THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE, et al.,

Plaintiffs,

v.

ANDREW WHEELER, et al.,

Defendants,

and

AMERICAN FARM BUREAU FEDERATION; AMERICAN FOREST & PAPER ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; LEADING BUILDERS OF AMERICA; NATIONAL ALLIANCE OF FOREST OWNERS; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL CATTLEMEN'S BEEF ASSOCIATION; NATIONAL CORN GROWERS ASSOCIATION; NATIONAL MINING ASSOCIATION; NATIONAL PORK PRODUCERS COUNCIL; NATIONAL STONE, SAND AND GRAVEL ASSOCIATION; PUBLIC LANDS COUNCIL; and U.S. POULTRY & EGG ASSOCIATION,

Intervenor-Defendants.

No. 2:15-cv-01342-JCC

INTERVENOR-DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: June 28, 2019

ORAL ARGUMENT REQUESTED

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INTRODUCTION[1]

Plaintiffs' motion for summary judgment should be denied and the intervenor-defendants' cross-motion granted for a litany of reasons set out below: Plaintiffs lack standing, their claims are time barred, new rules will soon moot their claims, and the claims are meritless on their own terms.

First, however, the record must be set straight. Plaintiffs describe the 40-year-old waste treatment system (WTS) exclusion as a "loophole" that "allows waters of the United States to be stripped of protection" under the Clean Water Act (CWA or Act) if they are "use[d] as industrial waste dumps." Dkt. 67, at 6. Nothing could be further from the truth. Creating waste treatment systems and discharging from those systems into navigable waters is regulated to the hilt and always has been. Before passage of the CWA in 1972, creating WTS components in waters subject to state or federal jurisdiction required compliance with then-applicable law. After 1972, new provisions required federal permits both to construct and to discharge from WTS features created in or by impounding "waters of the United States." But at no time could a system operator simply "appropriate" "pre-existing waters of the United States" and thereby "stri[p]" them of protection.

The CWA's Section 404 permit program (33 U.S.C. 1344) covers the discharge of dredged or fill material to construct a WTS in waters of the United States (WOTUS).[2] The process to obtain a Section 404 permit from the U.S. Army Corps of Engineers is rigorous. Among other things, a permit applicant must show, and the Corps conclude, that there is no practicable alternative to constructing the WTS in the WOTUS that would have less adverse impacts, and the applicant must mitigate effects on WOTUS. If the agencies conclude that a WTS should not be constructed in particular WOTUS, they can deny a Section 404 permit to build the system.

In addition, discharges from a waste treatment system to waters of the United States must

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[1] The Edison Electric Institute and Utility Water Act Group each represent the interests of entities that have a significant interest in the waste treatment system exclusion and the disposition of these motions. Each has therefore contributed substantive and financial assistance to the intervenors in the preparation of this brief.

[2] *See, e.g.*, Declaration of Andrew Cole (Cole Decl.) at ¶ 5:13-25 (describing "exhaustive" Section 404 permitting process for the Donlin mine site).

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comply with Section 402's National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. 1342. Indeed, some WTS are themselves technologies required by NPDES permits. NPDES permits prevent pollution reaching the waters of the United States by ensuring that subsequent discharges to downstream waters comply with water quality standards. Often, systems are subject to state requirements, too, such as state groundwater discharge programs.

Thus, every aspect of waste treatment systems that may impact waters of the United States—from construction, to operation, to subsequent discharges—is regulated by EPA, the Corps of Engineers, or the States under the Clean Water Act and complementary state antipollution laws. *See, e.g.*, Declaration of James Boswell (Boswell Decl.) at ¶¶ 3-4.

We demonstrate below that regulating WTS in these ways comports with the text and structure of the CWA. It also makes perfect sense. Waste treatment systems are ubiquitous and essential elements of industrial land use—for mining; power generation; pulp and paper mills; manufacturing; building for infrastructure, residential, or commercial use; and a host of other productive land uses, and often those systems involve natural or manmade ponds or channels. WTSs are designed "to convey or retain, concentrate, settle, reduce or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)" into surface waters. *Revised Definition of "Waters of the United States" Proposed Rule*, 84 Fed. Reg. 4154, 4205 (Feb. 14, 2019). In some cases, constructing WTS in an existing WOTUS is the *only* technologically and economically feasible option to treat discharges from industrial operations, and alternative treatment options could cause environmental harm. *E.g.*, Declaration of Jerry Schwartz (Schwartz Decl.) at ¶¶ 7-8. Varied though they are, WTS thus have one vital thing in common: they *prevent* pollution. They treat, settle, retain, reduce or remove pollutants before water is discharged, recycled, or reused.

Yet plaintiffs would turn this pollution-preventing scheme inside out. If, as plaintiffs demand, some WTSs were deemed waters of the United States, a facility would need an NPDES permit to discharge wastewater *into* its treatment system, and that permit would require compliance with

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technology- and water quality-based limits *before* the water is treated in the WTS. That incongruous situation would frustrate the pollution-preventing purposes of WTS. In short, plaintiffs' requested relief would harm the environment (to say nothing of the economy), not improve it.

Plaintiffs' procedural arguments are equally meritless. The WTS exclusion is well within the agencies' statutory authority and is a reasonable interpretation of the CWA. The exclusion has been on the books for 40 years. The agencies under *seven* Presidents have found it to be justified and consistent with—indeed essential to—the goals of the Act. If the Court addresses plaintiffs' claim on the merits, it should conclude that the agencies acted lawfully when they continued to extend the exclusion to systems created in WOTUS.

But the Court need not concern itself with the merits, because plaintiffs lack standing to press their claim and because this case is on the verge of becoming moot. Take first mootness. The agencies have proposed to rescind the 2015 WOTUS Rule that plaintiffs challenge, including its WTS provision. 83 Fed. Reg. 32227 (July 12, 2018). The comment period for the proposed repeal rule closed in August 2018. The repeal rule is likely to be finalized during this Court's consideration of the motions, restoring the agencies' regulations to their pre-2015 form, complete with the original waste treatment system provision that has neither changed nor been challenged for 40 years and is not the subject of this suit.[3] The repeal rule will moot plaintiffs' claim.

As to standing, plaintiffs have not identified any concrete injury that they will suffer absent an injunction. Two projects plaintiffs identify are still obtaining necessary approvals and are years away from being constructed and operated. A third was built decades ago and is beyond the reach of declaratory or injunctive relief. Beyond that, no declarant has shown that continued application of the WTS exclusion to systems constructed in WOTUS will have any effect on his enjoyment of the environment. The declarants' concerns instead stem from conjecture that some yet-to-be-built WTS might one day fail—an unsupported concern that in any event would arise from the permit

[3] The *Spring 2019 Unified Agenda of Regulatory and Deregulatory Actions* states that repeal of the 2015 Rule will be finalized in August 2019. Office of Info. & Regulatory Affairs, *Definition of "Waters of the United States"—Recodification of Preexisting Rule*, https://perma.cc/4BL5-H6SA . It is anticipated that a new WOTUS Rule will be finalized in December 2019. *Revised Definition of "Waters of the United States,"* https://perma.cc/4QL8-4PLM.

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issued, not from the WTS exclusion. Plaintiffs' speculative concerns—which ignore the extent to which WTS are regulated and plaintiffs' ability to challenge particular permits—are not sufficient to establish standing.

STATEMENT OF FACTS

1. The Clean Water Act

The Clean Water Act establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Two of these programs require an entity to obtain a permit before it may lawfully "discharge . . . any pollutant" into "navigable waters," defined as the "addition of any pollutant" from "any point source" to "the waters of the United States." 33 U.S.C. §§ 1311(a), 1362(7), 1362(12)(A). Under Section 402, EPA and authorized state agencies may issue NPDES permits for "the discharge of any pollutant" to WOTUS. 33 U.S.C. 1342(a). Under Section 404, the Corps of Engineers may issue permits for "the discharge of dredged or fill material." 33 U.S.C. 1344(a).

For unpermitted point source discharges Congress created a strict liability scheme, enforceable by agency and citizen civil actions with penalties in excess of $50,000 per violation per day. 33 U.S.C. 1319(b), 1319(d), 1365. The Act also provides for substantial criminal penalties for negligent or intentional violations. 33 U.S.C. 1319(c)(1)-(2); *see* Declaration of Timothy S. Bishop (Bishop Decl.), Ex. A at 11153.

2. The Waste Treatment System Exclusion

a. Regulatory history. Historically, EPA's definition of "waters of the United States" for the NPDES program included impoundments of WOTUS. Consistent with longstanding agency practice, a final NPDES regulation promulgated in 1979 expressly excluded "waste treatment systems" from the definition of "navigable waters." 44 Fed. Reg. 32854, 32901 (June 7, 1979). That rule provided that "waste treatment systems … are not waters of the United States." *Id.* at 32901. EPA explained that it "agree[d] with a frequently encountered comment that waste treatment lagoons or other waste treatment systems should not be considered waters of the United States." *Id.* at

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32858. EPA also recognized that "[u]nder some circumstances, it is appropriate to impound navigable streams in order to create" a treatment system and explained that it did not intend to prohibit this practice. *Id.*; *see* 40 C.F.R. 260.10 (defining "impoundment"). By rule, therefore, impoundments of WOTUS remained WOTUS unless they were waste treatment systems.

When it revised the NPDES regulations a year later, EPA amended the definition of WOTUS by adding a sentence to the WTS exclusion. The final rule limited that exclusion to "manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from impoundment of waters of the United States." 45 Fed. Reg. 33290, 33424 (May 19, 1980).

Immediately, members of the regulated public explained to EPA that this limitation was inconsistent with EPA's long-standing interpretation and practice and would subject many existing and previously-approved WTSs to regulation as WOTUS.[4] The regulation, with the sentence added in 1980, would include within the WOTUS definition any waste treatment facility originally built in areas now considered WOTUS, even though they were lawful when constructed and even though EPA recognized them as acceptable treatment technology in effluent guidelines and NPDES permits.

Shortly thereafter, EPA "agree[d] that the regulation" establishing the new limitation on the WTS exclusion "should be carefully re-examined" and "may be overly broad." *Consolidated Permit Regulations*, 45 Fed. Reg. 48620, 48620 (July 21, 1980). EPA acknowledged that "read literally," the final regulation "could require many power plants and oil refineries (among other industries) to apply for NPDES permits for discharges *into* their ash ponds and treatment lagoons. We did not intend this result." Bishop Decl., Ex. C at 1. Accordingly, two months after the May 1980 regulation was published, the agencies suspended the effectiveness of the sentence "until further notice." 40 C.F.R 122.2 n.1. EPA stated its intent to "promptly . . . develop a revised definition and to publish it as a proposed rule for public comment" and explained that, "[a]t conclusion of

[4] *E.g.*, Bishop Decl., Ex. B.

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that rulemaking, EPA will amend the rule, or terminate the suspension." 45 Fed. Reg. 48620.

EPA revisited the suspension in 1983, when it stated that it was "continu[ing]" the suspension. EPA explained that it would address the suspension through final agency action in a later rulemaking. *Environmental Permit Regulations*, 48 Fed. Reg. 14153, 14157 (Apr. 1, 1983).

Later, in a proposed rule issued October 2, 1984 regarding Section 404 state program regulations, EPA proposed an exclusion to the definition of WOTUS for purposes of Section 404 that simply stated that "[w]aste treatment systems . . . are not waters of the United States *404 Program Definitions and Permit Exemptions*, 49 Fed. Reg. 39012, 39018 (Oct. 2, 1984). This proposed definition contained neither the limiting language nor any suspension. It was promulgated as a final rule following notice and comment (53 Fed. Reg. 20764, 20774 (June 6, 1988)), and remains in force today. 40 C.F.R. 232.2.

b. Agency practice. Agency practice has been consistent with respect to the exclusion from WOTUS of treatment systems created by "impound[ing] navigable streams." 44 Fed. Reg. at 32858. In October 1992, for example, EPA issued advisory guidance regarding the regulation of waste treatment systems created by the impoundments of existing waters of the United States in two Alaskan mining projects. EPA's memorandum clarified that discharges into impounded waters that are part of a WTS permitted under Section 404 do not require a separate permit under Section 402. Bishop Decl., Ex. D at 2. That is because "impoundments 'created by discharge of fill material . . . if permitted by the Corps under Section 404 for purposes of creating a waste treatment system, would no longer be waters of the U.S.'" *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 214 (4th Cir. 2009) (*Ohio Valley*) (quoting Bishop Decl., Ex. D at 2).

In September 1998, the agencies explained that "nothing in CWA [Section] 402 or EPA's implementing regulations per se prohibits using impounded portions of naturally occurring surface waters as waste treatment systems." *State Program Requirements*, 63 Fed. Reg. 51164, 51183 (Sept. 24, 1998). Rather, converting waters of the United States to a WTS may require a permit under Section 404. *Id.* Any language suggesting otherwise "has been long suspended." *Id.* And

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EPA in October 2000 issued guidelines which advocated use of constructed wetlands as a best practice in waste treatment and explained that such systems could be constructed in a water of the United States under a Section 404 permit that identifies the water as an excluded WTS. Bishop Decl., Ex. E at 16.

Continuing this practice, EPA in a March 2006 letter to the Corps, explained in the context of Appalachian surface mining that "the waste treatment system exclusion continues to apply to the creation or use of a waste treatment system in waters below a valley fill permitted by the Corps under CWA [Section] 404" because "it is often impracticable to locate sediment ponds directly below valley fills, [such that] the use of a stream segment to connect the fill and pond is 'an unavoidable and necessary component of the treatment system.'" *Ohio Valley*, 556 F.3d at 214 (citing Letter from Benjamin H. Grumbles, Ass't Adm'r, Office of Water, EPA, to John Paul Woodley, Ass't Sec'y of the Army (Mar. 1, 2006)). More recently, EPA recognized waste treatment ponds as "best management practices" for controlling pollutant discharges from stormwater. *See* EPA, *Water: Best Management Practices, Post-Construction Stormwater Management in New Development & Redevelopment* (Aug. 17, 2014), https://perma.cc/QT9S-FUH2.

c. Purpose and function. Many operations, including electric power plants, mine sites, commercial and residential construction projects, and paper mills rely on the WTS exclusion to handle and treat wastewater generated during operations. *See, e.g.*, Bishop Decl., Ex. F at 57; Bishop Decl., Ex. G at 21; Schwartz Decl. at ¶ 4. WTS are critical to many industrial projects and utilized to protect water quality adjacent to and downstream of the operation. *See, e.g.*, Bishop Decl., Ex. H at 1 ("electric companies utilize onsite features to … recycle and reuse water at generating sites"); Bishop Decl., Ex. F at 57 ("The electric utility industry commonly uses systems of interconnected pipes, channels, basins, ponds, and other features for collecting and treating wastewater").

For example, EEI explained that its members incorporate ditches and channels into their WTS to carry wastewater to "cooling ponds" to treat for thermal pollution, or to reservoirs that allow for

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settling of insoluble constituents prior to discharge into a WOTUS. Bishop Decl., Ex. H at 10. Ditches and channels might also route water through the treatment system and then back for reuse on site. *Id.* The components of these systems ensure proper water treatment either prior to discharge pursuant to an NPDES permit or as part of a system designed to eliminate the need for such a discharge. *See, e.g.*, Bishop Decl., Ex. F at 59-60.

Many such systems incorporate features that would otherwise qualify as waters of the United States. *E.g.*, Bishop Decl., Ex. G at 21; Schwartz Decl., at ¶ 6:3-5. The agencies have advocated a very broad definition of WOTUS, encompassing for example any "conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally intermittently flow." *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality). Without the WTS exclusion, waste treatment systems could not take advantage of pre-existing features such as wet depressions or drainage systems, when it is impracticable or infeasible to construct the WTS entirely outside of such areas, or where using existing features minimizes environmental impacts. And even a WTS feature constructed on dry land (for which no Section 404 permit would be required) could still thereafter be considered a jurisdictional WOTUS, absent a WTS exclusion, because of its location or attributes.

Waste treatment systems are just that: *systems*. Their critical features may include man-made features as well as "ponds, lagoons, basins, and other impoundments, along with the ditches, channels, and canals that convey waste to and from those features." Bishop Decl., Ex. F at 60. As the Fourth Circuit has recognized, while emphasizing EPA's and the Corps' "consistent administrative practice," "stream segments, together with the sediment ponds to which they connect, are unitary 'waste treatment systems.'" *Ohio Valley*, 556 F.3d at 209, 214; *see* Bishop Decl., Ex. I at 57 ("sediment ponds and stream segments are both parts [of] the treatment system because they ensure that ultimate discharges into the streams below . . . will meet state water quality standards and comply with section 402 effluent limitations.").

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3. 2015 WOTUS Rulemaking

In 2014, the agencies set out to redefine "waters of the United States" within the meaning of the Act. *Definition of "Waters of the United States" Under the Clean Water Act: Proposed Rule*, 79 Fed. Reg. 22,188 (Apr. 21, 2014). The proposed rule expanded the definition of "waters of the United States" but maintained the same WTS exclusion that had been in effect since 1979. The proposal explained that the "agencies do not propose any changes to the existing exclusions for waste treatment systems designed consistent with the requirements of the CWA." *Id.* at 22199. Rather, they would maintain the "longstanding" exclusion of such systems but make "ministerial" changes by deleting a cross reference to a regulation that is no longer in the Code. *Id.* at 22217. Because the agencies were not reconsidering the merits of the exclusion, they "d[id] not seek comment on [this] existing regulatory provisio[n]." *Id.* at 22190.

Interested industry groups commented all the same. *E.g.*, Bishop Decl., Ex. G at 20 (commenting that the proposed revision "needlessly retains" the limitation and suspension, and that it should be deleted); Bishop Decl., Ex. J at 61; Bishop Decl., Ex. K at 8. Environmental groups also commented about the limitation and suspension. For example, the National Resource Defense Council commented that the agencies "are not proposing to do anything new" with regard to the WTS exclusion but suggested that a final rule "explicitly limit" the exclusion for WTS constructed in WOTUS to pre-existing treatment facilities. Dkt. 67-1, at 60. Others urged that the agencies should "eliminate … entirely" the exclusion's application to such WTS. Dkt. 67-2, at 16.

The final Rule explained that, in an effort to provide a "clearer" approach, it would define "waters of the United States" using categories of waters that are "jurisdictional in all instances, waters that are excluded from jurisdiction, and a narrow category of waters subject to a case-specific analysis." *Clean Water Rule*, 80 Fed. Reg. 37054, 37057 (June 29, 2015). "The exclusions [were] an important aspect of the agencies' policy goal of providing clarity and certainty." *Id.* at 37097. All existing exclusions were retained, as well as several new exclusions added that "reflect[] longstanding agency practice." *Id.* at 37059. The 2015 Rule "ma[de] no substantive change

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to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA." *Id.* at 37073. It made only ministerial changes "for purposes of clarity." *Id.* at 37059. It deleted a cross-reference to an since-repealed part of the code. *Id.* at 37097. And although it retained the May 1980 limiting language, it continued the suspension. *Id.* at 37114.[5]

The agencies observed that commentators had expressed concern that the proposed rule inadvertently inserted a comma that changed the meaning of the exclusion. 80 Fed. Reg. at 37097. The agencies explained that the comma had been inserted in the course of deleting the outmoded cross-reference, and they deleted the comma in the final rule because they "d[id] not intend to change how the waste treatment exclusion is implemented." *Id.* Further, they explained that comments requesting substantive changes were beyond the scope of the proposed rule such that the final rule did not reflect those suggested changes. *Id.* "Continuing current practice, any waste treatment system built in a 'water of the United States' would need a section 404 permit to be constructed and a section 402 permit for discharges from the waste treatment system into 'waters of the United States.'" *Id.*

4. Subsequent developments

The 2015 WOTUS Rule was highly controversial and spawned dozens of lawsuits throughout the country. It was challenged by States, the regulated community, and environmental NGOs alike. Courts preliminarily enjoined enforcement of the rule in more than half the States on the grounds that its definition of "waters of the United States" is *over*-expansive. *In re EPA & Dep't. of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1365 (S.D. Ga. 2018); *see also* Order, *Am. Farm Bureau Fed'n v. EPA*, 3:15-cv-00165 (S.D. Tex. May 28, 2019) (Dkt. 193).

[5] The 2015 Rule provides that, for purposes of Section 402, "[t]he following are not 'waters of the United States' even where they otherwise" satisfy the definition of WOTUS: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the CWA]. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States." 80 Fed. Reg. at 37114. A footnote continues, as at all times since 1980, to suspend the second sentence. *Id.* For purposes of Section 404, the 2015 Rule continues to provide that "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States." *Id.* at 37118.

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The agencies are now in the midst of repealing and replacing the 2015 Rule in two stages. In the first stage, they have proposed to repeal the 2015 Rule. *See* 82 Fed. Reg. 34899 (July 27, 2017) (notice of proposed rulemaking); 83 Fed. Reg. 32227 (July 12, 2018) (supplemental notice). The comment period closed on August 13, 2018. Finalization of the repeal rule—which would restore the regulations to the versions in place immediately before the 2015 Rule—is slated for August 2019. See p.3 n.3, *supra*.

Separately, the agencies propose to promulgate a replacement definition of "waters of the United States." 84 Fed. Reg. 4195 (Feb. 14, 2019). That proposal continues the exclusion for waste treatment systems and includes a definition of "waste treatment system." *Id.* at 4193. The agencies have solicited comments "on all aspects of the proposed exclusions," including the WTS exclusion. *Id.* at 4195. A comment submitted by Earthjustice on behalf of plaintiffs here addressed the scope of the WTS exclusion. Bishop Decl., Ex. L at 45. That comment raised many of the same arguments that plaintiffs now bring before this Court. *Id.* at 45-48. The comment period for the 2019 Rule closed on April 15, 2019 and a final rule is anticipated in December 2019. *See* p.3 n.3, *supra*.

ARGUMENT

The Court should deny plaintiffs' motion for summary judgment and grant intervenor-defendants' cross-motion for three reasons. First, plaintiffs lack standing because they have not identified any project that will be permitted and constructed before the pending rulemakings are completed, and they have not plausibly established that they or their members would be injured by any such construction in any event, or that their claimed injury could be avoided by the remedies they seek. Second, plaintiffs' request for relief is untimely, both because the WTS exclusion has been in place—unchallenged—for four decades and because the agencies are undertaking efforts to repeal and replace the 2015 WOTUS Rule within months, mooting their claims. Third, plaintiffs' claims lack merit. The WTS exclusion is entirely consistent with the statute and is essential to ensuring effective treatment of water to minimize downstream pollution. Granting plaintiffs' motion would interfere with this established system and do nothing to improve the quality of downstream waters.

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A. Plaintiffs lack standing

To establish standing at this summary judgment stage, plaintiffs (and, more specifically, their members) must show that they "have suffered an 'injury in fact,'" meaning "an invasion of a legally protected interest" which is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks omitted). A procedural right in a vacuum is not enough. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). In addition, plaintiffs must establish "a causal connection between the injury and the conduct complained of" such that the injury is "'fairly . . . trace[able] to the challenged action.'" *Lujan*, 504 U.S. at 60. Finally, plaintiffs must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 61. On summary judgment, plaintiffs "bea[r] the burden of establishing standing" and cannot "rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 411-12 (quotation marks omitted). Plaintiffs fail to satisfy any of these requirements and so lack standing.

Plaintiffs allege that the WTS exclusion poses a risk of pollution allowed "either under pending proposals or recently-issued permits" to "specific" water bodies in which their members possess "recreational and aesthetic interests." Dkt. 67, at 17. But the declarations plaintiffs cite establish no such thing; in fact, they show that their members have only a generalized interest in preserving vast watersheds that are not impacted by the WTS exclusion.

1. Plaintiffs have not established a concrete or particularized injury-in-fact

"The relevant showing for purposes of Article III standing. . . is not injury to the environment but injury to the plaintiff." *Friends of the Earth v. Laidlaw Envtl Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). To show a concrete, particularized injury plaintiffs must show that "[they] use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183-84. Plaintiffs must establish "specific facts" showing that their members' enjoyment of the environment "will be lessened" if this Court does

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not vacate the WTS exclusion before its repeal is finalized. The asserted injury must be real and "imminent" and cannot be "conjectural." *Lujan*, 504 U.S. at 560.

Plaintiffs have not remotely made that showing. In support of their motion, they offer just two member declarations. But both fall distantly short of establishing standing.

Myron Angstrom's declaration states, in a generalized way, that he "want[s] surface waters in the Kuskokwim River watershed to be protected" and is "opposed to any attempts by [the] agencies to narrow the scope of [CWA] protections." Dkt. 67-3, at ¶ 5. He identifies the Donlin Gold Mine Project in Alaska as a "concern[]" of his, on the ground that—although it is located 250 river miles away—it conceivably could "contribute to the cumulative decline in water quality in the Kuskokwim River watershed." *Id.* ¶ 9. This declaration is facially deficient.

To begin with, Mr. Angstrom lives hundreds of miles away from the proposed mine site and seems not to have visited there recently. He says he visited "the area" some thirty-seven years ago and an unidentified number of times since—none recently. Dkt. 67-3, at ¶ 6. Visiting decades ago is not the kind of "use" that *Friends of the Earth* demands. 528 U.S. at 183.

More fundamentally, Mr. Angstrom fails to identify any particular injury he would suffer as a result of features at the Donlin site. He merely hypothesizes that the project as a whole might harm the watershed. Dkt. 67-3, at ¶ 9. As to WTS—the only element of the project relevant to standing here—he avers that he is "concerned that the waste treatment systems proposed for the Donlin Gold Mine Project *will not perform as intended*." *Id.* ¶ 10 (emphasis added). That is not enough.

First, it amounts to no more than "conjectural [and] hypothetical" handwringing and thus is not a basis for standing. *Lujan*, 504 U.S. at 561 (quotation marks omitted). That is especially so because the negative pregnant is obvious: If Mr. Angstrom is wrong and the systems *do* perform as intended, they will *prevent* water pollution downstream of the project, protecting the environment near where Mr. Angstrom lives and recreates—the very reason the exclusion exits.

Second, Mr. Angstrom is really complaining that he fears the Section 404 permit for the Donlin mine WTS will not protect the watershed from pollution. But any complaint he has there would be

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with the Corps' permit and other federal and State environmental permits the project has obtained or is in the process of obtaining—themselves subject to challenge—not with the WTS exclusion.

Third, although the Donlin mine already has a Section 404 permit for construction, it is still in the process of obtaining necessary state approvals, including dam licensing certificates, and is therefore years away from being constructed. Cole Decl., at ¶¶ 5, 10-12. Any conjectural injury from its operations is neither "actual" nor "imminent" (*Lujan*, 504 U.S. at 560)—which matters especially in light of the impending repeal rule. Nor would even a successful challenge to the 2015 Rule have any effect on the Donlin mine: that rule has been enjoined in Alaska. *North Dakota*, 127 F. Supp. 3d at 1051 & n.1.

Courts regularly reject standing based on these kinds of speculative chains. In *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000), for example, the court held that it is "clearly conjecture and hypothetical" to suppose that a plaintiff's injury would occur if "[a facility] is constructed, a leak or malfunction occurs, contaminants reach [a water body], the contaminants reach[plaintiffs' location]" and the plaintiff thereby suffers some injury. *Id.* at 1191. Such a "weak[] likelihood of concrete harm" does not satisfy standing. *Summers*, 555 U.S. at 495. That is Mr. Angstrom's declaration precisely, made doubly irrelevant because any harm would flow from defects in or violation of the Section 404 permit, not the WTS exclusion he challenges.

James DeWitt's declaration also is deficient. He says he is concerned generally about the environment and enjoys birding and fishing, including near his home in Boise, Idaho. Dkt. 67-6, at ¶¶ 2-8. He identifies the Midas Gold Corporation's proposal to construct a mine 100 miles north of Boise. *Id.* ¶ 13. He speculates that the construction site may include streams that are WOTUS, that some may be used "to convey and treat waste," and that the agencies may rely on the WTS exclusion WOTUS "located on the mine site from water quality standards." *Id.*

These three layers of speculation—Midas's "exploratory" project *may* involve impounding waters, which *may* be "waters of the United States," and to which the agencies *may* apply the WTS

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exclusion—are not enough for standing. They are also untrue. The proposed waste treatment program design for the Midas project does not contemplate the use of jurisdictional WOTUS to convey or treat waste. Declaration of L. Michael Bogert (Bogert Decl.) at ¶ 15. Anyway, Mr. DeWitt does not claim to recreate in any on-site waters that he speculates Midas may use in its waste treatment systems. He does not explain how he would be helped by vacating the exclusion in the 2015 Rule when that rule is now enjoined in Idaho. *North Dakota*, 127 F. Supp. 3d at 1051 & n.1. And he ignores that any Section 404 permit to build a WTS in WOTUS would protect downstream waters.

Mr. DeWitt also identifies the decades-old Hecla Grouse Creek Mine. Dkt. 67-6, at ¶ 14. He complains that its permits require compliance with water quality standards at the discharge point from Pinyon Creek into Jordan Creek, and not from a settling pond into Pinyon Creek—but he expresses no connection to or use of Pinyon Creek. Nor could he, given that Pinyon Creek was long ago "permanently dewatered." Bishop Decl., Ex. M at 31. Besides that, promulgation of the 2015 Rule has no bearing at all on the current status of the Hecla mine's WTS. Hecla's Section 402 and 404 permits were issued long before the 2015 Rule was issued and its vacatur would not affect their status. Any complaint he has is properly with these permits, not the WTS exclusion.[6]

2. Plaintiffs have not established causation or redressability

Plaintiffs cannot show any causal connection between a purported injury and the agencies' decision to maintain the WTS exclusion in the 2015 Rule. They accordingly cannot show that the remedy they request—an injunction—would redress any of their supposed injuries.

[6] Plaintiff associations also submit declarations from employees to establish certain elements of associational standing. Dalal Aboulhosn, Sierra Club's Deputy Legislative Director, testifies that she "care[s] about the ecosystem" and is concerned in light of the Donlin project that she "will be unable to stop pollution and habitat loss" in her job at the Club. Dkt. 67-4, at ¶ 12. Chris Wilkie, the "primary advocate" for the Puget Soundkeeper Alliance, says he is "concerned" that the waste treatment system exclusion will mean that water quality on the whole will "deteriorate." Dkt. 67-5, at ¶¶ 2,14-15. And Austin Walkins, a conservation associate at the Idaho Conservation League, states that he is concerned that the waste treatment system exclusion "increas[es] the cumulative effect of pollution that is discharged or runs off into waters that ICL works to restore and protect." Dkt. 67-7, at ¶¶ 2,13. Those vague and "generalized grievances" are suffered "by all or a large class of citizens" and not sufficiently particularized for Article III standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

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The agencies have a longstanding policy of excluding waste treatment systems from the definition of waters of the United States. The 2015 Rule did not change this. It simply continued the suspension of contrary language—suspension that has been continuous since 1979 except for two months in 1980. The 2015 Rule did not change how the exclusion is interpreted or applied. With or without that Rule, plaintiffs' alleged injuries would have been the same.

What is more, the relief plaintiffs seek will not impact the mine sites they identify. There is no chance that the Midas Gold site will be affected by the limitation of the WTS exclusion that plaintiffs seek: "Nowhere in the proposed water treatment program design for the [Midas project] is there any design accommodation for, or reliance by Midas Gold on, the Waste Treatment System Exclusion under the Clean Water Act." Bogert Decl. at ¶ 15. And the Corps has already issued permits for the Donlin and Hecla sites. A vacatur here would not have retroactive effect on those final agency permits resting on then-valid regulations. *See Jordan v. Nicholson*, 401 F.3d 1296, 1299 (Fed. Cir. 2005) ("The Supreme Court has repeatedly denied attempts to reopen final decisions in the face of new judicial pronouncements"); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("New legal principles, even when applied retroactively, do not apply to cases already closed."). By their own admission, plaintiffs seek only to enjoin the agencies from using the suspended language to permit "new or expanded waste treatment systems" Dkt. 67, at 18.

B. This action is untimely

1. The six-year statute of limitations for challenging the waste treatment exclusion has long since past

An Administrative Procedure Act (APA) challenge to final agency action generally must be brought within six years after the claim accrues. 28 U.S.C. 2401(a); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 626-27 (2018). Plaintiffs' claims are untimely because the challenged exclusion was promulgated decades ago.

While a subsequent agency rule can create a "renewed opportunity" for legal challenges, it does so only when "EPA was [actually] reconsidering any underlying regulations." *Ohio Pub.*

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Interest Research Grp. v. Whitman, 386 F.3d 792, 800 (6th Cir. 2004). Reopening occurs only if the agency undertakes a "serious, substantive reconsideration" of the existing rule. *Nat'l Mining Ass'n v. DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995). That is not the case here. The agencies made clear that they were not reexamining or substantively changing the WTS exclusion, were maintaining longstanding practice, and therefore were not accepting comments on the exclusion. *Supra*, p. 9-10.

Plaintiffs claim their "harm" derives from the agencies' "decision to abandon their prior stated intention to 'promptly' amend the Exclusion or 'terminate the suspension.'" Dkt. 67, at 20. But any agency intention to "promptly" revisit the exclusion had obviously been abandoned over the course of the last 39 years. The statute of limitations has long since run for any cause of action premised on the idea that the stated intention to "promptly" amend the exclusion was legally binding. And an agency's failure to perform a legally-required act is every bit as reviewable as its decision *to* act. *See, e.g.*, *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1075-76, 1078-79 (9th Cir. 2016) (reviewing agency failure to act to comply with duty imposed by regulation); *Houseton v. Nimmo*, 670 F.2d 1375 (9th Cir. 1982) (agency's long delay in processing request constituted denial).

The agencies' express decision *not* to revisit the suspension in 1983 meant that permitting decisions continued to rely upon the exclusion in cases of impoundments of WOTUS. This agency practice was reaffirmed and memorialized in 1990s and 2000s guidance documents and in EPA's approval of the Texas NPDES program. It was judicially approved by the Fourth Circuit in 2009 in *Ohio Valley*, 556 F.3d at 211-12. *Supra*, pp. 7, 9.

Moreover, the 1980 suspension itself was a "final" agency act subject to an APA challenge. As the D.C. Circuit has held, "an 'indefinite suspension' does not differ from a revocation simply because the agency chooses to label it a suspension." *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984). Thus, "suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA [Section] 553." *Envt'l Def. Fund, Inc. v. EPA*, 716 F.2d 915,

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920 (D.C. Cir. 1983). It follows that plaintiffs had until 1986 to challenge the 1980 suspension of the manmade-features limitation. They brought no such challenge, which is now long-since time-barred.

2. Judicial intervention is not warranted in light of new rulemakings

The agencies are actively re-considering the WOTUS definition, including the WTS exclusion. The repeal rule, slated for August finalization, will soon moot plaintiffs' claim. *Supra*, n.3. Principles of judicial economy suggest restraint, especially since plaintiffs have not shown that any new WTSs will be permitted or constructed imminently under the challenged provision.

In addition, the proposed rulemaking for the replacement WOTUS rule invited comment on the WTS exclusion. *Supra*, p. 11. Plaintiffs raised the same arguments in their comments to the agencies that they make here, simply swapping reference to the 2015 Rule for the proposed 2019 Rule. Once finalized, the new WOTUS Rule will render plaintiffs' arguments doubly moot. *See, Coal. of Airline Pilots Ass'n. v. FAA*, 370 F.3d 1184, 1189-90 (D.C. Cir. 2004). Judicial intervention decades after the original agency action and months before a new one is not warranted.

C. Plaintiffs' merits arguments are not persuasive

1. The WTS exclusion is consistent with the statutory text

Plaintiffs argue that the WTS exclusion—or more precisely EPA's suspension of the sentence that limits the exclusion to manmade bodies of water not created in or by impounding WOTUS—is unlawful because EPA lacks statutory authority to remove "waters of the United States" from the Act's protections. Dkt. 67, at 12. This argument is sweeping; its logic would invalidate not just the WTS exclusion, but also seven other exclusions under 33 C.F.R. 328.3(b), all of which are essential to the functioning of the CWA scheme. It is also circular: through exclusions, the agencies exercise their undisputed authority to define what a WOTUS is in the first place. *See Ohio Valley*, 556 F.3d at 212 (Corps "has the authority to determine which waters are covered by the CWA.").

The Fourth Circuit in *Ohio Valley* considered this precise issue and concluded that the WTS exclusion was lawful. In that case, the plaintiffs challenged CWA permits that had been based in

part on the Corps' characterization of stream segments as "waste treatment systems." 556 F.3d at 185-86, 211. Reversing the district court judgment, the Fourth Circuit held that the Corps' application of the WTS exclusion to a stream that would otherwise be a "water of the United States" was permissible. *Id.* at 212-15. The court of appeals held that the Corps' permitting decision, including its conclusion that stream segments connecting valley fills to sediment ponds are waste treatment systems and not waters of the United States, was a reasonable interpretation of the Act. *Id.* at 216. Plaintiffs here barely acknowledge this decision. *See* Dkt 67 at 7 n.3.

Despite this, plaintiffs argue that "[t]he exclusion cannot be reconciled with the Act's purpose of controlling and eventually eliminating pollution discharges into our Nation's waters." Dkt. 67 at 7. But the WTS exclusion does not free a discharger from the need to obtain and comply with (1) Section 404 permits required if a waste treatment system is constructed in WOTUS in the first place, or (2) Section 402 permits necessary to discharge from a waste treatment system to a WOTUS. The WTS exclusion exempts only those discharges into the treatment system itself. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2007) ("The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds") (citing 45 Fed. Reg. 48620-21). That makes sense: treating WTSs and their components as WOTUS would produce absurd results, requiring treatment to occur upstream of wherever the approved treatment system is actually located.

Plaintiffs invoke the CWA's goal to eliminate "the discharge of pollutants into the navigable waters." 33 U.S.C. 1251(a)(1). But that general goal yields to specific operative provisions of the Act, *which authorize EPA and the Corps to issue permits for such discharges*. The authority provided by Section 404 is particularly relevant to the WTS exclusion. As the Corps pointed out in its brief in *Ohio Valley*, Section 404 authorizes the Corps to issue a permit to fill a WOTUS in its entirety. Indeed, it "is a statutory mechanism" that allows "removing waters completely from jurisdiction." Bishop Decl., Ex. I at 68 n.2. This is the Corps' decades-old interpretation. *See* 45 Fed. Reg. at 85340 ("When a portion of the Waters of the United States has been legally converted to

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fast land by a discharge of dredged or fill material, *it does not remain waters of the United States subject to section 301(a)*") (emphasis added). If the Corps has authority to allow WOTUS to be filled completely, it reasonably may promulgate an exclusion that permits a temporary conversion of a WOTUS into a WTS for the purpose of protecting downstream water quality. *See* Bishop Decl., Ex. I at 68 n.2. Indeed, when the Corps permits the creation of WTSs in existing WOTUS, it often does so to "minimize the physical extent of the [WTS]." *Id.* at 59.

Furthermore, Congress has ratified the exclusion. Given that the agencies have consistently excluded waste treatment systems from WOTUS since 1979, Congress is assumed to have been aware of this rule when it amended the CWA on numerous occasions since then, and to have approved it. *See Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984) (congressional failure to disapprove of federal agency regulations, while "not dispositive, . . . strongly implies that the regulations accurately reflect congressional intent").

2. The WTS exclusion is consistent with critical elements of the CWA

Classifying WTSs as WOTUS would create intractable conflicts with other CWA programs. If WTS components were classified as WOTUS, states would be required to establish water quality standards under CWA Section 303, including "designated uses" of the WOTUS and criteria necessary to protect those uses. 33 U.S.C. 1313; 40 C.F.R. 131.3. "Waste transport," however, is forbidden as a "designated use." 40 C.F.R. 131.10(a). Instead, states would have to designate WTSs for fishable and swimmable uses, unless they conducted a "use attainability analysis" and satisfied one of six narrow reasons why attaining such uses is infeasible. 40 C.F.R. 131.10(g), (j). If a fishable/swimmable use is designated, a WTS would almost always fail to meet applicable criteria, and the state would have to designate the WTS as an impaired water and develop a total maximum daily load to ensure water quality criteria were met. 33 U.S.C. 1313(d)(1)(C). That regulatory quagmire would require states to jump through inappropriate hoops never intended for this purpose, wasting state and industry resources for no gain at all in downstream water quality.

Furthermore, countless NPDES permits and separate state regulatory permits are based on the

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premise that treatment has occurred within a WTS. Each of those permits would be rendered inapposite were treatment required before water enters the system rather than within the treatment system. Adopting plaintiffs' position would require a massive diversion of federal and state regulatory resources, now directed toward protecting waters actually used for fishing and swimming, to restructuring WTSs and their inputs—all for no discernable gain in environmental protection.

3. The waste treatment system exclusion is not arbitrary and capricious

Plaintiffs argue that the WTS exclusion in the 2015 Rule, in particular, the failure to reinstate the suspended sentence, is arbitrary and capricious because the agencies did not provide an explanation for treating WTSs differently from other impoundments of WOTUS; and because EPA "never explained the shift from its 1980 position that only manmade waste treatment systems should be excluded from the definition of [WOTUS] to its present position permanently extending the exclusion." Dkt. 67, at 13.

Neither objection is persuasive. As to the first, the agencies have excluded WTSs, including those created in jurisdictional waters, since the 1980s. 44 Fed. Reg. at 32858; 45 Fed. Reg. at 48620. They did not change that practice here. Instead, they explained that they did not alter the longstanding practice regarding waste treatment systems. 80 Fed. Reg. at 37059. The agencies had no duty to explain long-since-past policy decisions that were outside the scope of the 2015 rulemaking. As to the second objection, the agencies explained in issuing the 2015 Rule that they decided to continue with longstanding and often-explained practice rather than make a substantive change. *Id.* at 37096. It is the sharp shift in policy and backtracking on settled reliance interests that plaintiffs advocate that would have required careful explanation by the agencies had they adopted it. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *see* Schwartz Decl. at ¶ 9:23-25 (many paper and pulp mills have relied on the exclusion in its current form over the last 40 years).

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4. The agencies complied with notice and comment rulemaking procedures

Plaintiffs argue that the agencies rendered a temporary suspension permanent without following notice and comment rulemaking procedures. Dkt. 67, at 15. Plaintiffs' premise is flawed: there is nothing temporary about a suspension that has been in effect for 40 years. The agencies fully met their notice and comment obligations *for the 2015 Rule* that made no relevant change in prior policy. The 2014 proposal made clear that the substance of the WTS exclusion was beyond the scope of the proposal. The agencies considered only ministerial changes that had no impact on substance. They addressed comments regarding ministerial changes and made only changes that did not impact their longstanding policy. 80 Fed. Reg. at 37073. The limiting language, along with its suspension, remains in place.

Plaintiffs also argue that the agencies addressed only some comments on the exclusion—specifically, complaints that the agencies inadvertently added a comma that changed the substance of the exclusion. But the agencies appropriately addressed comments on the erroneous comma, because they did not intend any substantive changes to the exclusion. *See* 80 Fed. Reg. at 37097.

D. Plaintiffs improperly ask this Court to substitute plaintiffs' judgment for that of the agencies, to the detriment of the Nation's waters and economy

Plaintiffs ask for a declaration that the WTS exclusion is unlawful for substantive and procedural flaws given its "permanent" suspension of the limiting language and suggest that the agency action making the suspension "permanent" should be "'h[e]ld unlawful and set aside.'" Dkt. 67, at 19. They also seek to enjoin the permitting of new or expanded WTSs "that fit the description in the suspended sentence (*i.e.* manmade bodies of water that neither were originally created in waters of the United States nor resulted from the impoundment of waters of the United States)," "pending" the agencies' compliance with notice-and-comment rulemaking procedures. *Id.* at 16.[7]

Plaintiffs' requested relief would constitute judicial lawmaking. They ask the Court to set aside

[7] Plaintiffs ask this Court to declare the "Waste Treatment System Exclusion" unlawful. Notably, however, all of their arguments are directed solely to the second sentence of the WTS exclusion—and specifically to EPA's decision to continue the suspension of that second sentence in the 2015 Rule—and not to the WTS exclusion itself.

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a longstanding regulatory practice that serves important goals and has created settled reliance interests and to promulgate in its place plaintiffs' preferred policy that the agencies tasked with implementing the CWA have consistently declined to adopt. That would not restore the status quo ante—it would destroy it. The practice in place for decades prior to the 2015 Rule extended the WTS exclusion to those portions of WTSs constructed in or impounding existing WOTUS. Thus to entertain plaintiffs' request—to override decades of settled regulatory practice in favor of a rejected alternative—would unlawfully "intrude into the administrative province." *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979); *see also, e.g.*, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015).

The practical importance of the longstanding administrative practice that plaintiffs attack cannot be overstated. Industrial operations of all types—including power generation, mining, and pulp and paper mills—as well as land uses like construction, produce waters that must be treated before they can be released to WOTUS or reused, sometimes in complex and interconnected systems. *See* Boswell Decl. at ¶¶ 4-5; Declaration of Rebecca McGrew (McGrew Decl.) at ¶¶ 2-3:10-25. Settling and cooling ponds, clarifier ponds, sludge and stormwater management ponds, retention basins, treatment tanks, and a host of other specialized treatment features, as well as the conveyances that move water to, within, and from WTSs, are essential to manage and treat effluent, contain accidental releases, and satisfy NPDES requirements. *E.g.*, Schwartz Decl. at ¶ 4:3-18. Indeed, EPA recognizes these features as "best management practices" for treating effluent discharges. *See*, *e.g.*, Bishop Decl., Ex. F at 58-59. Treating water before it is released to a WTS, instead of within the WTS, would be impossible in some cases and enormously costly in all cases. *See id.* at 64-66; Boswell Decl. at ¶ 7 (repeal of the WTS exclusion would "severely impact the coal mining industry"); McGrew Decl. at 3:1-5 (explaining "inordinately burdensome" costs); Schwartz Decl. at ¶ 8:20-21 (loss of exclusion "would be extremely disruptive" and could force mill shutdowns). There is no doubt that, nationwide, billions of dollars in additional costs would result. *See, e.g.*, Bishop Decl., Ex. F at 65-66. Yet it would serve no purpose that is not already served by the

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combination of Section 404 and 402 permitting that applies to WTS construction and discharges.

Plaintiffs' theory that releases into certain WTSs must comply with NPDES permit requirements fails to recognize the extent to which WTSs are already closely regulated by EPA, the Corps, and the States to promote clean water, or that treating water before it reaches the WTS would render WTSs useless for their intended purpose. It would require a massive and enormously costly change in the way that industrial and municipal waters have been successfully managed since well before the CWA was passed—one that would disrupt virtually every corner of the U.S. economy.

CONCLUSION

In sum, plaintiffs are not entitled to an injunction. The CWA authorizes the agencies' determination that WTSs should not be regulated as waters of the United States. WTSs serve the Act's goals by collecting and treating water before it is discharged in compliance with NPDES permits, and by satisfying the criteria for obtaining Section 404 permits if constructed in WOTUS. Plaintiffs have not shown that they will suffer any injury if this longstanding practice continues. By contrast, an injunction would destroy four-decade, settled expectations of regulated parties essential to the Nation's economy.

Plaintiffs' motion for summary judgment should be denied, and intervenor-defendants' cross motion granted. Judgment should be entered for intervenor-defendants.

Dated this 29th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court of the Western District of Washington on all parties registered for CM/ECF in the above-captioned matter.

Dated at Seattle, Washington, this 29th day of May, 2019.

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