Nos. 20-1238, 20-1262, 20-1263

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO,
Plaintiff/Appellee,

v.

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

CHANTELL and MICHAEL SACKETT; and
AMERICAN FARM BUREAU FEDERATION, et al.,
Intervenor-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)

FEDERAL APPELLANTS' REPLY BRIEF

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Oral argument is requested.

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GLOSSARY

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

INTRODUCTION

Colorado fails to rehabilitate the district court's legal errors. Colorado argues that the Agencies' interpretation is barred by the fractured *Rapanos* decision. But it is not. And the district court itself acknowledged its reading of *Rapanos* is untenable. The court realized that its reading "arguably *foreclosed every* formulation of 'waters of the United States' proposed in *Rapanos*, or proposed by the Agencies thus far." Appendix 118 n.11. That cannot possibly be right. And pursuant to the Supreme Court's *Brand X* decision, it is not right. Because "navigable waters" and "waters of the United States" are ambiguous terms, the Agencies have discretion to interpret them. *Rapanos* merely addressed what waters the Agencies *may not* regulate. Its opinions do not dictate what waters the Agencies *must* regulate. Although Colorado spends much of its brief offering alternative merits arguments, none has any merit.

As to harm, Colorado's arguments exhibit profound confusion. The State strains to claim the mantle of environmental protection. But under Colorado law, businesses and developers in Colorado *may not now pollute* Colorado's state waters. The State claims harm because it has no program to *authorize* discharges into state waters. As to the district court's "enforcement" theory, Colorado points to no evidence — because no evidence exists — showing that the NWPR will cause a material change in federal enforcement efforts. And even crediting this speculative theory, neither the district court nor Colorado has established imminent harm that

will occur before a ruling on the merits. The mandatory injunction, interfering in the Executive Branch's prosecutorial enforcement discretion and the separation of powers pending resolution of the merits of the case, should therefore be reversed.

The Agencies' unopposed request for expedited argument during the Court's September 21-24, 2020 sitting remains pending. Given the great importance of these issues — evidenced by the many intervenors and amici — the Agencies renew their request that the Court set argument during that week or reverse promptly based on the briefs.

ARGUMENT

I. The district court erred in concluding that Colorado established a likelihood of success on the merits.

A. The district court should have applied *Brand X*, and it misinterpreted *Rapanos*.

As explained in the Agencies' opening brief, the district court made two basic errors on likelihood of success: (1) the court failed to apply the rule of *Brand X*, and (2) the court misinterpreted *Rapanos* as nullifying agency discretion. Agencies Opening Brief at 26-31. Colorado's brief merely papers over these basic errors.

First, Colorado's argument is inconsistent with the rule of *Brand X*. A judicial interpretation of a statute generally does *not* bind an agency interpreting a statute at *Chevron* Step Two. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). Therefore, Colorado is wrong when it

categorically states that an agency may not "adopt interpretations that the Supreme Court has rejected." Colorado Brief at 18. The whole point of *Brand X* is that agency interpretations supersede even a "better" judicial interpretation, unless the statutory language unambiguously precludes the agency's reading. *See also United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008).

Colorado does not dispute that the phrase "waters of the United States" is ambiguous. Nor could it: *Rapanos* confirms that point. *See* 547 U.S. 715, 740, 749-52, 752 (2006) (plurality); *id*. at 778, 780 (Kennedy, J., concurring); *id*. at 796 (Stevens, J., dissenting). This Court has likewise so held. *United States v. Hubenka*, 438 F.3d 1026, 1031 (10th Cir. 2006); *see also* Agencies Opening Brief at 28-29. Indeed, Colorado's argument that the case should be resolved at *Chevron* Step Two necessarily assumes that the statutory language is ambiguous. Colorado Brief at 20.

Because "waters of the United States" is ambiguous, *Brand X* controls. Accordingly, *Rapanos* does not mandate that the Agencies adopt a broader definition of "waters of the United States." That is to say, "nothing 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.'" *California v. Wheeler*, No. 20-cv-03005-RS, 2020 WL 3403072, at *6 (N.D. Cal. June 19, 2020) (quoting *Brand X*,

545 U.S. at 982). *Rapanos* was concerned with the *outer bound* of the reach of the Clean Water Act — i.e., what waters the Agencies' regulations *may not* reach. It did not address how far the Agencies *must* reach. 547 U.S. at 731-39 (plurality); *id*. at 758 (Roberts, C.J., concurring); *id*. at 778 (Kennedy, J.); *see also* Agencies Opening Brief at 29-30. This alone is fatal to the district court's merits analysis.

Colorado's claim that "Justice Kennedy and the dissenters agreed that waters with a 'significant nexus' to navigable waters *are* 'waters of the United States' under the Clean Water Act," Colorado Brief at 22 (emphasis added), also misunderstands the opinions in *Rapanos*. Justice Kennedy opined that the Agencies *may not* regulate beyond those waters having a "significant nexus"; he did not direct what waters the Agencies *must* regulate. 547 U.S. at 778. The dissenting Justices were clear, too: their opinion was merely that the Corps had made "a reasonable interpretation of a statutory provision," not that it was the *only* plausible interpretation. *Id*. at 788. Nothing in *Rapanos* bars the Agencies from relying on the plurality's approach.

Colorado's theory also cannot be reconciled with the fact that the Justices encouraged the Agencies to redefine "waters of the United States" by regulation. Agencies Opening Brief at 30-31. It would make no sense for the Justices to encourage the Agencies to define "waters of the United States" by regulation if *Rapanos* "arguably *foreclosed every* formulation of 'waters of the United States' proposed in *Rapanos*, or proposed by the Agencies thus far," as the district court

opined. Appendix 118 n.11 (emphasis original). The district court misunderstood *Rapanos* and *Brand X*. Its stated ground for an injunction was error.

B. Colorado's alternative merits arguments also fail.

Colorado makes alternative merits arguments. Colorado Brief at 28-60. The district court discussed none of them, basing its "success" analysis solely on *Rapanos*. Appendix 116-18. Though this Court is not barred from considering such arguments, where the "district court did not rule on these [alternative] arguments" for affirming a preliminary injunction, the court of appeals may "decline to do so in the first instance," allowing the plaintiff to "renew these contentions on remand." *Great Western Shows, Inc. v. Los Angeles County*, 42 Fed. Appx. 929, 930 (9th Cir. 2002). Particularly as Colorado's remaining arguments are largely based on an extensive administrative record, they are better addressed by the district court first. *Cf., e.g., McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017) ("We are a court of review, not of first view." (internal quotation marks omitted)). In any event, the arguments lack merit.

1. Clean Water Act

The NWPR is consistent with the Clean Water Act and its objectives and policies. While Colorado asserts that the rule is inconsistent with the Act's "text," Colorado Brief at 12, it never develops that argument. Nor does Colorado contest the ambiguity of the terms "navigable waters" and "waters of the United States."

Colorado's contention that the NWPR violates the Clean Water Act's objectives and policies is likewise undeveloped. It argues the Agencies must define "waters of the United States" more broadly because one of the Act's objectives is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Colorado Brief at 19, 45 (quoting 33 U.S.C. § 1251(a)). But Congress also limited the Act's jurisdiction to "navigable waters," 33 U.S.C. § 1362(7), 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 Agencies must necessarily *balance* the statutory objectives and policies. 85 Fed. Reg. 22,253, 22,269-72, 22,287-88 (Apr. 21, 2020).

Moreover, the "textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Rapanos*, 547 U.S. at 752 (plurality). And "no legislation pursues its purposes at all costs." *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234 (2013). 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 Australian Bank Ltd.*, 561 U.S. 247, 270 (2010); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 501 (2d Cir. 2017) (holding that EPA's interpretation was reasonable even if, in the court's view, it may not have been "best designed to achieve the Act's overall goal of restoring and protecting the quality of

the nation's water"). Colorado's reliance on a statutory objective does not nullify the Agencies' delegated authority under *Chevron* to define "navigable waters."

Colorado also asserts that the NWPR impermissibly weakens the federal-state partnership envisioned by the Act. Colorado Brief at 28-31. But there has always been a line between federal Clean Water Act jurisdiction and state jurisdiction. Shifting that line does not weaken the envisioned federal-state partnership. It simply shifts some control from the federal government to the States, which many States welcome. The federal government will continue to provide grants and technical support to States, *see* 85 Fed. Reg. at 22,318, and each State remains free to impose additional protections on waters within its bounds, whether they are "waters of the United States" or state waters, 33 U.S.C. § 1370. Indeed, Colorado has taken the ultimate step to protect all waters within the State that are not "waters of the United States": it prohibits any discharge of pollutants into state waters. Colo. Rev. Stat. § 25-8-501(1); *see also* Appendix 97; Agencies Opening Brief at 16-17.

Colorado argues that the NWPR is inconsistent with the Clean Water Act's legislative history, which indicates that jurisdiction extends "as far as was permissible under the Commerce Clause." Colorado Brief at 32 (quoting 118 Cong. Rec. 33,692, 33,699 (1972) (statement of Sen. Muskie)). But the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001) (*SWANCC*), specifically rejects the notion that the Act's coverage of

"navigable waters" extends to the constitutional limit. *Accord Rapanos*, 547 U.S. at 738, 776 (plurality and Kennedy, J.). Like Colorado's reliance on a single objective of the Act, this legislative history neither prescribes any particular definition of "waters of the United States" nor preclude the Agencies' interpretation thereof.

Finally, citing *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1472-73 (2020), Colorado contends that the Agencies should not depart from the "longstanding regulatory practice of the Agencies." Colorado Brief at 33-34. But *Maui* does not preclude Agencies from reconsidering "longstanding regulatory practice." The Court merely expressed that a longstanding regulatory practice can weigh against a judicial interpretation. 140 S. Ct. at 1472-73. And the "significant nexus" regime is a judicial overlay that even Justice Kennedy envisioned would yield to "more specific regulations." 547 U.S. at 782. The fact that the pre-2015 Rule approach was "workable," Colorado Brief at 33, does not prevent the Agencies from establishing a clearer and more sensible approach.

2. Administrative Procedure Act (APA)

Colorado next argues the Agencies violated the APA by failing to adequately explain the basis for the NWPR. Colorado Brief at 34-56. But the Agencies thoroughly explained their rationale and addressed all of the considerations mentioned by the State. Such record-intensive deferential review is better conducted by the district court in the first instance. In any event, judicial review of the rule is

highly deferential, requiring that the Agencies merely explain why they "believe [the rule] to be better" than what it replaced. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

a. Reliance interests

Colorado first complains that the Agencies did not address the State's reliance on the Agencies' prior position. Colorado Brief at 37-39. That is categorically wrong. The Agencies specifically recognized and provided a thorough reasoned response to alleged reliance issues in their Response to Comments, Topic 1: Legal Arguments, at 27-30, https://beta.regulations.gov/document/EPA-HQ-OW-2018-0149-11574. Regardless, reliance alone does not preclude the Agencies from changing their interpretation. Instead, if a "prior policy has engendered serious reliance interests," an agency may not *ignore* those interests. *Fox Television*, 556 U.S. at 515. The Agencies did not: they explained that "replacing the multi-factored case-specific significant nexus analysis with categorically jurisdictional and categorically excluded waters" provides better clarity for members of the regulated community as well as States and tribes. 85 Fed. Reg. at 22,270. The Agencies also thoroughly addressed the effect of the replacement. *Id*. at 22,331-34; *see also* Resource and Programmatic Assessment at 59-92 and Appendices A & B, https://www.epa.gov/nwpr/navigable-waters-protection-rule-supporting-documents.

Moreover, the fact that the NWPR followed a change in Administrations is entirely permissible. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities"); *Brand X*, 545 U.S. at 981 (acknowledging that an agency may consider the "the wisdom of its policy on a continuing basis," for example, "in response to . . . a change in administrations" (internal quotation marks omitted)). New Administrations are free to change course by reasoned explanations.

Colorado cannot credibly claim that its justifiable reliance on the "significant nexus" bars adoption of the NWPR. Even at its inception, Justice Kennedy offered the significant nexus standard only as a stopgap — i.e., "[a]bsent more specific regulations" and "to avoid unreasonable applications of the statute." *Rapanos*, 547 U.S. at 782; *see also* Agencies Opening Brief at 30-31 (other Justices calling for regulatory revisions). The Agencies have attempted to provide greater clarity through various guidance and regulatory changes ever since. *Id.* at 10-15.[1] Colorado had ample notice that the Agencies would likely replace the significant nexus test. Colorado thus lacked justifiable reliance in a permanent continuation of the prior,

[1] Colorado asserts that Executive Order 13778 "directed" the Agencies to adopt the plurality's test. Colorado Brief at 8. To the contrary, the Executive Order provided that the Agencies "shall *consider* interpreting the term 'navigable waters' . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*." 82 Fed. Reg. 12,497 (Feb. 28, 2017) (emphasis added).

highly criticized regulatory regime — one that the State itself sought to block in 2015. Appendix 113-14.[2]

Colorado's reliance on *Department of Homeland Security v. Regents of University of California*, 140 S. Ct. 1891, 1913 (2020), *cited in* Colorado Brief at 37, is misplaced. There, the DHS argued that it "did not need to" consider reliance interests with respect to an agency policy decision, and the Supreme Court faulted the agency for wholly failing to address that factor. *Id*. Here, in contrast, the Agencies provided exactly the reasoned explanation that was held lacking in *Regents*. *See* 85 Fed. Reg. at 22,331-34; Resource and Programmatic Assessment at 6-8 (Introduction); Response to Comments, Topic 1: Legal Arguments at 27-30.

Colorado also asserts that the Agencies must more fully address the particular reliance interest of *Colorado in particular*. Colorado Brief at 38. That is incorrect: an agency is not required "to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. . . . Instead, the agency's response to public comments need only enable us to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did." *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (internal quotation marks omitted). And

[2] Colorado makes the same lack-of-time argument in criticizing the Agencies' economic analysis and in claiming that it did not have enough time to prepare for the permitting gap. Colorado Brief at 48, 73-74; *see also infra* pp. 24-25. Colorado had at least three years to prepare for the possibility of the NWPR.

in any event, the Agencies did address the reliance interests of States and tribes, as explained above.

b. Science

Colorado asserts that the "Agencies explicitly reject science in establishing the 2020 Rule," and it faults them for "stating that 'science cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the [Act].'" Colorado Brief at 40 (quoting NWPR, 85 Fed. Reg. at 22,261). But the Agencies' quoted conclusion is entirely correct. The ultimate decision regarding how to define "waters of the United States" is necessarily a *legal* judgment. In fact, EPA's Science Advisory Board and Connectivity Report *agreed* that "the science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters." 85 Fed. Reg. at 22,261, 22,268-71.

This is the Agencies' longstanding position. They explained this same point in promulgating the 2015 Rule: "the agencies' interpretation of the [Act] is informed by the Science Report and the review and comments of the [Science Advisory Board], *but not dictated by them*." 80 Fed. Reg. 37,054, 37,060 (June 29, 2015) (emphasis added).

Colorado claims that the Agencies were required to rebut, yet failed to rebut, the Connectivity Report. Colorado Brief at 41-42. By implication, the State is

arguing that the presence of any ecological connection — essentially any "nexus" whatsoever — between downstream navigable waters and upstream waters makes the Agencies' interpretation arbitrary and capricious. That is inconsistent with Congress's delegation to the Agencies and with *Chevron*. Although EPA's Science Advisory Board believed that the Agencies might define "waters of the United States" more broadly based on the Board's scientific perspective, the Agencies' final policy choice had to weigh *other* relevant factors as well — including the statutory text, the Supreme Court decisions, the Act's objectives and policies, clarity, and predictability. *See, e.g.*, 85 Fed. Reg. at 22,252.

Regardless, the Agencies did not "reject science," as Colorado asserts. Colorado Brief at 40. Nor have the Agencies "disregarded the conclusions of EPA's own Science Advisory Board" or the Connectivity Report. *Id*. at 42. The Agencies fully explained how science, including the Connectivity Report, supported the rule. *E.g.*, 85 Fed. Reg. at 22,261, 22,271, 22,288. Thus, the Agencies used the 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 NWPR's "tributary" definition. *Id*. 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 scientific "typical year" concept to inform what may be within a normal range of precipitation and other climatic variables for a particular geographic region. *Id*.

Colorado specifically faults the Agencies for not including ephemeral waters and nonadjacent wetlands with any nexus to downstream waters. Colorado Brief at 40, 44. But the Agencies explained that decision in detail. Specifically, they reasonably concluded that ephemeral streams — which "flow only in direct response to precipitation," 85 Fed. Reg. at 22,251; *see also id*. at 22,275 — are not "navigable waters." As the Agencies explained, "[i]n determining the limits of [their] power to regulate discharges under the Act," they "must necessarily choose some point at which water ends and land begins." *Id*. at 22,309 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985)). And ephemeral "waters" are often *not water* at all, for they are not "continuously present, fixed bodies of water," and they lack a "regular and predictable surface water connection." *Id*. at 22,278.

Colorado persistently misstates the environmental impact of excluding ephemeral waters and nonadjacent wetlands from the NWPR. Critically, unpermitted discharges to any and all ephemeral waters and wetlands in Colorado

are "flatly prohibited" by Colorado law, regardless of the NWPR. Colorado Brief at 76 n.17. Moreover, Colorado confuses the scope of Clean Water Act "jurisdiction" with the breadth of the Act's regulatory "protection." As the Supreme Court made clear in *County of Maui*, discharges of pollutants to ephemeral waters and wetlands nonetheless violate the Act and are subject to regulation and protection under the Act if conveyed downstream to a jurisdictional water. 140 S. Ct. at 1470-77; *see also Rapanos*, 547 U.S. at 742-43 (plurality). Therefore, federal protection can still extend to these waters and wetlands under the NWPR.

In short, Colorado's "science" argument seeks to hold Agencies to a standard that does not exist. The State faults the Agencies for "fail[ing] to establish that the scientific backing for the 'significant nexus' test had changed with any updated scientific literature." Colorado Brief at 44. But that is not legally required. The Agencies may change the definition of "waters of the United States" without showing a change in the relevant science. All that *Fox Television* requires is a reasoned explanation for the interpretation based on the relevant considerations. The Agencies' balanced consideration of the statutory text, case law, experience, implementation, and science easily meets that standard.

c. Economic Analysis

Colorado faults the Agencies' Economic Analysis, https://www.epa.gov/nwpr/navigable-waters-protection-rule-supporting-documents, which accompanied

the NWPR. Colorado Brief at 45-51. But any fault in that analysis is immaterial to the reasonableness of the rule. The NWPR is clear that the Agencies did not rely on the specifics of that analysis in promulgating the rule. 85 Fed. Reg. at 22,332. While the Agencies developed the analysis to evaluate the NWPR's potential economic effects and changes in state and tribal regulatory programs pursuant to longstanding Executive Orders, these effects were not a basis for the NWPR. *Id.* at 22,332, 22,335. Unless an agency's economic analysis is a basis for its decision, the analysis is not subject to judicial review — save by a "small entity" with a statutory right of review, *see* 5 U.S.C. § 611 — and the analysis is not a basis for setting aside or enjoining such an action. *See, e.g., Allied Local & Regional Manufacturers Caucus v. EPA*, 215 F.3d 61, 78-81 (D.C. Cir. 2000); *see also Western Wood Preservers v. McHugh*, 925 F. Supp. 2d 63, 75-76 (D.D.C. 2013).

Colorado nevertheless asserts that a serious flaw in an economic analysis, even if the analysis is not required, can still undermine a rule. Colorado Brief at 47 (citing *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012), *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007)). The cited cases are inapposite. Those agencies "decide[d] to rely on a cost-benefit analysis as part of its rulemaking" — i.e., as a justification for the rule at issue. *Home Builders*, 682 F.3d at 1040 (citing *Portland*, 507 F.3d at 713). The Agencies did not do so here, and Colorado has established no serious flaw.

Colorado also claims that, in adopting the NWPR, the Agencies relied on factors that Congress did not intend. Specifically, the Agencies should not have considered whether States might "fill in the gaps in clean water protection." Colorado Brief at 49. But, as explained above, the Act expressly provides for federal-state cooperation. *See also* 85 Fed. Reg. at 22,252-53, 22,269. It is wholly reasonable for the Agencies to consider potential state responses to the NWPR. And nothing in the Act (or in the APA) dictates that the Agencies must ignore these potential real-world responses. Moreover, Colorado misreads EPA "Guidelines" on economic analysis. Colorado Brief at 49. The passage cited by Colorado relates to establishing a regulatory "baseline" from which a comparison is conducted — i.e., "when determining which rules to include in a baseline." Guidelines for Preparing Economic Analyses, at 5-13, https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf. EPA included only *current* state laws and regulations in setting that baseline. Nothing thereafter prevented the Agencies from comparing that baseline to likely state regulatory responses, as reasonably done for the NWPR.

d. Typical year

Colorado claims that it was not given a sufficient opportunity to comment on how the Agencies would determine a "typical year," or how the Agencies would evaluate whether intermittent streams contribute flow to traditional navigable waters. Colorado Brief at 50-56. But the Agencies explained the concept of a "typical year"

in the proposed rule, 84 Fed. Reg. 4154, 4177 (Feb. 14, 2019), and they addressed public comments that they received on that topic. 85 Fed. Reg. at 22,261; Response to Comments, Topic 9: Typical Year, https://beta.regulations.gov/document/EPA-HQ-OW-2018-0149-11574.

Colorado asserts that the NWPR's definition of "typical year" is "vague and undefined." Colorado Brief at 50. That is wrong. It is not a new concept: under longstanding practice, the agencies have used 30-year climate records to assess normal precipitation conditions to inform wetlands delineations. Thirty years is the most common and recognized timeframe used in other government climatic data programs. *See* Response to Comments, Topic 9: Typical Year at 3. The Agencies articulated the Agencies' proposed methodology in determining "typical year" in the proposed rule as well. 84 Fed. Reg. at 4177 (treating a year as "typical" when "observed rainfall from the previous three months falls within the 30th and 70th percentiles" for totals over the immediately preceding 30 years).

The Agencies' proposal further identified a number of accepted procedures to determine whether a stream has intermittent flow or contributes surface flow to traditional navigable waters. *Id*. at 4176-77. The final rule fleshes this out even more. 85 Fed. Reg. at 22,292-95. Colorado imagines some circumstances in which it might prove difficult to determine if a water is being assessed under "typical year" conditions. But such hypotheticals provide no basis for concluding that the NWPR

is arbitrary on its face. "To prevail in this and any facial challenge to an agency's regulation, the plaintiffs must show that there is 'no set of circumstances' in which the challenged regulations might be applied consistent with the agency's statutory authority." *Scherer v. U.S. Forest Service*, 653 F.3d 1241, 1243 (10th Cir. 2011). Colorado has not argued — nor could it — that "typical year" cannot be applied under any set of circumstances.

3. National Environmental Policy Act (NEPA)

The Agencies did not violate NEPA in promulgating the NWPR, Colorado Brief at 56-60, because the Clean Water Act expressly exempts the rule from NEPA's requirements. The Act provides that "no action of the [EPA] Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]." 33 U.S.C. § 1371(c)(1).

This statutory exemption applies even though EPA promulgated the NWPR jointly with the Army. 85 Fed. Reg. at 22,250 (noting joint promulgation). On its face, the Act's exemption is not limited to actions taken by EPA alone. "That [a Clean Water Act] Rule was promulgated jointly by the EPA Administrator and the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator." *In re U.S. Department of Defense & U.S. EPA*, 817 F.3d 261, 273 (6th Cir. 2016), *rev'd on other grounds sub nom. National Ass'n of*

Manufacturers v. Department of Defense, 138 S. Ct. 617 (2018). The Ninth Circuit reached the same conclusion in *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328-29 (9th Cir. 1992). Colorado argues that *Anchorage* is "distinguishable" because it does not involve a rulemaking, but it does not explain why that fact is relevant. Neither the Clean Water Act exemption nor anything in NEPA turns on whether the agency action is a rulemaking or other administrative agency action.

The NWPR broadly concerns the jurisdictional scope of the entire statute, including many Clean Water Act programs administered by EPA alone. *See* 80 Fed. Reg. at 37,054-55 (describing at least six exclusively EPA programs in which the term "waters of the United States" is used). Notably, EPA shares its Clean Water Act permitting authority with the Army in only one provision, namely, Section 404, 33 U.S.C. § 1344. And EPA has the ultimate authority to determine the scope of the Act's jurisdiction. *See* 43 Op. Att'y Gen. 197, 1979 WL 16529 (Sept. 5, 1979). For NEPA purposes, therefore, the NWPR is an "action of the [EPA] Administrator" subject to the statutory exemption, notwithstanding the Army's participation. Thus, the Agencies were not required to prepare a NEPA analysis.

* * *

In sum, Colorado has no likelihood of success on the merits.

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

As explained in the opening brief (pp. 35-43), the district court had no evidentiary basis to conclude that the NWPR's incremental reduction in Clean Water Act jurisdiction would cause any cognizable reduction in federal enforcement while adjudicating the merits of Colorado's claims. The district court relied on the *total*, average number of federal Clean Water Act enforcement actions in Colorado — three to five per year. Appendix 109. This ignored that the NWPR still subjects many waters in Colorado to jurisdiction under the Act. And the Act continues to protect against discharges to ephemeral waters and nonadjacent wetlands when pollutants are conveyed to jurisdictional waters. The district court's rejection of "Colorado's alleged chain of causation between the new Rule and the damage to state waters [a]s pure speculation" for Colorado's 'permitting gap' theory, Order at 11, also requires rejection of any harm from a purported enforcement gap.

A. Colorado adduces no evidence of likely harm prior to a merits decision.

Colorado failed to affirmatively make the "enforcement" argument that the district court credited. Colorado does not contest that it barely mentioned the (claimed) increase in enforcement burden in its preliminary injunction motion, as the court explained. Appendix 107-08 n.6. Although one of its declarations touched on enforcement briefly, Appendix 84-85, 87, that is not sufficient. Contrary to

Colorado's assertion, Colorado Brief at 13, the declaration did not explain the enforcement burden "in detail." It does not describe the where, when, or what of the unidentified enforcement cases, let alone detail the burden entailed by those undescribed actions. *See* Agencies Opening Brief at 36-38.

Regardless, Colorado is wrong to dismiss the case law establishing that alleged irreparable harm must occur *before* the district court can rule on the merits. Colorado Brief at 64 (remarking on the "single case cited by the Agencies to support their timing argument"). The Agencies cited binding precedent from this Court and the Supreme Court for this incontrovertible proposition. Agencies Opening Brief at 35 (citing *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009); *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003); and *Winter v. NRDC*, 555 U.S. 7, 22 (2008)).

Colorado next proffers "the basic proposition that it is insufficient for a plaintiff to allege irreparable harm from activities that will take place *solely* after the conclusion of litigation." Colorado Brief at 64. But that does not negate the requirement that Colorado demonstrate irreparably harm *before* the district court can rule on the merits. *RoDa Drilling*, 552 F.3d at 1210.

Colorado has not done so here. Colorado states that it "*alleged* 'an *immediate* compliance and enforcement burden' that would begin as soon as the 2020 Rule takes effect." Colorado Brief at 64 (first emphasis added). But an allegation is not

enough. To justify a preliminary injunction, Colorado had to provide a factual chain of causation to certain and great irreparable harm caused by the agency action at issue — here, an incremental narrowing of Clean Water Act jurisdiction — before a merits ruling. The declaration cited by Colorado does not complete that link, nor does it even answer the basic questions on timing, failing to explain when the burden will materialize. The declaration merely states vaguely that it "will need to assume some of this [enforcement] burden *in the future*." Appendix 85 (emphasis added).

Colorado baldly asserts that the "district court's findings were supported by the record evidence and do not constitute an abuse of discretion." Colorado Brief at 65. But the court said nothing about timing of a merits decision or when the alleged enforcement burden would come about, let alone made a "finding" on timing. Nor did the court tie any lack of enforcement to the incremental changes made by the NWPR. Instead, it implicitly (and wrongly) assumed that all federal enforcement under the Clean Water Act would cease in Colorado based on statistics regarding *all*, annual federal enforcement. There are still far-reaching "waters of the United States" in Colorado, however, and consequently jurisdiction for continuing federal enforcement. Colorado has no evidence linked to the NWPR's changes.

As explained in the Agencies' opening brief (pp. 39-43), the district court's conclusion on enforcement harm is just speculation. Colorado does not explain how any burden is "certain and great," as it must to justify a preliminary injunction. Even

if one (wrongly) assumes all federal enforcement stops for now in Colorado, the court's theorizing at most implies the State might need to pursue one or two enforcement cases before the court could rule on the merits. This temporary duty — even if certain to occur, which is not — does not constitute "certain and great," "irreparable" harm.

B. The district court correctly rejected Colorado's other harm arguments.

Colorado's alternative harm arguments, all of which the district court rejected, also fail to establish that "certain and great" irreparable harm would occur before the district court can rule on the merits. These findings by the district court, based on review of Colorado's scant declarations and evidence, are not "clear error." *New Mexico Department of Game & Fish v. U.S. Department of Interior*, 854 F.3d 1236, 1245 (10th Cir. 2017).

Colorado repeatedly tries to resurrect the "permitting gap" argument that the district court rejected. Appendix 100-03. Although the State tries to position itself as the defender of "science" and the "environment" throughout its brief, Colorado's supposed harm actually derives from its desire to *allow* businesses and developers *to pollute*. Colorado agrees that — after the NWPR — polluting, dredging, or filling ephemeral waters and nonadjacent wetlands "would still be flatly prohibited" under state law. Colorado Brief at 76 n.17. Thus, Colorado claims harm from wanting to allow such pollution.

The district court correctly rejected this argument. It found that Colorado had provided no specific evidence supporting it. Appendix 100-01. Now fighting the district court's factual conclusions, the State asserts that "the estimated annual number of projects and enforcement actions would require Colorado to provide oversight." Colorado Brief at 64. Colorado has the burden to establish imminent, irreparable harm caused by the NWPR, but the State has not answered when that harm will occur or how much that "oversight" will cost. The district court correctly rejected this grasping at straws.

Moreover, Colorado also does not deny that any "permit gap" or related harm to the State is self-inflicted. Agencies Opening Brief at 41-42. The district court correctly concluded that "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)). Accordingly, these purported harms are per se legally insufficient for Colorado to obtain an injunction here. *See id.* Colorado's appellate brief does not even cite or respond to the Supreme Court's *Pennsylvania* case, let alone refute the district court's application of it. And Colorado does not rebut the court's reasoning or point to any particular evidence showing an imminent need for continued federal permitting.

Colorado further asserts that the Agencies are abandoning cooperative federalism. Colorado Brief at 29-31. They are not. They are simply redefining

"waters of the United States," not changing the structure of the Act or how it functions. *See supra* pp. 6-7. The division between federal and state authority has always been a key feature of the Act. Colorado has always had — even more clearly since *Rapanos* — purely state waters that only Colorado may regulate.

Trying to recast itself as the protector of the environment, Colorado speculates that there might be "detrimental impacts" to state waters or "environmental harm" from illegal fill activities. Colorado Brief at 76-85. But the State again fails to address its own law prohibiting dredge or fill in those waters. Agencies Opening Brief at 16-17, 43 & n.9; Appendix 80, 97-98. The district court correctly dismissed these arguments. It found that "Colorado's alleged chain of causation between the New Rule and the damage to state waters is pure speculation." Appendix 104. "Colorado offer[ed] 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.*; *cf.* Colorado Brief at 79 (again asserting that such discharges are "likely" but without providing any evidence). There is simply no evidence of any actual environmental harm pending a resolution of the merits.

* * *

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.

Allowing the NWPR to go into effect in Colorado would benefit both the public and the State. The NWPR establishes a clear line between waters and wetlands that are federally regulated "navigable waters" and those that are left solely for Colorado to regulate. Reversing the preliminary injunction would restore a uniform nationwide rule as well. The injunction is not in the public interest, and the balance of equities weighs against it.

As explained in the Agencies' opening brief (p. 44), the district court cited only the status quo in its analysis. Thus, Colorado is incorrect to assert that the court determined that the public interest and balance of equities "weigh in Colorado's favor." Colorado Brief at 86. The district court did no such weighing. This was a facial and fatal failing by the court to complete the required analysis before issuing a preliminary injunction.

Colorado is also wrong that "delaying implementation of the 2020 Rule will cause the Agencies and Intervenors no harm." Colorado Brief at 86. The rule provides a clear enforceable line for the Agencies as well as for the public, States, and tribes. *See* Agencies Opening Brief 44-45. The Agencies' Economic Analysis estimated that the benefits of the NWPR well outweigh the costs. *See, e.g.*, 85 Fed. Reg. at 22,334; Agencies Opening Brief at 15. But the district court's ruling blocks those public benefits. The public interest is best served by permitting the clarity and

nationwide uniformity the NWPR provides to take immediate effect in Colorado — just like the rest of the United States.

CONCLUSION

For the foregoing reasons and those set forth in the Agencies' opening brief, the Court should vacate the preliminary injunction.

Respectfully submitted,

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

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