10 *Assistance Project*, 137 S. Ct. 2080 (2017). The Agencies argue for a narrowly tailored injunction,
 11 “limited to preventing specific instances of imminent and permanent environmental injury that
 12 Plaintiffs have proven.” *Opp.* at 39.¹⁸ But the Ninth Circuit requires that injunctive relief redress
 13 the entirety of harm demonstrated by a plaintiff. *See, e.g., California v. Azar*, 911 F.3d at 582; *Cf.*
 14 *City & Cty. of San Francisco*, 897 F.3d at 1244. Here, a limited injunction will not address the
 15 entirety of the widespread, nationwide harms detailed in the record and declarations. The Agencies
 16 assert that the States’ and Cities’ failure to carve Hawaii out of their request for relief shows the
 17 overbreadth of that request, since Hawaii (among other states), has no impact on water quality in
 18 the States and Cities. *Opp.* at 39.¹⁹ However, the Agencies do not dispute that many states are
 19 upstream of the States and Cities. *See Mot.* at 33-34. An injunction that covers all but a very few
 20 states is neither equitable nor practical, because, while some states may suffer “greater loss in
 21 federal protection, all states will be significantly impacted” and “harms threatened by the Rule will
 22 be extensive, long-lasting, and nationwide.” Sullivan Decl. ¶¶ 3, 21. Moreover, the States and

23
 24 ¹⁸ The Agencies go so far as to suggest that injunctive relief should be so narrowly
 25 tailored that it should address only specific watersheds within the States and Cities. *Opp.* at 39.
 26 But neither of the cases upon which the Agencies rely support such a drastic limitation to the
 relief sought in the face of evidence that widespread harm is threatened absent an injunction. *See*
Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-66 (2010); *Madsen v. Women’s Health*
Ctr., Inc., 512 U.S. 753, 765 (1994).

27 ¹⁹ The Agencies similarly argue that the Rule would not harm some other states because a
 28 “ cursory look at a watershed map shows that numerous states flow directly to the ocean.” *Opp.* at
 39. But the States and Cities have demonstrated that the Rule threatens loss of water quality
 protections and harm to streams and wetlands both within and among all states across the country.

1 Cities have shown that an injunction that applies only within their borders will not prevent
2 immediate and irreparable nationwide degradation of water quality or prevent widespread
3 dredging and filling of irreplaceable wetlands. *Id.* ¶¶ 8, 21-51

4 Finally, the “structure of the CWA and comity concerns” do not “support denial of” the
5 States’ and Cities’ Motion either. *Opp.* at 40. The Agencies assert that because “many” of the
6 non-plaintiff states “expressed support for” the 2020 Rule and there are challenges to the 2020
7 Rule pending in other courts, nationwide relief would be too broad. *Id.* But that is beside the
8 point, because, again, a non-nationwide injunction would not protect the States and Cities from
9 suffering the harms they have identified that the 2020 Rule will cause. And the Agencies’ reliance
10 on the cooperative federalism embodied by the CWA (*Opp.* 40) cuts decidedly in the other
11 direction. Indeed, cooperative federalism favors a nationwide injunction because irreparable harm
12 to the environment will occur across the country absent such relief and the Agencies point to no
13 actual harm to any state (or the federal government or any private party) by keeping the 2019 Rule
14 in place while the Court decides the merits. After all, the 2019 Rule re-promulgated rules that had
15 been in place since the early 1980s and with which both state regulators and the regulated
16 community are quite familiar.

17 CONCLUSION

18 The Court should grant the States’ and Cities’ Motion for Preliminary Injunction or Stay.
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1 Dated: June 8, 2020

Respectfully Submitted,

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LA2020300885

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CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Andrew R. Wheeler, et al.**

Case No.: **3:20-cv-03005-RS**

I hereby certify that on June 8, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION OR STAY

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 8, 2020, at Los Angeles, California.

Ernestina Provencio

Declarant

/s/ Ernestina Provencio

Signature