No. 20-1238

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO,
Plaintiff/Appellee,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants/Appellants.

Appeal from the United States District Court for the District of Colorado
No. 1:20-cv-01461-WJM-NRN (Hon. William J. Martinez)

APPELLANTS' OPENING BRIEF

Of Counsel:

MATTHEW Z. LEOPOLD
General Counsel
DAVID FOTOUHI
Principal Deputy General Counsel
U.S. Environmental Protection Agency

CRAIG SCHMAUDER
Deputy General Counsel
Department of the Army

DAVID R. COOPER
Chief Counsel
U.S. Army Corps of Engineers

JEFFREY BOSSERT CLARK
Assistant Attorney General
JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
BRIAN C. TOTH
ROBERT J. LUNDMAN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-0943
eric.grant@usdoj.gov

Oral argument is requested.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF RELATED CASES x

GLOSSARY xi

INTRODUCTION 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE ISSUES 4

PERTINENT STATUTES AND REGULATIONS 4

STATEMENT OF THE CASE 5

A. Statutory and regulatory background 5

1. 1980s regulations and Supreme Court opinions interpreting those regulations 5

2. The 2015 Rule 8

3. The 2019 Repeal Rule and the 2020 Navigable Waters Protection Rule 10

4. Colorado law on dredging and filling state waters 16

B. Proceedings below and in other courts concerning the NWPR 17

SUMMARY OF ARGUMENT 23

STANDARD OF REVIEW 25

ARGUMENT 26

I. The district court erred in concluding that Colorado established a likelihood of success on the merits because the court's conclusion was based on a misinterpretation of *Rapanos* 26

II. Colorado did not establish the "certain and great" irreparable harm necessary to justify a mandatory injunction before judgment 35

A. Colorado did not make the harm argument that the district court credited 36

B. Nothing indicates that any enforcement harm will occur *before* the district court can rule on the merits 38

C. Any harm to Colorado is not "certain and great" 39

III. The balance of equities and the public interest weigh against a preliminary injunction 44

CONCLUSION 47

STATEMENT REGARDING ORAL ARGUMENT 49

CERTIFICATE OF COMPLIANCE 50

CERTIFICATE OF DIGITAL SUBMISSION 51

CERTIFICATE OF SERVICE 52

FEDERAL RULE OF APPELLATE PROCEDURE 28(f)
ADDENDUM OF SELECTED STATUTES AND REGULATIONS

Clean Water Act

33 U.S.C. § 1251.....1a

33 U.S.C. § 1311.....2a

33 U.S.C. § 1362.....3a

Navigable Waters Protection Rule

33 C.F.R. § 328.3.....4a

ATTACHMENT

District court order under review (June 19, 2020)

TABLE OF AUTHORITIES

Cases

Aid for Women v. Foulston,
41 F.3d 1101 (10th Cir. 2006) 26

Brown Shoe Co. v. United States,
370 U.S. 294 (1962).....47

California v. Wheeler,
No. 20-cv-03005-RS,
2020 WL 3403072 (N.D. Cal. June 19, 2020) 22, 33, 47

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984).....20, 27

County of Maui v. Hawaii Wildlife Fund,
140 S. Ct. 1462 (2020).....34

Dominion Video Satellite, Inc. v. Echostar Satellite Corp.,
356 F.3d 1256 (10th Cir. 2004) 18

East Bay Sanctuary Covenant v. Trump,
950 F.3d 1242 (9th Cir. 2020) 46

Georgia v. Wheeler,
418 F. Supp. 3d 1336 (S.D. Ga. 2019) 10

Greater Yellowstone Coalition v. Flowers,
321 F.3d 1250 (10th Cir. 2003) 35, 39

Heckler v. Chaney,
470 U.S. 821 (1985).....41

Heideman v. South Salt Lake City,
348 F.3d 1182 (10th Cir. 2003) 26

Hernandez-Carrera v. Carlson,
547 F.3d 1237 (10th Cir. 2008) 28

In re EPA & Department of Defense Final Rule,
803 F.3d 804 (6th Cir. 2015) 10

In re U.S. Department of Defense & U.S. EPA Final Rule,
713 Fed. Appx. 489 (6th Cir. 2018) 10

Marks v. United States,
430 U.S. 188 (1977).....33

Morrison v. National Australia Bank Ltd.,
561 U.S. 247 (2010).....34

National Ass'n of Manufacturers v. Department of Defense,
138 S. Ct. 617 (2018).....10

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) 26-28, 33

New Mexico Department of Game & Fish v. U.S. Department of Interior, 854 F.3d 1236 (10th Cir. 2017)..... 35-36

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932).....24

Nken v. Holder,
556 U.S. 418 (2009).....44

North Dakota v. EPA,
127 F. Supp. 3d 1047 (D.N.D. 2015) 9

Northern California River Watch v. City of Healdsburg,
496 F.3d 993 (9th Cir. 2007) 31

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,
389 F.3d 9735 (10th Cir. 2004) 26, 36

Pennsylvania v. New Jersey,
426 U.S. 660 (1976).....19, 41

Prairie Band of Potawatomi Indians v. Pierce,
253 F.3d 1234 (10th Cir. 2001) 35, 40

Rapanos v. United States,
547 U.S. 715 (2006).....2, 6-8, 29-32

RoDa Drilling Co. v. Siegal,
552 F.3d 1203 (10th Cir. 2009).....25, 35

Rodriguez v. United States,
480 U.S. 522 (1987).....34

Sierra Club v. U.S. Army Corps of Engineers,
990 F. Supp. 2d 9 (D.D.C. 2013).....46

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996).....28

Solid Waste Agency of Northern Cook County v. Corps,
531 U.S. 159 (2001).....6, 29

Stender v. Archstone-Smith Operating Trust,
958 F.3d 938 (10th Cir. 2020).....20, 37

Texas v. EPA,
389 F. Supp. 3d 497 (S.D. Tex. 2019).....10

Texas v. EPA,
829 F.3d 405 (5th Cir. 2016).....25

United States v. Bailey,
571 F.3d 791 (8th Cir. 2009).....31

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003).....29

United States v. Donovan,
661 F.3d 174 (3d Cir. 2011).....31

United States v. Eurodif S.A.,
555 U.S. 305 (2009).....28

United States v. Gerke Excavating, Inc.,
464 F.3d 723 (7th Cir. 2006).....31

United States v. Hubenka,
438 F.3d 1026 (10th Cir. 2006) 29

United States v. Johnson,
467 F.3d 56 (1st Cir. 2006).....31

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985).....6, 28

United States v. Robison,
505 F.3d 1208 (11th Cir. 2007) 31

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020)..... 23-24, 37, 38

U.S. Army Corps of Engineers v. Hawkes Co.,
136 S. Ct. 1807 (2016).....31, 45

Vasquez v. Hillery
474 U.S. 1334 (1986). 33

Winkler v. Andrus,
614 F.2d 707 (10th Cir. 1980) 25

Winter v. NRDC,
555 U.S. 7 (2008).....18, 25, 35

Statutes and Court Rule

Administrative Procedure Act

5 U.S.C. § 551.....3

5 U.S.C. § 705.....18, 26

28 U.S.C. § 1292..... 3-4

28 U.S.C. § 1331.....3

Clean Water Act

33 U.S.C. § 1251.....3, 5

33 U.S.C. § 1251.....5

33 U.S.C. § 1311.....5

33 U.S.C. § 1342.....5

33 U.S.C. § 1344.....5

33 U.S.C. § 1362.....5

Colo. Rev. Stat. § 25-8-103 16

Colo. Rev. Stat. § 25-8-501 16-17

Colo. Rev. Stat. § 25-8-503 17

Fed. R. App. P. 4.....4

Rules and Regulations

33 C.F.R. § 328.3 ..... 1, 21

51 Fed. Reg. 41,206 (Nov. 13, 1986) 5

53 Fed. Reg. 20,764 (June 6, 1988) 5

80 Fed. Reg. 37,054 (June 29, 2015) 8-9, 14

82 Fed. Reg. 34,899 (July 27, 2017) 10

83 Fed. Reg. 32,227 (July 12, 2018) 10

84 Fed. Reg. 4154 (Feb. 14, 2019) 11

84 Fed. Reg. 56,626 (Oct. 22, 2019) 11

85 Fed. Reg. 22,250 (Apr. 21, 2020) 11-15, 32, 45

Other Authorities

Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) 10

Michael S. Greve, *The Upside-Down Constitution* (2012) 47

STATEMENT OF RELATED CASES

There are no prior or related appeals.

GLOSSARY

Agencies	U.S. Environmental Protection Agency and U.S. Army Corps of Engineers
Appendix	Appellants' Appendix filed July 9, 2020
APA	Administrative Procedure Act
Corps	U.S. Army Corps of Engineers
EPA	U.S. Environmental Protection Agency
NWPR	Navigable Waters Protection Rule

INTRODUCTION

The scope and reach of the Clean Water Act depend on the meaning of "navigable waters," which the Act defines with the ambiguous phrase "waters of the United States." Congress left it to the Agencies — the Environmental Protection Agency and the Army Corps of Engineers — to define that statutory phrase. In the Navigable Waters Protection Rule (NWPR), the Agencies have adopted a definition that synthesizes the statutory language, Supreme Court precedent, the objectives and policies of the Act, and relevant science. With the rule, the Agencies have resolved decades of uncertainty about the federal reach of the Clean Water Act. Going forward, anyone wondering if particular waters or wetlands are "navigable waters" subject to the Clean Water Act will resolve that inquiry by simply reading Title 33 of the Code of Federal Regulations, Section 328.3. The definition of "waters of the United States" there draws a clear line between those waters and wetlands that are regulated by the Agencies and those that are left to Colorado and the other States to regulate. In far more cases than before, the definition will inform regulated parties and the public if the CWA applies.

Equally important, the NWPR provides clear nationwide uniformity. Five years of litigation have resulted from the Agencies' 2015 effort to define "waters of the United States." That litigation led to a regulatory patchwork. One definition of "waters of the United States" applied in about half of the States. Another definition

applied in the other half — with the divide shifting over time. The NWPR ends that shifting patchwork.

Except in Colorado. The district court here granted the State of Colorado's motion and preliminarily enjoined the NWPR. As elaborated herein, however, the court abused its discretion in granting the preliminary injunction in two principal respects.

First, the district court made a legal error: it concluded that the Supreme Court's fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006), foreclosed the Agencies from defining "waters of the United States" based on *any* of the opinions in that case, including the four-justice plurality. But the various opinions in *Rapanos* did not hold that the Act unambiguously defined "waters of the United States." Rather, they addressed how far the Agencies *may* regulate, not how far they *must* regulate. *Rapanos* invited rather than prohibited further agency rulemaking to define what "waters of the United States" constitute "navigable waters." The district court's error should have been readily apparent from the recognition that, under its reasoning, *none* of the Justices' opinions could guide future rulemaking.

Second, although the district court correctly rejected most of Colorado's theories of harm, it ultimately found harm based on an argument that Colorado had not made: the State would potentially have to take a few more enforcement actions. But this "harm" is speculative — not "certain and great," as required. Neither the

court nor Colorado identified any specific waters that would qualify as "waters of the United States" absent the NWPR, let alone any related enforcement actions. Nor did the court find that this harm would occur before it could rule on the merits over the following several months.

Finally, the district court did not balance the equities or address the public interest; it merely stated that its ruling would preserve the status quo. But the NWPR provides greater regulatory certainty than the status quo. The rule also provides far more benefits than costs. And it returns authority and policy-making discretion over many waters to Colorado consistent with the cooperative-federalism design of the Clean Water Act. The court erred in ignoring those considerations. Its injunction was an abuse of discretion that should be vacated.

STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Colorado's claims arose under the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. Appellants' Appendix (Appendix) 12, 45-52 (filed July 9, 2020).

(B) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court's order grants a preliminary injunction. Appendix 120.

(C) That injunction was entered on June 19, 2020. Appendix 120. The Agencies timely filed their notice of appeal on June 23, 2020, or 4 days later. Appendix 121-23; *cf.* Fed. R. App. P. 4(a)(1)(B).

(D) The appeal is from an order granting a preliminary injunction, which is appealable pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in determining that Colorado was likely to succeed on the merits of its challenge to the NWPR.

2. Whether the district court abused its discretion by granting a preliminary injunction — including a disfavored mandatory injunction — absent evidence that Colorado would suffer "certain and great" irreparable harm before the district court renders a final decision on the State's claims.

3. Whether the district court abused its discretion in ruling that the balance of harms and public interest favors an injunction based solely on the conclusion that an injunction would preserve the status quo.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 et seq., with the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id*. § 1251(a), while declaring its policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," *id*. § 1251(b). The Act prohibits "the discharge of any pollutant by any person" without a permit, *id.* § 1311(a), to "navigable waters," defined as "the waters of the United States," *id.* § 1362(7). EPA authorizes States (including Colorado) and Indian tribes to issue National Pollutant Discharge Elimination System (or "Section 402") permits for the discharge of pollutants other than dredged or fill material. *Id*. § 1342; Appendix 15. For discharges of dredged or fill material, the Secretary of the Army acting through the Corps, or a State or tribe with an assumed program, may issue "Section 404" permits. *Id*. § 1344(a), (d), (g). Colorado does not have an approved Section 404 program. Appendix 15-16.

1. 1980s regulations and Supreme Court opinions interpreting those regulations

In the 1970s and 1980s, the Agencies promulgated a regulatory definition of "waters of the United States." *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986) (Corps); 53 Fed. Reg. 20,764 (June 6, 1988) (EPA). The Agencies administratively modified their application of this definition in response to three Supreme Court decisions.

First, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-35 & n.9 (1985), the Court deferred to the Corps' claim of jurisdiction over wetlands "actually abut[ting]" a traditional navigable water. The Court thus made clear that "waters of the United States" extend beyond traditional navigable waters. *Id*.

Second, in *Solid Waste Agency of Northern Cook County v. Corps*, 531 U.S. 159, 167-68, 171-72 (2001) (*SWANCC*), the Supreme Court rejected the Corps' broad reading of its regulations that asserted regulatory jurisdiction over non-navigable, isolated, intrastate waters based on the use of those waters by migratory birds. The Court held that the term "navigable" must be given meaning within the context of the statute; that is, the term "navigable" is relevant to determining the reach of "waters of the United States." *Id*.

Third, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court assessed the particular application of the Corps' 1986 regulations to four wetlands. The result was a 4-1-4 set of opinions that remanded the Corps' assertion of jurisdiction over certain wetlands. *See id.* at 719-57 (plurality opinion of Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ.); *id*. at 759-87 (Kennedy, J., concurring); *id.* at 787-810 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.). Both the plurality and Justice Kennedy determined that the Corps' application of its regulatory definition exceeded the statutory reach of the Clean Water Act, and that the cases should be remanded for a determination of whether the wetlands were

within a narrower articulation of "waters of the United States." *Id*. at 757 (plurality); *id*. at 786-87 (Kennedy, J., concurring).

The plurality stated that "the traditional term 'navigable waters' . . . carries some of its original substance" and "includes, at bare minimum, the ordinary presence of water." *Id*. at 734. The plurality would have limited "waters of the United States" to traditional navigable waters and those "relatively permanent bod[ies] of water connected to traditional interstate navigable waters" and to "wetlands with a continuous surface connection" to such relatively permanent waters. *Id.* at 739. The plurality would have excluded "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States.' " *Id*. at 742. The plurality opinion did not address how far the Agencies' definition of "waters of the United States" *must* reach. Rather, it addressed how far the Agencies *may* reach.

Justice Kennedy agreed with the plurality that Congress was not legislating to the full extent of its Commerce Clause power when it enacted the Clean Water Act. Like the plurality, he did not purport to define how far the Agencies *must* regulate. He opined that jurisdiction could extend to waters that have a " 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. at 759; *see also id*. at 779 ("[T]he word 'navigable' in the Act must be given some effect."). But Justice Kennedy expressly rejected the dissent's view that the Act "would permit federal regulation whenever wetlands lie alongside a ditch or drain,

however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778.

The *Rapanos* dissent found the Corps' broad regulations "reasonable," and it would have upheld the finding of jurisdiction. *Id*. at 810 (Stevens, J., dissenting).

Justices representing the entire spectrum of the opinions in *Rapanos* invited the Agencies to promulgate a new regulatory definition of "waters of the United States." Chief Justice Roberts joined the four-justice plurality. But he also wrote a separate opinion chastising the Agencies for their failure to use the "generous leeway by the courts in interpreting the statute" to "develop[] *some* notion of an outer bound to the reach of their authority" following the Court's *SWANCC* decision. *Id*. at 757-58. He noted "how readily the situation could have been avoided" had the Agencies exercised their "delegated rulemaking authority" under the Clean Water Act. *Id*. at 758. Justice Breyer joined the dissent and wrote a separate opinion explaining that the Agencies "may write regulations defining the term — something that [they have] not yet done." *Id*. at 811. And Justice Kennedy provided a jurisdictional test to be applied "[a]bsent more specific regulations" promulgated by the Agencies while noting the "potential overbreadth of the Corps' regulations" at the time. *Id*. at 782.

2. The 2015 Rule

In 2015, the Agencies revised the regulatory definition of "waters of the United States." 80 Fed. Reg. 37,054 (June 29, 2015). A primary purpose of the "2015 Rule"

was to "increase [Clean Water Act] program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act." *Id.* at 37,054. The 2015 Rule was "not dictated by" science, which the Agencies and EPA's Science Advisory Board acknowledged could *not* answer the *legal* question of what constitutes "waters of the United States." *Id.* at 37,060. And "the agencies' technical expertise and extensive experience in implementing the [Clean Water Act] over the past four decades" were relevant factors. *Id.* at 37,055. The 2015 Rule proffered the Agencies' interpretation of Justice Kennedy's "significant nexus" discussion in *Rapanos* as its legal touchstone. *See id*. at 37,060.

Parties sought judicial review of the 2015 Rule in district courts across the country. Colorado challenged the rule in the District of North Dakota as part of a coalition of States. Colorado argued that the 2015 Rule encroached on States' rights, contending that "the limits of federal jurisdiction, not environmental protection" were at issue. *North Dakota v. EPA*, No. 3:15-cv-00059, ECF No. 212 at 33 (D.N.D. June 1, 2018). Colorado, other States, and private parties simultaneously filed petitions for review in the courts of appeals.

In August 2015, the District of North Dakota preliminarily enjoined the 2015 Rule in Colorado and 12 other States. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015). The petitions filed in the courts of appeals, including Colorado's petition, were consolidated in the Sixth Circuit; in October 2015, that court

stayed the 2015 Rule nationwide. *In re EPA & Department of Defense Final Rule*, 803 F.3d 804, 808-09 (6th Cir. 2015). But after the Supreme Court held that challenges to the 2015 Rule must be brought in the district courts, *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 624 (2018), the Sixth Circuit vacated its nationwide stay, *In re U.S. Department of Defense & U.S. EPA Final Rule*, 713 Fed. Appx. 489, 490-91 (6th Cir. 2018). Colorado later withdrew from the District of North Dakota case. The court there voluntarily dismissed Colorado and lifted the preliminary injunction as to that State in May 2019. Order, *North Dakota v. EPA*, No. 3:15-cv-00059, ECF No. 280 (D.N.D. May 14, 2019).

Since then, two district courts have ruled on the merits of summary judgment motions regarding the 2015 Rule. Both held that the Rule was "unlawful" for various reasons and remanded it to the Agencies. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497, 504-06 (S.D. Tex. 2019).

3. The 2019 Repeal Rule and the 2020 Navigable Waters Protection Rule

In 2017, the Agencies began reconsidering the 2015 Rule. *See* Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Feb. 28, 2017). The Agencies outlined and pursued a two-step rulemaking process. In Step One, the Agencies proposed to repeal the 2015 Rule and reinstate the prior regulations. 82 Fed. Reg. 34,899 (July 27, 2017) (proposed rule); 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice of proposed rulemaking). In Step Two, the Agencies proposed a revised definition of "waters of

the United States." 84 Fed. Reg. 4154 (Feb. 14, 2019) (proposed rule). For that rule, which would become the NWPR, the Agencies provided a 60-day comment period and received approximately 620,000 comments on the proposed rule. 85 Fed. Reg. 22,250, 22,261 (Apr. 21, 2020). The Agencies conducted four in-person meetings with state regulators and held a public hearing where the regulators participated. *Id*.

Responding in part to the two district court orders holding the 2015 Rule unlawful and remanding it to the Agencies, *supra* p. 10, the Agencies in October 2019 issued a final rule repealing the 2015 Rule and reinstating the 1986 Regulations. 84 Fed. Reg. 56,626 (Oct. 22, 2019). This "Repeal Rule" went into effect on December 23, 2019. *Id*. at 56,626. Multiple parties have sought judicial review of the Repeal Rule in various district courts.[1]

On January 23, 2020, the Agencies signed a final rule revising the definition of "waters of the United States." The NWPR was published on April 21, 2020, and

[1] *See Chesapeake Bay Foundation, Inc. v. Wheeler*, D. Md. No. 1:20-cv-01063 (filed Apr. 27, 2020); *Murray v. Wheeler*, N.D.N.Y. No. 1:19-cv-01498 (filed Dec. 4, 2019, and also challenging the NWPR); *Navajo Nation v. EPA*, D.N.M. No. 2:20-cv-00602 (filed June 22, 2020, and also challenging the NWPR); *New Mexico Cattle Growers' Ass'n v. EPA*, D.N.M. 1:19-cv-00988 (filed Oct. 22, 2019, and also challenging the NWPR); *Pascua Yaqui Tribe v. EPA*, D. Ariz. No. 4:20-cv-00266 (filed June 22, 2020, and also challenging the NWPR); *Pierce v. EPA*, D. Minn. No. 0:19-cv-02193 (complaint supplemented to challenge Repeal Rule); *Puget Soundkeeper Alliance v. EPA*, W.D. Wash. No. 2:20-cv-00950 (filed June 22, 2020, and also challenging the NWPR); *South Carolina Coastal Conservation League v. Wheeler*, D.S.C. No. 2:19-cv-03006 (filed Oct. 23, 2019); *Washington Cattlemen's Ass'n v. EPA*, W.D. Wash. No. 2:19-cv-00569 (complaint supplemented to challenge Repeal Rule and NWPR).

it went into effect in 49 States — in all save Colorado because of the preliminary injunction at issue here — on June 22, 2020. 85 Fed. Reg. at 22,250.

The NWPR defines the limits of federal jurisdiction consistent with the Constitution, the Clean Water Act, and case law. The rule establishes four straightforward categories of jurisdictional waters: "(1) The territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands)." *Id*. at 22,273. The Rule also excludes "many water features that traditionally have not been regulated, and define[s] the operative terms used in the regulatory text." *Id*. at 22,270; *see also id*. at 22,340-41 (regulatory text). Ephemeral features are categorically excluded from jurisdiction under the NWPR. *Id*. at 22,340. But certain discharges of pollutants to non-jurisdictional waters may be regulated under the Act if those discharges are conveyed to downstream navigable waters. *Id.* at 22,297.

The NWPR "presents a unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas." *Id*. at 22,252. But it is not a rote adoption of the *Rapanos* plurality's test. Thus, the NWPR includes "intermittent" tributaries that "flow[] continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is

elevated or when snowpack melts)." *Id*. at 22,338. The NWPR also includes as "adjacent wetlands" those that are "inundated by flooding" from a jurisdictional water during "a typical year," as well as wetlands separated from a jurisdictional water "only by a natural berm, bank, dune, or similar natural feature." *Id*. at 22,338. The Agencies thoroughly explained their reasons for drawing these lines. *See*, *e.g.*, *id*. at 22,303-04.

In developing the NWPR, the Agencies were guided by the Clean Water Act's policies and objective; case law, including both the plurality and concurring opinions in *Rapanos*; and scientific principles. They balanced the objective of the Clean Water Act to restore and maintain the integrity of the Nation's waters with the policy of Congress to maintain States' primary responsibilities and rights. *Id*. at 22,252. The final rule also provides clarity and predictability for federal agencies, States, Indian tribes, the regulated community, and the public. *Id*.

The Agencies fully explained the science informing the rule and discussed the Connectivity Report that had accompanied the now-repealed 2015 Rule. *Id*. at 22,261, 22,271, 22,288. For example, the Agencies explained that they used "the Connectivity Report to inform certain aspects of the revised definition of 'waters of the United States,' such as recognizing the 'connectivity gradient' and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system." *Id*. at 22,288. The Agencies analyzed and applied

the "connectivity gradient" and ecological interconnection between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system, which informed the tributary definition. *E.g.*, *id*. at 22,288. The Agencies further looked to the Report, principles of hydrologic connectivity, and longstanding practice in defining the flow classifications used throughout the regulation, determining that inundation by flooding may establish jurisdiction, and using the "typical year" concept to inform what may be within a normal range of precipitation and other climatic variables for a particular geographic region. *E.g.*, *id*. at 22,288. Looking forward, the Agencies are relying on science to develop implementation tools, including approaches to identify flow classification and typical-year conditions. *Id*.

But the ultimate line-drawing cannot be a purely scientific exercise, as the Agencies must consider the statutory language and policy considerations along with the science. *Id*. at 22,261, 22,268-71; *see also* 80 Fed. Reg. at 37,060 (explaining, in the 2015 Rule, that "the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the [Science Advisory Board], but not dictated by them"). For as the Agencies recognized in 2015, based on the Science Report, "science does not provide a precise point along the continuum [of connectivity] at which waters provide only speculative or insubstantial functions to downstream waters." 80 Fed. Reg. at 37,090.

The preamble to the NWPR thoroughly explains the basis for the rule and responds to comments on the proposed rule over 85 pages in the Federal Register. 85 Fed. Reg. at 22,250-334. The NWPR is also supported by a substantial administrative record, which has not yet been submitted to the district court. Colorado did attach to its motion part of that record, namely, the Agencies' Economic Analysis and Resource and Programmatic Assessment that accompanied the *proposed* rule. ECF Nos. 24-5, 24-6 (June 1, 2020). The final Economic Analysis and final Programmatic Assessment may be found at https://www.epa.gov/nwpr/navigable-waters-protection-rule-supporting-documents. The final Economic Analysis concluded that the benefits of the NWPR — improved clarity and consistency, resulting in reduced federal permitting and transaction costs — far outweigh costs or foregone benefits, such as impacts to "stream flows, water quality, drinking water treatment, endangered and threatened species habitats, and other ecosystem services." Economic Analysis at xviii-xxiii. In addition to the rule preamble and the Economic Analysis, the Agencies thoroughly explained their decisions in the final Resource and Programmatic Assessment and in a Response to Comments document, totaling more than 1,500 pages altogether.[2]

[2] The final rule spans 93 pages (279 columns) of the Federal Register. 85 Fed. Reg. at 22,250-342. The Response to Comments is available at https://beta.regulations.gov/document/EPA-HQ-OW-2018-0149-11574.

4. Colorado law on dredging and filling state waters

Colorado has state laws prohibiting any discharges to state waters. Its "state waters" are defined more broadly than "waters of the United States." Colorado waters include "any and all surface and subsurface waters which are contained in or flow in or through" the State. Colo. Rev. Stat. § 25-8-103(19); *see also* Appendix 97. On its face, this definition applies to perennial, intermittent, and even ephemeral waters created by rainfall or snow melt. In those state waters, Colorado law provides that *no* discharges are allowed, unless and until authorized by a state or federal permit. Specifically, "[n]o person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division," i.e., the Water Quality Control Division of the Colorado Department of Public Health and Environment. Colo. Rev. Stat. § 25-8-501(1); *see also* Appendix 97. With respect to pollutants other than fill, Colorado administers the Clean Water Act Section 402 program in the State, granting permits to discharge pollutants regulated under 33 U.S.C. § 1342. Appendix 15.

Even though these statutory provisions have been in place for decades, the State has not taken the steps necessary to establish its own permitting program for dredging and filling state waters. Appendix 15, 41, 71, 74-75. Rather, Colorado has relied on the Corps' Section 404 permits to authorize activities that impact "waters of the United States." Colorado law provides that "each permit issued pursuant to the

federal act shall be deemed to be a temporary permit issued under this article which shall expire upon expiration of the federal permit." Colo. Rev. Stat. § 25-8-501(1). But Colorado provides no mechanism for a party to obtain authorization to dredge and fill a purely state water. Appendix 15-16, 81-82, 100. Under Colorado law, moreover, "[n]o permit shall be issued which allows a discharge that by itself or in combination with other pollution will result in pollution of the receiving waters in excess of the pollution permitted by an applicable water quality standard unless the permit contains effluent limitations and a schedule of compliance specifying treatment requirements." Colo. Rev. Stat. § 25-8-503(4); *see also* Appendix 87-98.

Colorado has been on actual notice of impending changes to the definition of "waters of the United States" for many years. In addition to litigating to stop the 2015 rule before acceding to it, "[s]ince roughly January of this year, in anticipation of the [NWPR], state administrators have been working with the Colorado Legislature to amend the relevant statute to provide state authority equivalent to Section 404." Appendix 98 (citing Appendix 90, ¶ 2). But Colorado ultimately elected not to take action. The "legislature adjourned on June 15, 2020, without passing legislation that would provide Section 404-like authority to state administrators." Appendix 98.

B. Proceedings below and in other courts concerning the NWPR

On May 22, 2020, Colorado filed this lawsuit challenging the NWPR and asserting procedural and substantive flaws therein. Appendix 8-53. Colorado

claimed that Justice Kennedy's significant-nexus test in *Rapanos* is controlling, and that the NWPR must hew to that test as well as to the Clean Water Act's statutory objective, but that the NWPR fails to do so. Appendix 45-46.

Colorado filed a motion for a preliminary injunction against the NWPR on May 28, 2020 and, after the district court struck that motion, an amended motion on June 1, 2020. Appendix 1-2 (ECF Nos. 7, 24). The Agencies opposed Colorado's motion. Appendix 6 (ECF No. 51).

The district court issued a stay and a preliminary injunction on June 19, 2020, without holding a hearing. Appendix 94-120. The court construed the State's motion as one seeking a stay of agency action pursuant to 5 U.S.C. § 705, but it held that the traditional four-factor test for a preliminary injunction set forth in *Winter v. NRDC*, 555 U.S. 7, 20 (2008), nonetheless applied. Appendix 94-96. The court started its analysis with irreparable harm, noting that this Court has concluded that "a showing of irreparable harm is the single most important prerequisite" for the issuance of a preliminary injunction. Appendix 98 (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)). The court also noted that "the irreparable harm inquiry overlaps with whether Colorado asserts any cognizable harm from the New Rule" — i.e., whether Colorado has shown the required injury-in-fact for purposes of establishing its Article III standing to bring suit. Appendix 99.

The district court rejected several of Colorado's harm arguments. First, the court rejected the "permitting gap" argument. This theory is that a change in federal jurisdiction will result in projects that cannot move forward because the State relies on federal permits to authorize discharges in compliance with state law. Appendix 100 (explaining that Colorado forbids all fill activities in any water in the State but allows fill where the Corps issues a Section 404 permit); *see also supra* pp. 16-17. The court concluded primarily that Colorado had provided no specific evidence supporting its argument. Appendix 100-01. Moreover, "Colorado's inability to authorize these projects is the result of nothing other than Colorado's choice in the matter." Appendix 101 (citing *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976)).

Second, the district court rejected the State's assertion that the rule would directly cause environmental harm. The court explained that "Colorado's alleged chain of causation between the New Rule and the damage to state waters is pure speculation." Appendix 104. "Colorado offers no evidence in support of its contention that it is 'likely' that a previously-permitted developer (one who has so far sought to obey the law) would conclude that the narrowing of one law means there must be no more laws to comply with." *Id.*

Third, the district court rejected the State's argument that it will have to spend money on a replacement permitting scheme. The court concluded that the required legislative changes were not imminent. Appendix 106-07.

The district court then identified harm that it deemed sufficient — additional enforcement action that the State will undertake in place of the federal government because of the NWPR. Appendix 107-10. The court acknowledged that "none of the analysis that follows was squarely presented to the Court by Colorado," and it then cited one sentence each of the opening brief, a declaration, and the reply brief, before ruling that the issue was "preserve[d] (although barely)." Appendix 107-08 n.6 (quoting *Stender v. Archstone-Smith Operating Trust*, 958 F.3d 938, 948 (10th Cir. 2020)). The court noted that EPA has historically completed "between three and five" enforcement actions per year in Colorado. Appendix 109. It concluded that Colorado's burden of increased enforcement action was "fairly traceable to the New Rule" and "[a]t least some of the enforcement burden (i.e., filling in Disputed Waters) will now fall in Colorado's lap." Appendix 108-09. The court identified no specific enforcement cases that Colorado would take over. Nor did the court cite evidence of where or when that burden would develop — other than to say "now."

As to likelihood of success on the merits, the district court concluded that *Rapanos* "forecloses the approach taken in the New Rule." Appendix 116. Though the NWPR construes the indisputably ambiguous term "waters of the United States" under Step Two of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), the court held that *Rapanos* bars any such construction of the Act. The court concluded that the Agencies could not base the definition of "waters of the United States" on

the *Rapanos* plurality opinion because "five justices" both rejected the "plurality's categorical exclusion" of intermittent or ephemeral streams and found the plurality's test to be "inconsistent with the [Act's] text, structure, and purpose." Appendix 116. While the district court conceded that none of the *Rapanos* opinions purported to hold that the Act was unambiguous, the court nonetheless concluded that *Rapanos* was "unambiguously against the construction offered in the plurality opinion." Appendix 118. The court further conceded that the logic of its opinion is that "*Rapanos* arguably forecloses every formulation of 'waters of the United States' proposed in *Rapanos*, or proposed by the Agencies thus far." Appendix 118 n.11.

As to balance of harms and the public interest, the court concluded only that "it is the public interest . . . to maintain the status quo — what the regulated community is already accustomed to — pending resolution on the merits." Appendix 119.

The district court ordered that the effective date of the NWPR is "STAYED within the District of Colorado." Appendix 120. The court also mandated that the "Agencies (along with their officers, agents, servants, employees, attorneys, and all others who are in active concert or participation with any of them) are hereby PRELIMINARILY ENJOINED to continue administering Section 404 in Colorado under the provisions of 33 C.F.R. § 328.3 as it is presently codified." *Id.*[3]

[3] In this brief, we refer to the combined relief awarded by the district court as a "preliminary injunction." As explained below (p. 25), the same four-factor standard applies to the preliminary injunction and the stay components of that relief.

There are other challenges pending against the NWPR, including one filed in the Northern District of California by 17 States, the District of Columbia, and the City of New York. The plaintiffs there moved for a nationwide preliminary injunction, which was denied on the very same day as the injunction at issue here was granted. *California v. Wheeler*, No. 20-cv-03005-RS, 2020 WL 3403072 (N.D. Cal. June 19, 2020). The court in *Wheeler* explained that it was "suspect to attempt to cobble together a holding from the concurrence and the dissent" in *Rapanos*, as a basis for concluding that "the Agencies *must* construe the statute" in a particular way. *Id*. at *6 (emphasis added). With respect to the NWPR, there is no basis for a "court to substitute its judgment for the policy choices of the Agency." *Id*.

Two other pending cases challenge the NWPR in district courts within the Tenth Circuit. *See Navajo Nation v. Wheeler*, D.N.M. No. 2:20-cv-00602-MV-GJF (complaint filed June 22, 2020); *New Mexico Cattle Growers' Ass'n v. EPA*, D.N.M. No. 1:19-cv-00988-RB-SCY (motion for preliminary injunction seeking to strike certain text from rule filed May 26, 2020). Other challenges are pending in district courts in Arizona, Maryland, Massachusetts, South Carolina, and Washington.[4]

---

[4] Besides the cases that challenge the Repeal Rule and the NWPR, *see supra* note 1 (p. 11), several cases challenge the NWPR alone: *Chesapeake Bay Foundation v. Wheeler*, D. Md. No. 1:20-cv-01064 (Apr. 27, 2020); *Conservation Law Foundation v. EPA*, D. Mass. No. 1:20-cv-10280 (Apr. 29, 2020); *Environmental Integrity Project v. Wheeler*, D.D.C. No. 1:20-cv-01734 (June 25, 2020); *Oregon Cattlemen's Ass'n v. EPA*, D. Or. No. 3:19-cv-00564 (amended May 1, 2020); *South Carolina Coastal Conservation League v. Wheeler*, D.S.C. No. 2:20-cv-01687 (Apr. 29, 2020).

SUMMARY OF ARGUMENT

1. The district court erred in its analysis of Colorado's likelihood of success on the merits. *Rapanos* does not create a straitjacket from which the Agencies cannot escape. Rather, *Rapanos* was concerned with the *outer bound* on the reach of the Clean Water Act. It did not require the Agencies to regulate up to that outer bound, as the district court erroneously concluded. The Agencies here have exercised the ample discretion that Congress delegated to them to define "waters of the United States." In *Brand X*, the Supreme Court explained that judicial interpretation of a statute does *not* bind agencies interpreting statutes at *Chevron* Step Two *unless* the Court concludes that the statutory language is unambiguous. In *Rapanos*, the Court made clear that "waters of the United States" is ambiguous, and several Justices went further and encouraged the Agencies to clarify the regulatory definition of that term.

2. Colorado did not establish the required irreparable harm. Under the Supreme Court's decision in *Winter v. NRDC* and this Court's case law, a plaintiff moving for preliminary injunctive relief must establish that it is likely to suffer irreparable injury *before* the district court can resolve the merits. That irreparable injury must be both "certain and great." Colorado has failed to make this showing for three reasons. First, Colorado did not actually make the harm-related argument that the district court credited (i.e., increased enforcement burden), and courts are not supposed to substitute themselves for the litigants. *See, e.g., United States v. Sineneng-*

Smith, 140 S. Ct. 1575, 1579 (2020) (unanimously reminding that courts "normally decide only questions presented by the parties" (internal quotation marks omitted)). Second, Colorado did not even attempt to show that it will suffer an increased enforcement burden *before* the district court can rule on the merits. Third, any harm to Colorado is not "certain and great." At most, one could speculate that Colorado will have to choose whether to bring one or two additional enforcement actions. This sort of guesstimating cannot stand in for actual harm; thus, the harm is not certain. And even if the forecasting was certain enough, it does not predict the required great harm to warrant preliminary injunction — especially not an extraordinary mandatory injunction directed by the court to redress the speculative harm upon which it relied.

3. The balance of equities and the public interest weigh against a preliminary injunction. The district court cited only the status quo in its analysis, without any further weighing of the public interest. Allowing the NWPR to go into effect would benefit both the public and Colorado. The rule draws a clear line between waters and wetlands that are "waters of the United States" and those that are left to Colorado to regulate. It would restore a uniform nationwide rule — and so place Colorado and its citizens on a level playing field with the balance of the country and reinstate their ability to serve as a laboratory of democracy, as famously explained by Justice Brandeis in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). These public interests clearly outweigh the modest (at most)

and amorphous harm (if any) to Colorado discussed above, and the NWPR would provide Colorado with *more* authority to regulate waters within its borders.

The preliminary injunction should be vacated.

STANDARD OF REVIEW

Injunctive relief is "an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction, a plaintiff must establish four factors: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20. The irreparable harm must be "likely to occur before the district court rules on the merits," *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009), and a preliminary injunction may not issue based on the mere possibility of irreparable harm, *Winter*, 555 U.S. at 22. When the government opposes the injunction, as here, the "balance of harms" and "public interest" prongs merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The preliminary injunction standard also governs requests for a stay pursuant to 5 U.S.C. § 705. *See, e.g.*, *Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980); *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016); Appendix 95.

Furthermore, "a movant must satisfy an even heavier burden" when seeking "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it

could recover at conclusion of a full trial on the merits." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc). Thus, "any preliminary injunction fitting within one of the disfavored categories must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal case." *Id.*

This Court reviews a preliminary injunction order for abuse of discretion, which occurs whenever the district court commits an error of law or makes clearly erroneous factual findings. *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). The district court's legal conclusions are reviewed de novo. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

ARGUMENT

I. The district court erred in concluding that Colorado established a likelihood of success on the merits because the court's conclusion was based on a misinterpretation of *Rapanos*.

The district court erred in its analysis of Colorado's likelihood of success on the merits, wrongly concluding that *Rapanos* created a straitjacket from which the Agencies could not escape. As explained below, *Rapanos* does no such thing. The phrase "waters of the United States" is a textbook example of a statutory term that is suffused with ambiguity and that Congress has left to the Agencies to resolve using their rulemaking authority. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court rejected the exact

reasoning that the district court applied here. The Supreme Court explained that its interpretation of a statute does not bind agencies *unless and until* the Court concludes that the statutory language is unambiguous. *Id.* at 982.

The framework that the district court should have applied is set forth in *Chevron* and *Brand X*. Courts review agency interpretations of statutory language under the two steps of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). At Step One, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue," a court proceeds to Step Two to determine "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

When the Supreme Court directly interprets *ambiguous* statutory language, then the Court's interpretation does not preclude an agency from promulgating an alternative interpretation. That is to say, a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the *unambiguous* terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982 (emphasis added). *Chevron* "established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and

desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Id*. (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)). Absent a court's holding that statutory language has a single unambiguous meaning, "a court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation." *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009); *see also, e.g.*, *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008) (holding that a "prior judicial construction of a statute trumps [a subsequent] agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

Application of *Brand X* should have led to a straightforward rejection of Colorado's *Rapanos*-as-straitjacket argument. As an initial matter, it is undisputed that the phrase "waters of the United States" is ambiguous. It plainly leaves ample room for the Agencies to define what constitutes such waters, so long as they do not exceed their statutory authority. Even before *Rapanos*, the Supreme Court had held that the phrase "waters of the United States" was ambiguous. That is, in *Riverside Bayview*, the Supreme Court observed the "inherent difficulties of defining precise bounds to regulable waters" as one reason to defer to the Corps' judgment regarding the relationship between waters and adjacent wetlands. 474 U.S. at 134; *see also*

SWANCC, 531 U.S. at 170-71. This Court has reached the same conclusion: the "statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps." *United States v. Hubenka*, 438 F.3d 1026, 1031 (10th Cir. 2006) (quoting *United States v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003)). Colorado did not argue to the contrary in the district court. *See* ECF No. 55, at 4-6 (June 11, 2020) (instead arguing that the Agencies' interpretation fails at *Chevron* Step Two). Nor did the district court conclude that "waters of the United States" is unambiguous. Appendix 118.

Rapanos further confirmed the ambiguity of the phrase. The plurality opinion observed that "there was an inherent ambiguity in drawing the boundaries of any 'waters' " in its discussion of *Riverside Bayview*, 547 U.S. at 740, and it explained that "[w]aters of the United States is in *some* respects ambiguous," *id*. at 752; *see also id.* at 747-49. Justice Kennedy noted the deference due the Executive Branch in defining "waters of the United States" and criticized the plurality for interpreting the statutory text too definitively. *Id*. at 748. The dissent likewise pointed out the "ambiguity inherent in the phrase 'waters of the United States.' " *Id*. at 796.

In concluding that *Rapanos* foreclosed the Agencies' interpretation of the Act in the NWPR, the district court overlooked that the various *Rapanos* opinions address how broadly the Agencies *may* regulate, not how broadly they *must* regulate. That is, *Rapanos* established limits on how far the Agencies may go in defining

"waters of the United States." The plurality opinion, for example, stressed that there must be a limit on the statutory limit of the reach of "waters of the United States." *Id*. at 731-39. But the Court did not establish that the Agencies *must* regulate up to the statutory or constitutional limit or any other particular definition of "waters of the United States." *See id*. at 758 (Roberts, C.J., concurring) (noting the "generous leeway [afforded] by the courts" for the Agencies to "develop[] some notion of an outer bound to the reach of their authority"). Justice Kennedy in particular invoked administrative law principles of deference to agency expertise to support his conclusion that the Agencies *may* permissibly construe the Clean Water Act to encompass some waters that the plurality's approach would have excluded. *See, e.g., id.* at 778 (criticizing the plurality for granting "insufficient deference to . . . the authority of the Executive to implement th[e] statutory mandate"). And he welcomed "more specific regulations" by the Agencies. *Id*. at 782.

Rather than foreclosing the Agencies from interpreting the phrase "waters of the United States," Justices representing the entire spectrum of opinions in *Rapanos* encouraged the Agencies to promulgate a rule doing exactly that. *See id.* at 811 (Breyer, J., dissenting) (The Agencies "may write regulations defining the term — something that [they have] not yet done."); *id*. at 758 (Roberts, C.J., concurring) (remarking "how readily the situation could have been avoided" had the Agencies exercised their "delegated rulemaking authority" under the Clean Water Act); *id*. at

782 (Kennedy, J., concurring) (prescribing a jurisdictional test to be applied "[a]bsent more specific regulations" promulgated by the Agencies); *see also U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (describing the reach of the Clean Water Act as "notoriously unclear").

The district court's interpretation of *Rapanos* is also inconsistent with how every court of appeals interpreted and applied *Rapanos* before the Agencies redefined "waters of the United States." In all of these cases, the courts chose one of two options: they held that "waters of the United States" consisted of waters under the approaches of either the plurality opinion or Justice Kennedy's opinion, or they held that only waters meeting Justice Kennedy's test were jurisdictional.[5] None held that *Rapanos* prevents the Agencies from applying *any* of the approaches set forth in the *Rapanos* opinions, as the district court concluded here. Appendix 118 n.11.

The district court also misconstrued the NWPR. The rule does not adopt wholesale the *Rapanos* plurality's opinion. Even assuming that Justice Kennedy's opinion and the dissent's opinion together prohibit the Agencies from adopting the

---

[5] The First, Third, and Eighth Circuits held that the Agencies may establish jurisdiction under either the plurality or Justice Kennedy's approach. *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). The Seventh, Ninth, and Eleventh Circuits applied Justice Kennedy's approach. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1221-22 (11th Cir. 2007).

plurality's reasoning, Appendix 116-18 — which they do not — that is not what the Agencies did here. While the NWPR is informed by the *Rapanos* plurality opinion, it also draws from Justice Kennedy's opinion and from the commonalities between the two. *See, e.g.*, 85 Fed. Reg. at 22,268.[6] And identifying the specific connection(s) to traditional navigable waters that support Clean Water Act jurisdiction requires the Agencies to exercise scientific and policy judgment delegated to them by Congress, not merely to parse Supreme Court opinions. The Agencies exercised this delegated, expert discretion in formulating the NWPR. It reflects the Agencies' assessment of the proper balance between federal and state regulatory authority and their reasonable policy goal to develop bright-line criteria that would reduce the indeterminacy that had characterized prior definitions of "waters of the United States." *Id*. at 22,262. Those expert judgments warrant deference under the fundamental precepts of administrative law set forth in *Chevron* and *Brand X*. *See supra* pp. 27-28.

The only other district court to address the NWPR squarely rejected the analysis of the district court here when it denied a request by seventeen States for a

[6] For example, the NWPR addresses the *Rapanos* dissent's primary criticism of the plurality opinion. The dissent explained that the plurality "define[d] 'adjacent to' as meaning 'with a continuous surface connection to' other water," though "a dictionary" requires only that waters "lie close to each other, but not necessarily in actual contact." 547 U.S. at 805. The NWPR extends Clean Water Act jurisdiction to certain wetlands that have a close hydrologic connection but that are not continuously abutting navigable waters and their tributaries, including wetlands separated from jurisdictional waters only by natural dunes or berms. 85 Fed. Reg. at 22,307.

nationwide preliminary injunction against the rule. *California v. Wheeler*, 2020 WL 3403072, at *5-6. That court correctly recognized that it was "suspect to attempt to cobble together a holding from the concurrence and the dissent" in *Rapanos*, as a basis for concluding that "the Agencies must construe the statute" in a particular way. *Id*. at *6. Even if the concurring and dissenting Justices together concluded that the "plurality's articulation of the maximum permissible reach of the statute is an improper construction, a holding that the Agencies *must* construe the statute more broadly is a bridge too far." *Id*. "[N]othing in either the *Rapanos* concurrence or the dissent — or in the two read together — can be characterized as a holding 'that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'" *Id*. (quoting *Brand X*, 545 U.S. at 982).

The district court here opined that *Wheeler* "appears unaware of *Vasquez v. Hillery*," 474 U.S. 254 (1986). Appendix 117 n.9. But like *Marks v. United States*, 430 U.S. 188 (1977), *Vasquez* addresses the process for determining which Supreme Court opinion is controlling when there are multiple non-majority opinions. That process is simply not necessary to ascertain that none of the *Rapanos* opinions concludes that the Agencies *must* define "waters of the United States" in a certain way or that they *must* regulate waters up to some theoretical outer bound of their authority. The *Rapanos* opinions simply do not address whether the CWA *unambiguously* prohibits the Agencies interpretation in the NWPR, as required by *Brand X*.

Finally, Colorado suggested in the district court that the generalized objective of 33 U.S.C. § 1251(a) to maintain the integrity of the Nation's waters, together with legislative history indicating "that Congress intended a broad interpretation," should somehow override the *Chevron* delegation to the Agencies to interpret "waters of the United States." ECF No. 24, at 12 (June 1, 2020). It does not. Indeed, the Agencies have interpreted the statute broadly by, for example, extending navigable "waters" to wetlands (which *Riverside Bayview* held permissible). Moreover, the Supreme Court has rejected using statutory "objectives" to override specific statutory text in implementing provisions. Courts must "give the statute the effect its language suggests, however modest that may be," *not* "extend it to admirable purposes it might be used to achieve." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). After all, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam).

Moreover, the Agencies appropriately considered the Clean Water Act's other express policy directives, including recognizing and protecting the States' important role in implementing the Act and other rights. *See County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020); 33 U.S.C. § 1251(b) (policy "to recognize, preserve, and protect the primary responsibilities and rights of States"). Indeed, Colorado has never claimed that any language of the CWA unambiguously precludes the Agencies' interpretation of "waters of the United States" in the NWPR.

In sum, because "waters of the United States" is ambiguous, the Supreme Court's opinions interpreting the phrase do not preclude the Agencies from promulgating their own definition consistent with *Brand X*. On this fundamental error of law alone — which was its *only* basis for likelihood of success on the merits — the district court should be reversed and its injunction vacated.

II. Colorado did not establish the "certain and great" irreparable harm necessary to justify a mandatory injunction before judgment.

A plaintiff moving for preliminary injunctive relief must establish that it is likely to suffer irreparable injury if the requested injunction does not issue. *Winter*, 555 U.S. at 20. Irreparable injury "must be both certain and great." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). It is not enough that the injury be "merely serious or substantial." *Id*. Nor is it sufficient for the plaintiff to show that the challenged actions may *one day* result in harm that meets these exacting requirements.

Instead, the plaintiff must show that it will likely suffer irreparable injury *before* the district court can render *final judgment*. *RoDa*, 552 F.3d at 1210; *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003). A mere "possibility" of irreparable injury during that timeframe will not do; the Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22; *accord New Mexico Department of Game & Fish v. U.S.*

Department of Interior, 854 F.3d 1236, 1253 (10th Cir. 2017). And "historically disfavored" relief like "mandatory preliminary injunctions . . . must be closely scrutinized to assure that the exigencies of the case support granting a remedy that is extraordinary even in the normal course." *O Centro Espirita*, 389 F.3d at 975.

The district court erred in concluding that a small potential increase in Colorado's enforcement burden established the required imminent and actual harm to impose its mandatory injunction. As described above (pp. 19-20), the court rejected most of the State's harm arguments. But the court concluded that the State had done enough to show that it would be forced to shoulder an additional enforcement burden because of the NWPR. It then mandated that the Agencies continue such enforcement. The court erred because Colorado did not assert such harm, and the record does not establish either that the unasserted harm is sufficiently likely or sufficiently serious to support the extraordinary remedy of a preliminary injunction, let alone mandate that the Agencies continue their own enforcement efforts. And Colorado cannot show *any* environmental harm here because the State's more stringent no-discharge standard will protect any waters that were previously (but are no longer) "waters of the United States."

A. Colorado did not make the harm argument that the district court credited.

As the district court forthrightly conceded, it cobbled together for Colorado the sole harm that the court credited. Appendix 107-08 n.6. Colorado's motion

barely mentioned the enforcement burden. *Id*. One of its declarations mentions enforcement only briefly, after discussing the distinct "permitting gap" argument in depth. Appendix 84-85, 87. The district court, however, correctly rejected that latter theory of harm. Appendix 100. Citing *Stender v. Archstone-Smith Operating Trust*, 958 F.3d 938, 948 (10th Cir. 2020), the court concluded that Colorado "barely" preserved the enforcement issue. Appendix 108 n.6. But *Stender* addressed shifting legal standards and excused a party's failure to mention particular case law, not its failure to clearly assert a particular theory of harm and satisfy its evidentiary burden. Here, in contrast, Colorado has the evidentiary burden of establishing that "certain and great" irreparable injury *will* occur before final judgment. Particularly because remedying the supposed enforcement harm caused the court to enter a *mandatory* injunction that the "Agencies . . . *continue administering*" its existing programs in Colorado, Appendix 120 (emphasis added), Colorado's passing references to an increased enforcement docket are insufficient as a matter of law. The preliminary injunction should be vacated on this ground alone.

The district court's action to enjoin a duly promulgated regulation based on a theory of harm that the plaintiff did not even proffer is reminiscent of action recently and unanimously condemned by the Supreme Court in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). "Instead of adjudicating the case presented by the parties," the lower court reframed the issues, including to address "a question [that

the defendant] herself never raised earlier." *Id.* at 1578. The Supreme Court held that the lower court "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Id.* The district court here similarly abused its discretion in departing from the "principle of party presentation," namely, the rule that courts "normally decide only questions presented by the parties." *Id.* at 1579. This departure likewise warrants vacating the preliminary injunction.

B. Nothing indicates that any enforcement harm will occur *before* the district court can rule on the merits.

Even if Colorado had asserted the harm on which the district court relied, it is not sufficient to support a finding of irreparable harm of the sort necessary to justify a preliminary injunction. The court overlooked the requirement that the identified harm must occur *before* a potential ruling on the merits. The court did not even address a timeline for such a ruling. Thus, it failed to establish any deadline for the harm that Colorado is required to show. That alone was a fatal error.[7]

Looking beyond the district court's order, nothing in the record demonstrates that any material harm will happen before a merits ruling. The only fact on which the court relied is that EPA has *historically* completed 3-to-5 enforcement actions per year in Colorado. Appendix 109. The court then *presumed* — with no specific basis in the evidence before it about those past enforcement actions — that "at least

[7] The Agencies are ready to file the index to the administrative record (having filed it already in the Northern District of California and the District of South Carolina).

some" of these enforcement actions would relate to waters that are covered under the pre-NWPR regime, but not under the NWPR. Appendix 108-09. Nothing supported such a presumption. Specifically, no evidence before the district court reflects that federal enforcement actions are commonly brought regarding discharges that occur in waters that had been covered by the prior rule but are not covered by the NWPR — i.e., against discharges that occur solely in what the court called disputed waters and that never impact downstream waters. Nor is there evidence that any such discharges would be so significant that the federal government would commit its enforcement resources to pursuing such violations before this case can be resolved on the merits. Colorado's declaration states only vaguely that it "will need to assume some of this [enforcement] burden *in the future*." Appendix 85 (emphasis added). Such lack of specificity on the timing an alleged injury would occur bars a preliminary injunction. *See Greater Yellowstone Coalition*, 321 F.3d at 1260 (noting that if movants had only alleged irreparable harm from activities taking place *after* litigation, "this would be insufficient to justify a preliminary injunction in advance of the trial court's decision on the merits"). This flaw is also fatal to the injunction.

C. Any harm to Colorado is not "certain and great."

The district court referred to potential enforcement actions relating to waters that are covered under the pre-NWPR regime, but not under the NWPR, as occurring in "disputed waters." Even assuming there would have been federal enforcement

actions in disputed waters while the district court considers the merits, the harm hypothesized here is not "certain and great," as it must be to support a preliminary injunction. *Prairie Band*, 253 F.3d at 1250. The court observed that EPA has historically undertaken 3-to-5 Clean Water Act enforcement actions per year relating to impermissible dredging or filling in Colorado. The court then merely assumed that "[a]t least some" of the enforcement actions occurred in disputed waters. Appendix 109. Let us assume — because there is nothing more in Colorado's declarations about these actions, and so speculating is the only option — that half of those actions concern disputed waters. Rounding up, that is 2-to-3 enforcement actions per year, or potentially 1.5 actions before the district court could resolve the merits by the end of the year. Certainly, 1.5 hypothetical enforcement actions that Colorado may choose to take in the absence of federal action is not a "great" burden. And as underscored by these assumptions (in which we indulge for the sake of argument), it is not a "certain" burden either.[8]

Even if Colorado had presented evidence about when and where those enforcement actions would take place, Colorado still could not establish that certain-and-great harm would occur. The State has no entitlement to federal enforcement.

---

[8] In the Economic Analysis, the Agencies reviewed the effect of the NWPR on Section 404 permits issued in three case-study watersheds, analyzing 3,388 permits issued from 2011 to 2015. Combining those three watersheds, the Agencies found that 195 — approximately just six percent — would potentially be affected by the NWPR. Economic Analysis at 114-15, 141, 159.

The Supreme Court has held that the federal government's exercise of discretion to bring an enforcement action involves a "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). An "agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id*. Colorado may not base its claim of irreparable harm on discretionary federal action that the federal government may withdraw for nearly any reason. Yet the district court entered a "historically disfavored" "mandatory preliminary injunction" requiring such enforcement continue. Appendix 120.

Nor does Colorado's potential independent decision to bring or not bring an enforcement action constitute irreparable harm caused by the NWPR. Any such harm would be self-inflicted, caused by Colorado's own exercise of its enforcement discretion, not by the NWPR. The Supreme Court reached an analogous conclusion in *Pennsylvania v. New Jersey*. There, the Court held that another State's taxation law did not cause the required harm to the plaintiff States because they could readily fix the problem themselves. 426 U.S. at 664. The injury was "self-inflicted, resulting from decisions by their legislatures," and "[n]o State can be heard to complain about damage inflicted by its own hand." *Id*. Colorado's harm here is self-inflicted, resulting from the State's legislative and executive decisions on how to structure its state dredge-and-fill program and how to exercise its enforcement authority.

In effect, Colorado is seeking a free ride on the federal government's enforcement decisions; that is, the State wants the Agencies to continue enforcing the Clean Water Act in the State without any reduction in reach. But because Colorado has no legal right to that relief, any reduction in federal enforcement cannot cause legal injury to the State. It is completely Colorado's choice whether to continue the status quo or to choose another enforcement path with respect to waters that the NWPR returns to Colorado's exclusive control. Indeed, because Colorado has not acted to create a permitting regime for state waters, *see supra* pp. 16-17, the State has functionally already adopted a regime that is more protective of state waters than before the NWPR, when Colorado was content to rest on federal enforcement.

While the Clean Water Act leaves States free to enforce requirements that are more protective than those imposed by the Act — including by regulating or banning discharges of pollutants into waterbodies that fall outside the "waters of the United States" — the Act does not require the States to undertake particular enforcement activities. Nor does it create legally cognizable harm to Colorado for the United States to change its policy. The sort of harm to Colorado that the district court posited would result from the State's independent choices regarding the best allocation of its resources. Indeed, not only does Colorado not even estimate the costs that it might incur in having to undertake an enforcement action pending resolution of the merits, but it also fails to establish that it could not readily reprogram unused

funds from other sources or implement other cost-efficiency measures that inure to its overall benefit rather than to its detriment.

The district court recognized as much in rejecting Colorado's argument for irreparable harm stemming from an alleged "permitting gap" based on the Corps' no longer administering the Section 404 program and issuing dredge-and-fill permits. The court reasoned that "Colorado's inability to authorize these projects is the result of nothing other than Colorado's choice in the matter." Appendix 101. This same reasoning applies to the enforcement harm: any enforcement decision by the State would be the result of "Colorado's choice in the matter." After *Rapanos*, Colorado's state waters exceeded the reach of "waters of the United States." Yet Colorado never presented evidence that it took up enforcement actions post-*Rapanos*.[9]

---

[9] In addition, any permitting gap is not a new development caused by the NWPR. Colorado has always defined state waters to encompass more than "waters of the United States." Appendix 80 ("Colorado defines its 'state waters' far more broadly than 'waters of the United States.' "); Appendix 41. Thus, the "gap" is not a new issue. And Colorado has never created a state permitting program for dredge-and-fill of those state waters, even though Colorado's statute directs the State to do so. Appendix 69, 81. Moreover, the result of the permitting gap is *more* protection for Colorado's waters that were previously "waters of the United States" because state law flatly prohibits dredging and filling in state waters absent a permit. Even if it is theoretically possible that there are projects that involved filling state wetlands that would actually improve environmental conditions, Colorado has not identified any such project that will be blocked because of the permitting gap before the district court can rule on the merits. Instead, Colorado just asserts the conclusion — that the permitting gap will bar unidentified projects on an unspecified timeframe. *See* Appendix 84 ("The permitting gap threatens to hold back economic recovery efforts by delaying or cancelling key infrastructure and construction projects based on regulatory uncertainty and the State's lack of authority to issue necessary permits.").

* * *

In sum, Colorado has failed to demonstrate that "certain and great" irreparable harm will occur before the district court can rule on the merits.

III. The balance of equities and the public interest weigh against a preliminary injunction.

The "balance of harms" and "public interest" prongs merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). They weigh against an injunction here.

The district court cited only the "status quo" in its analysis of the balance of equities and the public interest. Appendix 118-19. But concluding with no analysis that the status quo is in the public interest was error, because allowing the NWPR to go into effect would benefit both the public and Colorado itself.

First, the NWPR draws a clear line between waters and wetlands that are "waters of the United States" and those that are left solely to Colorado to regulate. The line is markedly clearer than the *Rapanos*-based approach that the NWPR replaced, which depended on less precise standards rather than the NWPR's clearer rules. The Agency's analysis confirms those benefits. Specifically, the Agencies' Economic Analysis estimates the monetary benefits to the public of implementing the NWPR. *See* Economic Analysis at 171-82. The clarity and consistency of the NWPR's regulatory regime will lead to fewer transaction costs, fewer consultants, and reduced federal permitting, thereby providing a significant public benefit with

comparable environmental protection together with the protective state regulatory regimes. *E.g.*, 85 Fed. Reg. at 22,270 (explaining why "the final rule will be clearer than either the 2015 Rule or the pre-existing regulatory regime restored by the 2019 Rule"); *id*. at 22,273 ("This final rule establishes categorical bright lines to improve clarity and predictability for regulators and the regulated community."); Economic Analysis at xi-xxiii, 1-2. Even when making the most cautious assumptions in the economic forecast, the improved clarity and consistency of the NWPR and its reduced federal permitting and transaction costs outweigh any quantified foregone benefits. Economic Analysis at xviii.

Colorado's requested alternative — applying the 30-year old regulations that the 2019 Repeal Rule re-established — is not in the public interest. Even Justice Kennedy, after *Rapanos* and in a case in which the Corps had applied his significant nexus approach, described the reach of the Clean Water Act as "notoriously unclear." *Hawkes Co.*, 136 S. Ct. at 1816 (concurring opinion). The Agencies have reasonably drawn lines establishing Clean Water Act jurisdiction and have explained thoroughly why they were drawing those lines. *See supra* pp. 11-15.

Second, the district court's preliminary injunction has resulted in a federal regulatory definition in Colorado different from that in the rest of the country. Just as it did before the Repeal Rule went into effect, this patchwork will create uncertainty and confusion, hampering the Agencies' ability to efficiently perform regulatory

functions. This is also problematic for regulated persons operating in multiple States, thereby frustrating a key objective of federal regulation. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Engineers*, 990 F. Supp. 2d 9, 43 (D.D.C. 2013) (finding that "the public has an interest in regulatory efficiency" that comes with a uniform Clean Water Act permitting system, which could be undermined by a preliminary injunction); *cf. East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1281-82 (9th Cir. 2020) (recognizing the "compelling interest in ensuring that injunctions . . . do not undermine separation of powers" and the Executive's ability to administer its laws).

These documented public interests and benefits outweigh the at-most modest amorphous harm to Colorado discussed above. Moreover, Colorado's harm is based on a diminished view of its own sovereignty and regulatory authority. Under the NWPR, there are fewer waters in Colorado that are jointly regulated by the federal government. This leaves to the State the authority to regulate *more* waters as it sees fit. In these state waters, Colorado may now choose whether, for example, to ban all fill in wetlands around its headwaters (as it suggests it might prefer, Appendix 39-41). Or Colorado may, on its own, elect to fast track reservoir or other public-safety projects in those same wetlands (as it also suggests it might prefer, Appendix 42-43). For its expanded state waters, Colorado may now make locally responsive choices, rather than having the Agencies impose a one-size-fits-all federal solution. Returning control to Colorado is in the public interest and Colorado's interest, too.

In effect, Colorado seeks to abandon the Clean Water Act's express endorsement of federalism in 33 U.S.C. § 1251(b) and require the Agencies to regulate more of Colorado's waters. But just as antitrust law is for "the protection of competition, not competitors," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), the Clean Water Act does not shield Colorado from the responsibility (or from the concomitant opportunities and benefits) of weighing both environmental protection and development objectives — and then standing accountable to its citizens for the choices made by its officials. The Act directly envisions state control of certain waters, and that should result in the sharing of responsibility demanded by cooperative federalism. The NWPR does not disadvantage Colorado; it just permissibly restrikes the Clean Water Act's balance between the federal government and the States — a revised balance that many States are welcoming. *See California v. Wheeler*, 2020 WL 3403072, at *3 (noting that 23 States have intervened in the Northern District of California to defend the NWPR). Colorado is not entitled to elevate its preferences over other States with an equal stake in how the federalism balance is struck under the Clean Water Act by the assigned Agencies. *See generally* Michael S. Greve, *The Upside-Down Constitution* (2012) (presenting the theory of competitive federalism).

CONCLUSION

For the foregoing reasons, the Court should vacate the preliminary injunction.

Respectfully submitted,

s/ Eric Grant

Of Counsel:

MATTHEW Z. LEOPOLD
General Counsel
DAVID FOTOUHI
Principal Deputy General Counsel
U.S. Environmental Protection Agency

CRAIG SCHMAUDER
Deputy General Counsel
Department of the Army

DAVID R. COOPER
Chief Counsel
U.S. Army Corps of Engineers

JEFFREY BOSSERT CLARK
Assistant Attorney General
JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
BRIAN C. TOTH
ROBERT J. LUNDMAN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-0943
eric.grant@usdoj.gov

July 9, 2020
90-5-1-4-21720

STATEMENT REGARDING ORAL ARGUMENT

The Agencies believe that oral argument would be useful to the Court because the district court erred in preliminarily enjoining an important rule in Colorado, and argument would provide the Court with an opportunity to ask the parties questions about the ruling.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 11,855 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ Eric Grant
ERIC GRANT

Counsel for Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Antivirus Version 1.319.1124.0 (updated July 9, 2020), and according to the program are free of viruses.

s/ Eric Grant
ERIC GRANT

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2020, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of the filing to the following:

Jennifer H. Hunt
jennifer.hunt@coag.gov

Carrie Elizabeth Noteboom
carrie.noteboom@coag.gov

Eric R. Olson
eric.olson@coag.gov

Annette M. Quill
annette.quill@coag.gov

s/ Eric Grant
ERIC GRANT

Counsel for Appellants

FEDERAL RULE OF APPELLATE PROCEDURE 28(f)
ADDENDUM OF SELECTED STATUTES AND REGULATIONS

Clean Water Act

33 U.S.C. § 1251.....1a

33 U.S.C. § 1311.....2a

33 U.S.C. § 1362.....3a

Navigable Waters Protection Rule

33 C.F.R. § 328.3.....4a

Clean Water Act
33 U.S.C. § 1251

§1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . .

. . . .

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

. . . .

Clean Water Act
33 U.S.C. § 1311

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

. . . .

Clean Water Act
33 U.S.C. § 1362

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

. . . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

. . . .

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . . .

Navigable Waters Protection Rule
33 C.F.R. § 328.3

§ 328.3 Definitions

(a) *Jurisdictional waters*. For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;

(2) Tributaries;

(3) Lakes and ponds, and impoundments of jurisdictional waters; and

(4) Adjacent wetlands.

(b) *Non-jurisdictional waters*. The following are not "waters of the United States":

(1) Waters or water features that are not identified in paragraph (a)(1), (2), (3), or (4) of this section;

(2) Groundwater, including groundwater drained through subsurface drainage systems;

(3) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;

(4) Diffuse stormwater run-off and directional sheet flow over upland;

(5) Ditches that are not waters identified in paragraph (a)(1) or (2) of this section, and those portions of ditches constructed in waters identified in paragraph (a)(4) of this section that do not satisfy the conditions of paragraph (c)(1) of this section;

(6) Prior converted cropland;

(7) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;

(8) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in nonjurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6) of this section;

(9) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in nonjurisdictional waters for the purpose of obtaining fill, sand, or gravel;

(10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;

(11) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and

(12) Waste treatment systems.

(c) *Definitions*. In this section, the following definitions apply:

(1) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that:

(i) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (3) of this section;

(ii) Are inundated by flooding from a water identified in paragraph (a)(1), (2), or (3) of this section in a typical year;

(iii) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by a natural berm, bank, dune, or similar natural feature; or

(iv) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in paragraph (a)(1), (2), or (3) of this section in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

(2) *Ditch*. The term *ditch* means a constructed or excavated channel used to convey water.

(3) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(4) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(5) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(6) *Lakes and ponds, and impoundments of jurisdictional waters*. The term *lakes and ponds, and impoundments of jurisdictional waters* means standing bodies of open water that contribute surface water flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or through one or more waters identified in paragraph (a)(2), (3), or (4) of this section. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized nonjurisdictional surface water feature, through a culvert,

dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake or pond, or impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a water identified in paragraph (a)(1), (2), or (3) of this section in a typical year.

(7) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(8) *Perennial*. The term *perennial* means surface water flowing continuously year-round.

(9) *Prior converted cropland*. The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(10) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions).

(11) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(12) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or through one or more waters identified in paragraph (a)(2), (3), or (4) of this section. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized nonjurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term tributary includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

(13) *Typical year*. The term *typical year* means when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.

(14) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(16) of this section, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

(15) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(16) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

ATTACHMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 20-cv-1461-WJM-NRN

THE STATE OF COLORADO,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY;
ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency;
U.S. ARMY CORPS OF ENGINEERS; and
R.D. JAMES, in his official capacity as Assistant Secretary of the Army for Civil Works,

Defendants.

ORDER GRANTING AS-CONSTRUED MOTION FOR STAY OF AGENCY ACTION

Plaintiff State of Colorado ("Colorado") sues the U.S. Environmental Protection Agency ("EPA") and its administrator, along with the U.S. Army Corps of Engineers ("Corps of Engineers") and its administrator, to invalidate a new regulation regarding the scope of federal jurisdiction under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*. The Court will refer to Defendants collectively as "the Agencies."

Currently before the Court is Colorado's Amended Motion for Preliminary Injunction. (ECF No. 24.) The Court construes this as a motion seeking a stay of agency action under 5 U.S.C. § 705. For the reasons explained below, the Court finds that Colorado advances an unusual and partly self-contradictory theory of harm, but Colorado has nonetheless satisfied the elements required to obtain preliminary relief. The Court will therefore enjoin the Agencies from implementing their new regulation in

Colorado.[1]

I. LEGAL STANDARD

Colorado explicitly moves for a preliminary injunction under Federal Rule of Civil Procedure 65. (*See* ECF No. 24 at 2.)[2] Because this case seeks review of agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq*., the proper authority for preliminary relief is 5 U.S.C. § 705:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

But the distinction between Rule 65 and § 705 is mostly technical because a § 705 stay is a provisional remedy in the nature of a preliminary injunction, *see Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980), and its availability turns on the same four factors considered under a traditional Rule 65 analysis, *see, e.g.*, *Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 524 F. Supp. 2d 5, 8 (D.D.C. 2007).[3]

---

[1] Through the Agencies' notice of supplemental authority filed a little over an hour ago (ECF No. 60), the Court has been made aware of a decision earlier today from the United States District Court for the Northern District of California denying a preliminary injunction against the new regulation at issue here. *See State of California et al. v. Wheeler*, No. 20-cv-3005 (N.D. Cal.), ECF No. 171 (filed June 19, 2020) (on this docket as ECF No. 60-1) (hereinafter, "*State of California*"). The Court explains its disagreements with *State of California* below.

[2] All citations to ECF page numbers are to the page number in the CM/ECF header, which does not always match the document's internal pagination due to unnumbered caption pages and separately numbered prefatory material (such as tables of contents).

[3] The major practical difference, it appears, between a Rule 65 proceeding and a § 705 proceeding is that Rule 65(c) requires a court granting an injunction to consider a bond amount, whereas § 705 contains no such requirement.

The Supreme Court has described the four preliminary injunction factors as follows: "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

II. STATUTORY BACKGROUND & PROCEDURAL HISTORY

Absent a permit, the CWA prohibits "discharge of any pollutant," 33 U.S.C. § 1311, into "navigable waters," *id*. § 1362(12). "Navigable waters" means "the waters of the United States." *Id*. § 1362(7). The CWA does not further define "waters of the United States," so the Agencies have defined it by regulation. *See* 33 C.F.R. § 328.3. The current definition reaches more than literally "navigable" waters, but the precise details are unimportant for present purposes. What matters is that, on June 22, 2020, the Agencies will put into effect a new rule that narrows the current definition of that term. *See* 85 Fed. Reg. 22250 (Apr. 21, 2020). In other words, the new rule puts some waters outside the reach of the CWA that the Agencies previously considered to be within the reach of the CWA. The Court will refer to the rule in effect today as the "Current Rule," the rule to take effect this coming Monday as the "New Rule," and the waters that are encompassed by the Current Rule but not by the New Rule as "Disputed Waters."

Of particular importance in this regard is the "Section 404 permit" process, which refers to the Corps of Engineers' authority under CWA § 404 (33 U.S.C. § 1344) to "issue permits . . . for the discharge of dredged or fill material into the navigable waters." *Id*. § 1344(a). Thus, for instance, if a developer wants to fill in a marshy area so it may

build on it, and if that marshy area is deemed "navigable waters"—*i.e.*, "waters of the United States" as defined in 33 C.F.R. § 328.3—then the developer must first obtain a Section 404 permit from the Corps of Engineers. On the flipside, if the marshy area is not "waters of the United States" as defined in 33 C.F.R. § 328.3, then the developer does not need a Section 404 permit—meaning, from the perspective of federal law, the developer may fill in the marshy area with impunity. If the New Rule goes into effect, such a developer would no longer need a Section 404 permit to fill Disputed Waters.

But whether federal law requires a permit or not, a state may enforce its own standards that are stricter than Section 404. *See* 33 U.S.C. § 1344(t) ("Nothing in this section shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State . . . ."). Colorado asserts jurisdiction over "state waters," defined to mean (with exceptions not relevant here) "any and all surface and subsurface waters which are contained in or flow in or through this state." Colo. Rev. Stat. § 25-8-103(19). And "[n]o person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division [*i.e.*, the Water Quality Control Division of the Colorado Department of Public Health and Environment]." Colo. Rev. Stat. § 25-8-501(1).

The parties do not dispute that Colorado's definition of "state waters" embraces the Disputed Waters. Thus, anyone seeking to fill Disputed Waters will still need a permit from the state when the New Rule goes into effect. However, under Colorado law, "[n]o permit shall be issued which allows a discharge that by itself or in combination with other pollution will result in pollution of the receiving waters in excess of the

pollution permitted by an applicable water quality standard unless the permit contains effluent limitations and a schedule of compliance specifying treatment requirements." Colo. Rev. Stat. § 25-8-503(4). This presents a problem for Colorado: "Because discharges of large quantities of fill, by their nature, are likely to result in exceedances of state water quality standards and compromise the classified uses of these waters, the [state] could not allow almost any of them under a state discharge permit." (ECF No. 24 at 8.) In other words, there is no state water quality standard that contemplates dumping dirt and rock into water until it becomes dry land. Thus, filling state waters is flatly prohibited under Colorado law.

Since roughly January of this year, in anticipation of the New Rule, state administrators have been working with the Colorado Legislature to amend the relevant statute to provide state authority equivalent to Section 404. (ECF No. 56 ¶ 2.) These efforts, like many other things, were disrupted by the COVID-19 pandemic. (*Id*. ¶ 3.) The legislature adjourned on June 15, 2020, without passing legislation that would provide Section 404-like authority to state administrators.

The Court will provide additional background as it becomes relevant to the legal issues addressed below.

III. ANALYSIS

A. Irreparable Harm

Among the preliminary injunction factors, "a showing of probable irreparable harm is the single most important prerequisite." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (internal quotation marks omitted). "Without showing irreparable harm, [a party] cannot obtain a preliminary injunction." *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1143 (10th Cir.

2017). "[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (emphasis in original; internal quotation marks omitted). "Irreparable harm, as the name suggests, is harm that cannot be undone, such as by an award of compensatory damages or otherwise." *Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1105 (10th Cir. 2003). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Schrier v. University of Colorado*, 427 F.3d 1253, 1267 (10th Cir. 2005). Harm that is "merely serious or substantial" is not irreparable. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001).

In this case, the irreparable harm inquiry overlaps with whether Colorado asserts *any* cognizable harm flowing from the New Rule. If it does not, this Court does not have jurisdiction under Article III of the U.S. Constitution to adjudicate the dispute. In other words, every plaintiff in federal court must have "Article III standing," which entails the following:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted; certain alterations incorporated). "Article III standing is jurisdictional . . . ." *In re Peeples*, 880 F.3d 1207, 1212 (10th Cir. 2018).

Given the significance of irreparable harm in light of Article III standing, the Court

will address it before reaching the other preliminary injunction elements.

1. The "Permitting Gap" and Foregone Development

Colorado first asserts harm from what it calls the "permitting gap." (ECF No. 24 at 7.) The basic problem, Colorado says, is that Disputed Waters are still protected under state law (because they are "state waters") but Colorado's flat prohibition on filling state waters means that "project sponsors [*e.g.*, developers] will be left without any legal mechanism to authorize projects that require discharges of fill in these waters." (*Id*. at 8.)

It would seem that project sponsors were without such a legal mechanism—at least from the perspective of state law—even under the Current Rule, because Colorado simply prohibits fill. In other words, a developer discharging fill per a Section 404 permit would still appear to be violating state law, whether or not Colorado chose to enforce that law. However, Colorado's clean water statute further provides that "each permit issued pursuant to the federal act shall be deemed to be a temporary permit issued under this article which shall expire upon expiration of the federal permit." Colo. Rev. Stat. § 25-8-501(1). Thus, federal permits are essential to Colorado's ability to overcome its own ban on dredging and filling.

In light of the permitting gap, Colorado asserts that developers will not develop projects because Colorado cannot authorize their dredge and fill operations. From a preliminary injunction perspective, Colorado has provided no evidence of any such project, much less a project poised to start—in other words, one that needs a permit to fill Disputed Waters "before a decision on the merits [of this lawsuit] can be rendered,"

Winter, 555 U.S. at 22 (internal quotation marks omitted).[4] "Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. (emphasis added).

But the problem is deeper than simple failure to provide the evidence needed to support a preliminary injunction. Colorado's inability to authorize these projects is the result of nothing other than Colorado's choice in the matter. If such projects never get built, leading to economic harm, it is because the Colorado Legislature made the questionable decision to enact a clean water statute that provides no exception for filling. Colorado has thus categorically prioritized environmental preservation over economic gain—a prioritization in which the Agencies had no role in effecting. Projects not built under these circumstances would therefore be consistent with state policy, a policy wholly independent of the federal environmental policies codified in the CWA. The Court simply cannot see how adherence to state policy is an injury to the state, much less one caused by the New Rule. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("The injuries [complained of by the state-plaintiffs] were self-inflicted, resulting from decisions by their respective state legislatures. . . . No State can be heard to complain about damage inflicted by its own hand.").

Even if Colorado could assert the economic harm to developers as an injury to itself, Colorado may not sue the federal government to vindicate the federal rights (in this case, rights created by the APA and CWA) of its citizens (here, most notably,

[4] Obviously, if a developer plans to fill waters that remain "waters of the United States" under the New Rule, the developer can go to the Corps of Engineers for a Section 404 permit.

private developers). *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923); *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992). The Agencies point out as much in their response brief (*see* ECF No. 51 at 26), and Colorado's reply brief does not directly address the argument. It appears, rather, to address the argument indirectly by emphasizing "a project to improve safety on a state highway in Clear Creek County" (ECF No. 55 at 4)—in other words, something that Colorado itself (not any private developer) will forgo, and therefore outside the rule that a state may not assert its citizens' federal rights against the federal government.

The Clear Creek County project to which Colorado alludes is a plan to repair part of the famous—and famously rough—State Highway 5, which leads nearly to the summit of Mt. Evans. (*See* ECF No. 31 ¶¶ 20–28.) A 0.7-mile segment of the highway near Summit Lake is "heavily-damaged" due to frost heave. (*Id*. ¶¶ 21–22.) In part, this is because the road is surfaced with an impermeable material, which buckles when underlying groundwater freezes and thaws. (*Id*.) Colorado proposes to replace the road base with crushed rock, allowing the groundwater to freeze and thaw without displacing the road. (*Id*. ¶ 24.) According to Colorado, this will require some amount of filling in wetlands, including an approximately 1/3-acre that will become Disputed Waters under the New Rule, and therefore outside of the Section 404 permitting process. (*Id*. ¶ 26.) And, Colorado says, there is "[n]o alternative to reconstruction on the existing alignment," due to "steep conditions, land ownership, and lack of right-of-way . . . . Without a federal permitting mechanism to authorize discharge of fill into wetlands, the project could not move forward." (*Id*. ¶ 27.)

Assuming the truth of these assertions, and further assuming that inability to repair a routinely damaged but operational road segment is irreparable harm, Colorado's allegations are insufficient to show "imminent" irreparable harm. *See Heideman*, 348 F.3d at 1190. Colorado submits no evidence that it is prepared to begin reconstruction but for a permit, or that it will be prepared "before a decision on the merits [of this lawsuit] can be rendered." *Winter*, 555 U.S. at 22 (internal quotation marks omitted). To the contrary, Colorado says that "[a]n impact assessment has not been completed yet" on "the proposed project." (ECF No. 31 ¶ 25.) This strongly suggests that this particular highway repair project remains very much in the planning stages.[5]

But again, more fundamentally, the real problem is that Colorado has prohibited itself from filling "state waters," and it is apparently poised to enforce that prohibition against itself. That self-inflicted injury is manifestly not an injury caused by the New Rule.

2. Direct Environmental Harm

Colorado further claims that the New Rule will cause direct environmental harm because developers may begin filling Disputed Waters, in violation of state law. (ECF No. 24 at 9.) Notably, Colorado does not express any fear about rogue developers generally (at least not in its opening brief—but see below), probably because Colorado appreciates that a developer willing to take its chances without a state permit is

[5] It is also "generally known within [this] court's territorial jurisdiction," Fed. R. Evid. 201(b)(1), that State Highway 5 is open to the public usually only from Memorial Day to Labor Day, due to the highly inclement weather at such high elevation. Even if the construction-access season is longer than the public-access season, it cannot be much longer, and Colorado has submitted no evidence that it is prepared to begin construction before it must completely close the road for the winter season.

probably equally willing to take its chances without a Section 404 permit, whatever the scope of "waters of the United States." In other words, rogue developers operate unlawfully today under the Current Rule, and will continue to operate unlawfully under the New Rule, so the harm they cause cannot be attributed to or caused by the New Rule.

Colorado instead posits a very specific problem relating to developers "who previously sought federal permits." (ECF No. 24 at 9.) "[I]t is likely," Colorado says, "that some [of these] developers . . . may believe they are no longer subject to any regulatory oversight and will move forward with dredge and fill activities in [Disputed Waters] without taking the needed steps to protect downstream waters and mitigate any remaining environmental harm." (*Id*. at 9–10.)

Colorado certainly has an interest in protecting state waters, and that interest is cognizable for purposes of standing and irreparable harm when "the harm is sufficiently concrete." *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 697 n.13 (10th Cir. 2009) (summarizing *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007)). However, Colorado's alleged chain of causation between the New Rule and the damage to state waters is pure speculation. Colorado offers no evidence in support of its contention that it is "likely" that a previously-permitted developer (one who has so far sought to obey the law) would conclude that the narrowing of one law means there must be no more laws to comply with. This is nothing more than attorney argument.

Even as attorney argument, the theory runs into a doubly strong headwind because it relies on (1) the actions of third parties and (2) the prediction that someone will disobey the law. *See, e.g.*, *Chamber of Commerce v. EPA*, 642 F.3d 192, 200–01

(D.C. Cir. 2011) (if injury will be caused by a third party, claimant has "the burden of adducing facts showing that those third-party choices have been or will be made in such manner as to produce causation and permit redressability of injury" (internal quotation marks omitted; alterations incorporated)); *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 810 F.3d 827, 831 (D.C. Cir. 2016) ("We have rejected assertions of imminent injury where the prospective injury depends on future illegal activity, finding, for example, that a sheriff lacked standing to challenge President Obama's immigration policy partly because the plaintiff's theory depended on immigrants' committing crimes in the future. More generally, we are relatively hesitant to find standing when the asserted injury depends on the unfettered choices made by independent actors not before the courts." (internal quotation marks and citation omitted)); *cf*. *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1216 (10th Cir. 2015) (finding a challenge to prison regulations moot because, in part, "we decline to assume [the plaintiff] will repeat the misconduct that previously got him sent to administrative segregation").

A declaration from one of Colorado's water quality administrators asserts that the "EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations." (ECF No. 32 ¶ 15.) A declaration from a retired EPA employee describes an unpermitted fill that took place in Telluride "[i]n the late 1980s." (ECF No. 28 ¶ 21.) Colorado cites these declarations in its reply brief as "evidence that illegal fill activity occurs in the state." (ECF No. 55 at 4.) Indeed, it shows that illegal fill has happened *under the Current Rule*. Or, as the Court observed above, rogue developers will operate outside the law, whatever rule the Agencies adopt. The New Rule therefore does not cause illegal fill, nor has Colorado presented any evidence that

the New Rule will make illegal fill more likely. Nonetheless, this record of violation remains important below as part of a different standing theory.

3. Injury Through Costs of Creating and Running a Replacement Permitting Regime

Colorado claims that if the New Rule is not enjoined, it will eventually spend money to set up and administer its own 404-like permitting and enforcement regime, and the resources it expends in those efforts will ultimately be unrecoverable, even if it prevails in this lawsuit. (ECF No. 24 at 7, 9.) Colorado is correct that it cannot obtain damages from the Agencies, even if it eventually succeeds in invalidating the New Rule. *See* 5 U.S.C. § 702 (APA waives sovereign immunity only for actions "seeking relief other than money damages"). And courts have recognized that a plaintiff suffers irreparable harm if the defendant's action causes the plaintiff to spend, or deprives the plaintiff from earning, money that the plaintiff can never recover due to sovereign immunity, even if the plaintiff succeeds in proving the defendant's conduct unlawful. *See Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Cloud Peak Energy Inc. v. U.S. Dep't of Interior*, 415 F. Supp. 3d 1034, 1042–43 (D. Wyo. 2019).

One might argue that nothing about the New Rule forces Colorado to establish a state-law analogue to Section 404, so this alleged injury is not caused by the New Rule. The Court will pick up this argument again shortly in a context where it actually matters. In the current context, the problem for Colorado is more practical. Colorado admits that it will not spend any money to set up a Section 404-like permitting and enforcement regime until the Colorado Legislature amends Colorado's water quality statute to permit dredging and filling. (ECF No. 24 at 9 ("Colorado cannot simply start issuing dredge

and fill permits on June 22. Establishing its own permitting program for dredge and fill activities *will require legislative action* and a lengthy implementation process." (emphasis added)). And, as noted above (Part II), the Colorado Legislature adjourned for the year on June 15, 2020, without creating a Section 404 analogue. Colorado therefore will not be spending money anytime soon on a new permitting and enforcement regime.

4. Enforcement of the Current Statute

Colorado says that it "will need to and will take enforcement action against illegal fill activity in state waters"—meaning *all* fill activity in state waters—when the New Rule comes into effect. (ECF No. 32 ¶ 15.) Colorado admits that "nothing compels [it] to begin enforcing against non-permitted discharges after the [New] Rule goes into effect," but it asserts that it "cannot exercise its enforcement discretion in response to the sudden narrowing of the federal Section 404 permitting process without creating significant harm to Colorado's environment." (ECF No. 58 at 6.) Moreover, Colorado's water quality enforcers "do[] not currently have dedicated funding or staffing resources to undertake this enforcement effort, so [they] will need to pull enforcement resources currently dedicated to other clean water activities." (ECF No. 32 ¶ 15.) The question for present purposes is whether this is a cognizable Article III injury.[6]

[6] In fairness to the Agencies, none of the analysis that follows was squarely presented to the Court by Colorado. Colorado's diversion-of-resources argument comprises: (i) one ambiguous sentence in its opening brief (ECF No. 24 at 10 ("[The New Rule] imposes an immediate compliance and enforcement burden on Colorado, which does not currently have dedicated funding or staffing resources to undertake enforcement against illegal fill activities and instead has relied on EPA and Corps oversight.")); (ii) one sentence in a declaration supporting the opening brief (ECF No. 32 ¶ 15 ("The [Water Quality Control] Division does not currently have dedicated funding or staffing resources to undertake this enforcement effort, so will need to pull enforcement resources currently dedicated to other clean water activities.")); and (iii) one sentence in the reply brief (ECF No. 55 at 3 ("Enforcing against illegal fill activity in state waters will require the State to divert resources currently dedicated to other water pollution activities,

The New Rule does not require the states to pick up where the federal government left off. Strictly speaking, then, nothing about the New Rule compels Colorado to enforce its water quality laws in Disputed Waters. However, causation is not quite so strict. Article III requires that "there be a causal connection between the injury and the conduct complained of," meaning that "the injury must be *fairly traceable* to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (emphasis added). "Fairly traceable" cannot be stretched too far, particularly through actions a plaintiff chooses (but is not legally compelled) to take due to government action: "[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). The Court nonetheless finds that Colorado's claimed injury is fairly traceable to the New Rule.

First, Colorado's choice to begin enforcing its no-fill law in the event the New Rule takes effect is not arbitrary or disproportionate to the problem. The Agencies are no longer asserting jurisdiction over Disputed Waters. As between an environmental free-for-all and a total ban on filling, Colorado's choice to enforce a total ban is reasonable in light of the potential significant environmental damage that might flow from a choice *not* to enforce its own applicable statute. (*See* ECF No. 24 at 10–11.)

---

threatening compliance and enforcement across clean water programs.")). Colorado does not support these assertions with case law, and seems unaware of the various issues that a diversion-of-resources argument entails. But because the argument revolves around legal principles rather than factual development, it appears to be one of those arguments that the Tenth Circuit would deem to be "preserve[d] (although barely)," *Stender v. Archstone-Smith Operating Tr.*, 958 F.3d 938, 948 (10th Cir. 2020), meaning it would be error for this Court to disregard it as inadequately developed.

Second, Colorado's fear of environmental damage is not "fear[] of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. Although the New Rule will not *cause* anyone to violate water quality laws and therefore does not create injury on that account (*see* Part III.A.2, above), Colorado has nonetheless made a sufficient record—uncontested by the Agencies—that "EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations." (ECF No. 32 ¶ 15.) In other words, regardless of cause, the record shows that violations of Section 404 consistently happen, requiring enforcement action. At least some of that enforcement burden (*i.e.*, filling in Disputed Waters) will now fall in Colorado's lap. That share of the enforcement burden is not at all minimal or speculative. Colorado asserts, and the Agencies do not dispute, that about half of state waters protected by the Current Rule will be unprotected by the New Rule. (ECF No. 29 ¶ 13.)

Third, for several decades it has been established that diversion of resources is a cognizable harm in the context of Article III standing analysis. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Although cases upholding diversion of resources as a cognizable harm are almost always about nonprofit organizations seeking to advance a social goal (mostly fair housing, voting rights, and immigrant rights),[7] the Court is not aware of any case couching the diversion-of-resources injury

[7] *See, e.g.*, *id*. (fair housing organization "devote[d] significant resources to identify and counteract [the defendants'] racially discriminatory steering practices" (internal quotation marks omitted)); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) ("enforcement [of day-laborer solicitation ordinance] will require [the plaintiff] to divert resources from other of its [pro-immigrant] activities to combat the effects of the Ordinance"); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) (challenged law forced voting rights organization to "spend extra time and money educating its members about these Texas provisions and how to avoid their negative effects"); *see also* 13A Charles

as something unique to nonprofit organizations, or that is otherwise a "special relaxation" of standing. *Zeppelin v. Fed. Highway Admin.*, 305 F. Supp. 3d 1189, 1198 (D. Colo. 2018).

Fourth, diversion of resources creates economic harm that—in a case against a private litigant—could be recovered through compensatory damages. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002). However, as discussed in Part III.A.3, above, Colorado cannot recover its economic losses against the Agencies, even if it succeeds on the merits of this lawsuit, because the APA does not waive sovereign immunity to money damages.

For these reasons, the Court finds that Colorado is poised to suffer an injury in fact that is fairly traceable to the New Rule, and would be redressed by a favorable ruling in this case. Moreover, that injury is certainly impending and would be irreparable. Accordingly, Article III standing and the irreparable harm requirement of the preliminary injunction test are both satisfied.

B. Likelihood of Success on the Merits

The Court now turns to whether Colorado is likely to succeed in proving at least one of its theories that the Agencies unlawfully promulgated the New Rule.

1. Legal Standards

Although this case centers around interpretation of the CWA, Colorado's right to sue arises under the APA. The APA empowers a reviewing court to "set aside" agency action if it is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Generally, an agency

---

Alan Wright et al., *Federal Practice & Procedure* § 3531.9.5 nn.15–18 (3d ed., Apr. 2020 update).

decision will be considered arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

A reviewing court should engage in a "thorough, probing, in-depth review," *Wyoming v. United States*, 279 F.3d 1214, 1238 (10th Cir. 2002) (citation omitted), with its review of the merits "generally limited to . . . the administrative record," *Custer Cnty. Action Assoc. v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001). However, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

2. The Supreme Court's *Rapanos* Decision

The history of litigation over "waters of the United States" is long and complicated. For present purposes, the overridingly relevant decision is *Rapanos v. United States*, 547 U.S. 715 (2006). The Court finds the Third Circuit's summary of *Rapanos*—and the problems it has created—to be helpful for present purposes:

> In *Rapanos*, a consolidation of two cases, the Court considered "whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act." *Id*. at 729 (plurality opinion). The Court of Appeals for the Sixth Circuit had upheld the Corps' claim of jurisdiction. The Supreme Court, in a fractured 4-1-4 decision, vacated those judgments and remanded for further proceedings to determine whether the wetlands were subject to the restrictions of the CWA.
>
> Four dissenting Justices took an expansive view of the

CWA's reach. Justice Stevens, writing for the dissenting Justices, stated that the Court should have deferred to what he and his fellow dissenting Justices viewed as the Corps' reasonable interpretation of its jurisdiction. *Id*. at 796 (Stevens, J., dissenting). However, five Justices believed that the Corps' jurisdiction is more limited, although they did not all agree on the proper test to determine the scope of that jurisdiction.

Justice Scalia, writing for a four-Justice plurality, stated that the term "waters of the United States" as used in the CWA "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,] . . . oceans, rivers, [and] lakes.'" *Id*. at 739 (alterations in original) (citing Webster's New International Dictionary 2882 (2d ed. 1954)). The plurality opinion noted that "the phrase ['the waters of the United States'] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. As for wetlands, the Justices in the plurality concluded that they only fall within the scope of the CWA if they have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id*. at 742.

Justice Kennedy concurred. Although agreeing with the plurality's conclusion that the Corps' jurisdiction was more limited than the dissenters believed and that the case should be remanded, Justice Kennedy disagreed with the plurality's jurisdictional test. Under Justice Kennedy's approach, wetlands are subject to the strictures of the CWA if they possess a "significant nexus" with "waters of the United States," meaning that the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 779, 780 (Kennedy, J., concurring).

At first glance, the *Rapanos* opinions seem to present an analytical problem: the three opinions articulate three different views as to how courts should determine whether wetlands are subject to the CWA, and no opinion was joined by a majority of the Justices. So which test should apply? Interestingly, after explaining why he would have affirmed the judgments below, Justice Stevens noted that, "[i]t has been [the Supreme Court's] practice in a case coming to us

> from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate." *Id*. at 810 (Stevens, J., dissenting). That practice, he observed "has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views." *Id*. (citations omitted). Then, Justice Stevens stated that, although the Justices voting to remand disagreed about the appropriate test to be applied, the four dissenting Justices—with their broader view of the CWA's scope—would nonetheless support a finding of jurisdiction under either the plurality's or Justice Kennedy's test, and that therefore the Corps' jurisdiction should be upheld in all cases in which either test is satisfied. *Id*. at 810 & n.14.

United States v. Donovan, 661 F.3d 174, 179–80 (3d Cir. 2011) (parallel citations omitted).

In the immediate wake of *Rapanos*, the Agencies did not amend the definition of "waters of the United States" in 33 C.F.R. § 328.3, so federal courts (such as the Third Circuit in *Donovan*) were forced to grapple with what sort of gloss, if any, *Rapanos* imposed on that definition. Some courts, like the Third Circuit, concluded based on Justice Stevens's closing remarks that "the CWA is applicable to wetlands that meet either the test laid out by the plurality or by Justice Kennedy in *Rapanos*." *Donovan*, 661 F.3d at 184. Other courts, like the Seventh Circuit, have concluded that Justice Kennedy's "significant nexus" test controls. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006).

3. Colorado's Previous Suit to Prevent Federal "Overreach"

In 2015, the Agencies amended 33 C.F.R. § 328.3, purporting to codify Justice Kennedy's "significant nexus" test. *See* 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). Several states—including Colorado—successfully sued to enjoin the 2015 Rule. *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Specifically, they convinced the district court that the 2015 Rule's interpretation of "significant nexus" likely "violate[d]

the congressional grant of authority to the EPA" because it swept more broadly than Justice Kennedy would have allowed. *Id*. at 1056. In the *North Dakota* case, Colorado very much cared to ensure that the Agencies did not overstep their jurisdiction, regardless of the environmental benefits of broader regulation. (*See North Dakota et al. v. EPA et al.*, No. 3:15-cv-59 (D.N.D.), ECF No. 212 at 39 (filed June 1, 2018) ("Any implication that waters and lands falling outside federal CWA jurisdiction are somehow 'unregulated' and thus 'unprotected' must be rejected: what is at issue here are the limits of federal jurisdiction, not environmental protection. . . . Instead of Plaintiff States regulating the land and water within their borders to advance their own sovereign responsibilities to protect their resources and citizens, the [2015] Rule would have them defer to the federal government's vast regulatory overreach.").)

4. The New Rule

Not long after taking office, President Trump directed the Agencies to rescind or revise the 2015 Rule, and to "consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*." 82 Fed. Reg. 12497, 12497 (Feb. 28, 2017). In October 2019, after two district courts had invalidated the 2015 Rule following full merits briefing,[8] the Agencies repealed the 2015 Rule and reinstated the rule in effect at the time of *Rapanos*, *i.e.*, what this Court has called the "Current Rule." 84 Fed. Reg. 56626 (Oct. 22, 2019). Challengers promptly sued, arguing that the Current Rule violates the CWA by protecting too little, *Murray et al. v. Wheeler et al.*, No. 19-cv-1498 (N.D.N.Y., filed Dec. 4, 2019), and too much, *see, e.g.*, *N.M. Cattle Growers' Ass'n v. EPA et al.*, No.

[8] *See Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).

19-cv-988 (D.N.M., filed Oct. 22, 2019).

In April 2020, the Agencies published the New Rule (formally, "The Navigable Waters Protection Rule"), to take effect June 22, 2020. 85 Fed. Reg. 22250 (Apr. 21, 2020). It makes numerous changes to the Current Rule, which the Court need not describe in detail. For present purposes, the Court notes that one of the explicit purposes of the New Rule is to establish "categorically jurisdictional and categorically excluded waters." *Id*. at 22270. Among the categorical exclusions are "[e]phemeral features, including ephemeral streams, swales, gullies, rills, and pools." *Id*. at 22340.

5. Colorado's Current Challenge

Since the *North Dakota* case, Colorado has had a change of Attorney General administrations, and federal "overreach" is apparently now no longer such a great concern. Colorado now wants to force the federal government to remain in the role carved out for it in the Current Rule. Colorado's lead argument in this regard is that the New Rule is contrary to the CWA's purpose and legislative history because the New Rule—surprisingly—"conflicts with Congress' intent to create *a federal-state partnership* in which both the Agencies and the states would *work together* to protect the broadly defined 'waters of the United States.'" (ECF No. 24 at 13 (emphasis added).)

The Court frankly does not understand what sort of "federal-state partnership" Colorado envisions in the dredge-and-fill sphere. Colorado's unusual legislative policy is that dredge and fill is forbidden—without exception. But, as a practical matter, Colorado overlooks this policy and relies on a federal permit loophole, *see* Colo. Rev. Stat. § 25-8-501(1), because some wetlands are worth filling in pursuit of money or, more nobly, safety. In other words, Colorado "delegates" to the federal government the decision whether to issue a permit to do something that Colorado otherwise would not

allow, and Colorado reaps the benefits, at the expense of legislative policy. Colorado therefore has an unusual view of "work[ing] together to protect the broadly defined 'waters of the United States.'" (ECF No. 24 at 13.) *See also Rapanos*, 547 U.S. at 798 n.6 (2006) (Stevens, J., dissenting) ("Indeed, the Corps approves virtually all section 404 permits, though often requiring applicants to avoid or mitigate impacts to wetlands and other waters." (internal quotation marks omitted; alterations incorporated)).

As it turns out, however, the Court need not decide whether Colorado's (current) view about the purpose and history of the CWA wins the day. One of Colorado's alternate arguments has much more obvious merit, namely, that *Rapanos* already forecloses the approach taken in the New Rule.

It is notoriously difficult to understand what *Rapanos* is *for*, *see, e.g.*, *United States v. Johnson*, 467 F.3d 56, 60–66 (1st Cir. 2006), but it is much simpler to understand what *Rapanos* is *against*. Specifically, five justices rejected the Scalia plurality's categorical exclusion of "channels containing merely intermittent or ephemeral flow." 547 U.S. at 733–34 (plurality op.); *compare id*. at 768–70 (Kennedy, J., concurring in judgment) (finding the plurality's approach to "intermittent and ephemeral streams" to be "without support in the language and purposes of the [CWA]"); *id*. at 800–04 (Stevens, J., dissenting [joined by Souter, Ginsburg, and Breyer]) (rejecting plurality's categorical exclusion of intermittent or ephemeral stream beds). And more generally, five justices found the plurality opinion to be "inconsistent with the [CWA's] text, structure, and purpose." *Id*. at 776 (Kennedy, J., concurring in judgment); *see also id*. at 800 (Stevens, J., dissenting) ("[the plurality's] creative opinion is utterly unpersuasive"). The New Rule, however, is self-consciously intended to take the

plurality opinion (including its categorical exclusion of ephemeral watercourses), flesh out the details, and make it the new law of the land. *See* 85 Fed. Reg. at 22259–325. *Rapanos* forecloses this interpretation of the CWA. *See Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986) (agreement of five justices, even when not joining each other's opinions, "carr[ies] the force of law").[9]

The Agencies emphasize Justice Kennedy's statement in *Rapanos* that, "[a]bsent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries, in order to avoid unreasonable applications of the [CWA]." 547 U.S. at 782. The Agencies apparently view the New Rule as providing the called-for "more specific regulations." (ECF No. 51 at 15.) Whether or not the New Rule is more specific than the Current Rule, or helps to avoid unreasonable applications of the CWA, Justice Kennedy and the dissenters already rejected the specific approach the Agencies adopted here.

The Agencies also emphasize *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). There, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id*. at 982. The Agencies argue that *Rapanos* was not this kind of prior court decision, so the Agencies were free to reinterpret "waters of the United States." (ECF No. 51 at

[9] *State of California* views the reasoning here as a "suspect attempt to cobble together a holding from the [*Rapanos*] concurrence and the dissent." (ECF No. 60-1 at 11.) That decision appears unaware of *Vasquez v. Hillery*.

14–15.) The Court agrees with the premise, but, under the circumstances, the conclusion does not follow.

Again, it is difficult to discern what *Rapanos* was *for*—no judicial construction of the CWA offered in that case had the support of five justices. So the Agencies are correct that *Rapanos* did not "hold[] that its construction [of the CWA] follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. However, *Rapanos* is unambiguously *against* the construction offered in the plurality opinion, on which the New Rule is modeled.[10] So, although nothing in *Rapanos* forecloses reinterpretation of "waters of the United States," that decision *does* foreclose the reinterpretation at issue here.[11]

For at least these reasons, Colorado is likely to succeed in proving at least that the New Rule is "not in accordance with law." 5 U.S.C. § 706(2)(A).

C. Balance of Harms & Public Interest

In analyzing whether a preliminary injunction should issue against the government, the final two elements of the preliminary injunction test are treated

[10] For this reason, the Court disagrees with *State of California*'s reasoning that *Brand X* leaves open the interpretation adopted in the New Rule. (*See* ECF No. 60-1 at 11.) *Brand X* was about affirmative statements of how a statute *must* be interpreted, not about *foreclosed* interpretations (when other interpretations might be available).

[11] The problem for the Agencies, unfortunately, is that *Rapanos* arguably forecloses *every* formulation of "waters of the United States" proposed in *Rapanos*, or proposed by the Agencies thus far. For example, eight justices rejected Justice Kennedy's case-by-case "significant nexus" approach. *See Rapanos*, 547 U.S. at 753–57 (plurality op.) (arguing that Justice Kennedy's approach has no basis in the CWA); *id*. at 797–98, 807–09 (Stevens, J., dissenting) (arguing that case-by-case determination is foreclosed by earlier Supreme Court decisions and that Justice Kennedy's approach is therefore both incorrect and unnecessarily inefficient). And the plurality and Justice Kennedy (totaling five justices) rejected the categorically broad approach espoused by the dissenters and the Agencies. *See id*. at 746–53 (plurality op.); *id*. at 778–82 (Kennedy, J., concurring in judgment). In short, the Agencies will get sued—such as by Colorado, twice now—regardless of what they try. (*See* Part III.B.3, above.) But that is a problem for the Supreme Court to resolve. For present purposes, it remains unavoidable that five justices in *Rapanos* rejected the Agencies' current approach.

together. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Colorado argues, "When a case is brought under an environmental statute, the courts place extraordinary weight on a general concern for the public interest." (ECF No. 24 at 23 (citing *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1171 (D. Wyo. 1998)).) Colorado forgets that it wants this injunction, at least in part, so development can continue at the expense of the environment. Nonetheless, the Court agrees that the public interest would be better served by not allowing the New Rule to take effect at this time. If the Court were to decide otherwise, but then ultimately invalidate the New Rule (as appears probable on this record), it would likely create unnecessary confusion among the regulated community about what standard really applies. The Court finds it in the public interest, therefore, to maintain the *status quo*—what the regulated community is already accustomed to—pending resolution on the merits. *Cf*. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) ("the primary goal of a preliminary injunction is to preserve the pre-trial status quo").

The Agencies argue that any injunction must "address[] *only* the *specific* regulatory provisions purportedly creating imminent, irreparable harm." (ECF No. 51 at 30 (emphasis in original).) It appears, however, that the entire approach of the New Rule is contrary to *Rapanos*. Regardless, the Court finds it against the public interest to attempt to create a hybrid Current-New Rule, which would likely be even more confusing and unworkable than allowing the New Rule to take effect and later invalidating it. Rather, the Court will enjoin the Agencies to continue administering Section 404 in Colorado under the Current Rule.[12]

[12] Colorado does not seek a nationwide injunction (*see* ECF No. 55 at 12), presumably because Colorado is downstream of no other state, so it is difficult for Colorado to argue that

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Colorado's Amended Motion for Preliminary Injunction (ECF No. 24), construed as a motion for stay of agency action under 5 U.S.C. § 705, is GRANTED;
2. The effective date of the Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (Apr. 21, 2020) is STAYED within the District of Colorado; and
3. The Agencies (along with their officers, agents, servants, employees, attorneys, and all others who are in active concert or participation with any of them) are hereby PRELIMINARILY ENJOINED to continue administering Section 404 in Colorado under the provisions of 33 C.F.R. § 328.3 as it is presently codified.

Dated at Denver, Colorado this 19th day of June, 2020.

BY THE COURT:

William J. Martínez
United States District Judge

implementation of the New Rule elsewhere affects Colorado.