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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The State of Colorado,

Plaintiff/Appellee,

v.

U.S. Environmental Protection Agency, *et al.*,

Defendants/Appellants,

and

Chantell Sackett, et al.

Intervenors Defendants/Appellants.

On Appeal from the United States District Court
for the District of Colorado

The Honorable William J. Martinez, District Judge
D.C. No. 1:20-cv-01461-WJM-NRN

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

GLOSSARY

2008 Guidance	*Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008)
2020 Rule	*The Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22,250 (April 21, 2020)
Agencies	U.S. Environmental Protection Agency and U.S. Army Corps of Engineers
APA	Administrative Procedure Act
NEPA	National Environmental Policy Act
SAB	Science Advisory Board

INTRODUCTION

The district court did not abuse its discretion by preliminarily enjoining the Navigable Waters Protection Rule defining "waters of the United States" under the Clean Water Act ("2020 Rule"). The 2020 Rule will decrease the scope of federal jurisdiction over waters in Colorado far below that of the prior rule and protect fewer waters in Colorado than at any point since the passage of the federal Act in 1972.

The district court correctly found both that (1) Colorado is likely to succeed on the merits of its challenge to the validity of the 2020 Rule, and (2) allowing the 2020 Rule to go into effect would cause irreparable harm to Colorado pending resolution of the case on the merits. By entering a stay to preserve the status quo, the district court balanced Colorado's interest in maintaining the current level of federal protection over its waters and providing a workable framework for administration of the Act in the State.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in determining that Colorado is likely to succeed on the merits of its challenge to the 2020 Rule.

2. Whether the district court abused its discretion by enjoining the 2020 Rule where Colorado submitted evidence that it would suffer irreparable harm resulting from its implementation.

3. Whether the district court abused its discretion in determining that the balance of harms and public interest favors a stay preserving the status quo pending final resolution of Colorado's claims.

STATEMENT OF THE CASE

The Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act creates a uniform "national floor" of pollution protections by establishing minimum pollution controls for "waters of the United States." *See* 33 U.S.C. § 1370 (requiring states to impose permit standards that are no less stringent than EPA's standards); *Ark. v. Okla.*, 503 U.S. 91, 110 (1992) (the Act authorizes EPA "to create and

manage a uniform system of interstate water pollution regulation"). The Clean Water Act's central requirement is that pollutants, including dredged and fill materials, may not be discharged from a point source into "navigable waters," defined as "waters of the United States, including the territorial seas," without a permit. 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(7), 1362(12).

Because the Clean Water Act does not define "waters of the United States," the EPA and the Corps—the federal agencies responsible for enforcing the statute—provide a definition consistent with the scope and purpose of the Act. The Agencies' interpretation of "waters of the United States" is therefore an essential element of Clean Water Act permitting programs, including the Corps' section 404 dredged or fill material permit program. *See id.* § 1344.

The Agencies have defined the term "waters of the United States" through guidance and rulemaking. Regulations issued in 1977 and the 1980s defined the "waters of the United States" to cover: (1) waters used or susceptible of use in interstate and foreign commerce, commonly referred to as navigable-in-fact or "traditionally navigable" waters; (2)

interstate waters; (3) the territorial seas; and (4) other waters having a nexus with interstate commerce. *See Permits for Discharges of Dredged or Fill Material into Waters of the United States*, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977); *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336, 85,346 (Dec. 24, 1980); *Interim Final Rule for Regulatory Programs of the Corps of Engineers*, 47 Fed. Reg. 31,794 (July 22, 1982); *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,251-54 (Nov. 13, 1986); *Clean Water Act Section 404 Program Definitions and Permit Exemptions*, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988).

Several Supreme Court opinions have examined the meaning of "waters of the United States." As the Court has explained, the Clean Water Act establishes "broad federal authority to control pollution" in order to protect water quality, and "Congress chose to define the waters covered by the Act broadly." *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985). In addition, Congress' concern for the protection of water quality and aquatic ecosystems indicates an intent to confer Clean Water Act jurisdiction over wetlands with a significant nexus to

"navigable waters." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) ("*SWANCC*").

In *U.S. v. Rapanos*, the Court issued five separate opinions reviewing the Corps' definition of "waters of the United States" to include wetlands connected to traditional navigable waters by drains, none of which secured a majority of the justices. However, five justices agreed that waters that impact the quality of "navigable" water is the determining factor in defining the jurisdictional reach of the Clean Water Act. 547 U.S. 715, 779-80 (Kennedy, J., concurring), 793-94 (Stevens, J. et al., dissenting) (2006). In his concurring opinion in *Rapanos*, which rejected the plurality's "relatively permanent waters" test as "inconsistent with the Act's text, structure, and purpose," Justice Kennedy adopted a water quality-based definition of "waters of the United States," holding that wetlands fall within the scope of the Act if, either alone or in combination with "similarly situated lands in the region," they have a "significant nexus" to traditional navigable waters. 547 U.S. at 776, 779. Wetlands possess the required significant nexus if they "significantly affect the chemical, physical, and biological integrity

of other covered waters more readily understood as 'navigable.'" *Id*. at 780.

Since *Rapanos*, the Agencies have consistently included this significant nexus analysis in making jurisdictional determinations under the Clean Water Act, and issued guidance in 2008 explaining how they would apply the significant nexus standard. *See* Aplee. Supp. App. Vol. 1 at 12-24.[1] Under the 2008 Guidance, the determination of significant nexus is based on the ecological relationship between tributaries and their adjacent wetlands documented in scientific literature and reflected by physical proximity as well as shared hydrological and biological characteristics. Aplee. Supp. App. Vol. 1 at 19-23. Under this Guidance, the Agencies consider the flow and functions of the tributary together with the functions performed by all wetlands adjacent to that tributary in evaluating whether a significant nexus to traditional navigable waters is present.

[1] Appellee uses the following citation convention: (1) "Aplt. App." for the Agencies Appellants' Appendix and (2) "Aplee. Supp. App." for Appellee's Supplemental Appendix.

In 2015, the Agencies attempted to clarify the definition of "waters of the United States," issuing a new rule to do so ("2015 Rule"). The new definition covered waters having a "significant nexus" with the integrity of downstream navigable-in-fact waters and relied on a scientific literature review to support it, often referred to as the Connectivity Report. *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054, 37,057 (Jun. 29, 2015); Aplee. Supp. App. Vol. 1 at 25-300 and Aplee. Supp. App. Vol. 2 at 1-133. The 2015 Rule defined "significant nexus" to mean "a water, including wetlands, [that] either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of jurisdictional by rule waters. 80 Fed. Reg. at 37,106. The 2015 Rule was subject to a number of legal challenges in both district and circuit courts. After the Supreme Court held that jurisdiction to challenge the 2015 Rule lies with the district courts, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018), two courts ruling on the merits held that the 2015 Rule was unlawful. *Georgia v. Wheeler*, 418 F. Supp.

3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).

In 2017, the President directed the Agencies to review the 2015 Rule and issue new rules rescinding or revising the rule interpreting the terms "navigable waters" and "waters of the United States" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*, rather than the analysis articulated in Justice Kennedy's concurrence. Exec. Order No. 13778, 82 Fed. Reg. 12497 (Mar. 3, 2017). The Agencies undertook a two-step approach. First, the Agencies repealed the 2015 Rule and recodified the regulatory text that governed prior to the 2015 Rule, which was implemented using the 2008 Guidance. This first step was finalized in October 2019. *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules,* 84 Fed. Reg. 56,626 (Oct. 22, 2019). Second, the Agencies began working on the so-called "second step," a new rule redefining "waters of the United States."

In February 2019, the Agencies published a new proposed rule and provided a 60-day comment period. Colorado submitted comments on the proposed rule, raising a number of objections to and questions

about its legality and impact. *See* Aplee. Supp. App. Vol. 2 at 135-61. In particular, Colorado asked the Agencies to consider the proposed rule's specific economic impacts to Colorado prior to issuing the final rule, including (1) the impact the "404 permitting gap" created by the rule would have on state government, construction projects, and other Colorado businesses; and (2) the rule's impact on the state's large recreation industry. Aplee. Supp. App. Vol. 1 at 142-43, 149. Colorado also asked the Agencies to consider the proposed rule's environmental impacts to Colorado. *See generally* Aplee. Supp. App. Vol. 2 at 135-61.

Ultimately, the Agencies promulgated a rule that articulated a significantly narrower definition of "waters of the United States" than any prior definition in the history of the Clean Water Act. Under the 2020 Rule, "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. 33 C.F.R. § 328.3(a); 40 C.F.R. § 120.2(1). The

2020 Rule excludes from the definition of "waters of the United States," among other things, ephemeral features, including ephemeral streams, swales, gullies, rills, and pools. 33 C.F.R. § 328.3(b); 40 C.F.R. § 120.2(2).

The Rule also includes several definitions that further limit how the Agencies define "waters of the United States" in contrast to the pre-2020 regulatory framework. First, it restricts the definition of protected "adjacent wetlands" to those that "abut" or have a direct hydrological surface connection to another jurisdictional water "in a typical year." 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 120.2(3)(i). Wetlands are not considered adjacent if they are physically separated from jurisdictional waters by an artificial structure and do not have a direct hydrologic surface connection. The 2020 Rule also limits protections for tributaries to those that contribute perennial or uncertain levels of "intermittent" flow to a traditional navigable water in a "typical year," 33 C.F.R. § 328.3(c)(12); 40 C.F.R. § 120.2(3)(xii), a term whose definition leads to additional uncertainty, see 33 C.F.R. § 328.3(c)(13); 40 C.F.R. § 120.2(3)(xiii).

Collectively, these new definitions in the 2020 Rule will reduce the scope of waters subject to federal jurisdiction in Colorado far below that under the 2008 Guidance. Ephemeral and intermittent waters account for at least 68 percent of Colorado's stream miles. Aplee. Supp. App. Vol. 4 at 13. If the 2020 Rule goes into effect, all of Colorado's ephemeral streams will be categorically excluded from federal Clean Water Act protection, and it is unclear whether many of Colorado's intermittent streams will be covered or excluded under the new definition of "waters of the United States." Aplee. Supp. App. Vol. 4 at 12, 18. In addition, a significant percentage of Colorado's wetlands will likely be newly excluded from federal jurisdiction. Aplee. Supp. App. Vol. 4 at 33-34.

SUMMARY OF ARGUMENT

The district court's stay falls well within its discretion. The stay preserves the status quo of the existing regulatory program in Colorado pending final resolution of Colorado's claims, and the record presented to the district court supports the need for the stay. The district court properly concluded that Colorado established a likelihood of success on

the merits of at least one of its claims, that it would suffer irreparable harm if the stay were not entered, and that the balance of equities and the public interest weigh in favor of keeping the current system in place while the parties litigate this dispute.

The district court correctly held that the definition of "waters of the United States" that forms the foundation of the 2020 Rule is inconsistent with the text, structure, and purpose of the Clean Water Act as interpreted by the United States Supreme Court and did not reach Colorado's other claims—namely, that it was enacted in violation of the Administrative Procedure Act and the National Environmental Policy Act. In adopting the 2020 Rule, the Agencies failed to address the significant reliance interests created by decades of administering the section 404 permit program using a "significant nexus" approach that protected significantly more waters than the Rule, completely ignored the recommendations of EPA's own scientists regarding the impact of the Rule, and used faulty economic and programmatic premises to justify the drastic reduction in federal jurisdiction. And in adopting the 2020 Rule, the Corps made no attempt to comply with NEPA's

requirement to conduct an environmental review of this major federal action.

Colorado presented evidence of significant irreparable harm resulting from implementation of the 2020 Rule. The permitting gap created by the narrowing of federal jurisdiction will lead to increased enforcement burdens, which Colorado's supporting affidavits explained in detail and the district court recognized. In addition, the other harms Colorado presented also support issuance of a stay. Colorado's reasonable reliance on the federal dredge and fill permit system under the cooperative federalism that forms the foundation of the Clean Water Act cannot mean that the state must accept degradation of its waters when the Agencies abruptly change the rules in violation of the Act and the APA. Colorado also presented evidence of significant, non-speculative environmental harm that will occur in sensitive wetlands and other critical waterways as a result of the loss of federal jurisdiction.

Finally, neither the Agencies nor the Intervenors have presented any cognizable harm resulting from the stay, which simply preserves

the status quo in Colorado. The Agencies' interest in regulatory efficiency across the country does not outweigh the serious environmental and regulatory burdens suffered by Colorado. And the Intervenors' interest in less regulatory burden does not justify immediately allowing implementation of a flawed rule that will result in significant harm to water quality in Colorado.

ARGUMENT

I. Standard of Review

The district court construed Colorado's motion for preliminary injunction as a motion seeking a stay of action under 5 U.S.C. § 705. Because a stay under section 705 is a provisional remedy in the nature of a preliminary injunction, *see Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980), its availability is analyzed under the same elements: (1) the likelihood of success on the merits; (2) whether the movant will suffer irreparable injury if the injunction is denied; (3) whether the threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) whether the injunction would not be

adverse to the public interest. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016).

The Agencies incorrectly assert that the district court issued a disfavored "mandatory injunction" requiring heightened scrutiny. *See* Agencies' Opening Br. at 35-37. "Because the limited purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," mandatory preliminary injunctions are disfavored and require a heightened level of scrutiny. *Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1258-59 (10th Cir. 2005) (internal citations and quotations omitted). An injunction is mandatory "if the requested relief 'affirmatively require[s] the nonmovant to act in a particular way, and as a result . . . place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction.'" *Schrier*, 427 F.3d at 1261 (internal citations omitted) (where movant was requesting reinstatement to his former position at the University of Colorado, the court characterized the injunction as mandatory). To determine whether an injunction is mandatory or prohibitory, courts "look at the

substance of the injunction and compare it to the status quo ante—i.e., the last uncontested period preceding the injunction." *Evans v. Fogarty*, 44 F. App'x 924, 928 (10th Cir. 2002) (unpublished) (internal quotations and citation omitted). The stay issued by the district court simply preserves the Agencies' practice of making jurisdictional determinations based on the rule that was in effect prior to the 2020 Rule and the 2008 Guidance during the pendency of this case, thus maintaining the status quo, and does not require the Agencies to perform any affirmative act. The injunctive relief is not mandatory in nature, and there is no basis to engage in any heightened scrutiny of the preliminary injunction.

This Court reviews orders granting a preliminary injunction for an abuse of discretion. *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1140 (10th Cir. 2017). Under this standard, "review of the district court's exercise of discretion is narrow, and the merits . . . may be considered on appeal only insofar as they bear on the issue of judicial discretion." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007) (internal quotations and citations omitted). "An abuse of discretion occurs when a decision is premised on an erroneous

conclusion of law or where there is no rational basis in the evidence for the ruling." *First W. Capital Mgmt. Co.*, 874 F.3d at 1140 (internal quotations and citation omitted).

The Court reviews factual findings for clear error and conclusions of law de novo. *Wellington v. Daza*, 795 F. App'x. 605, 608 (10th Cir. 2020) (unpublished); *see also Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016); *N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, 854 F.3d 1236, 1245 (10th Cir. 2017). In reviewing the district court's factual findings, the Court "give[s] due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence" and "[does] not challenge that evaluation unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting *U.S. v. Robinson*, 39 F.3d 1115, 1116 (10th Cir. 1994)).

II. The district court correctly determined that Colorado established a likelihood of success on the merits.

The district court held that Colorado is likely to succeed on the merits of its claim that the 2020 Rule is inconsistent with the Clean Water Act. This ruling was not an abuse of the court's discretion. The deference given to agencies to use their expertise to define ambiguous terms does not permit agencies to contradict the governing statutes and adopt interpretations that the Supreme Court has rejected. Nor does that deference allow agencies to conduct rulemaking in violation of the Administrative Procedure Act or the National Environmental Policy Act as explained in Colorado's other claims, which Colorado briefed but, because the district court found sufficient basis to enjoin the Rule under the Clean Water Act, the district court did not discuss. Both the law and the record support the district court's determination that Colorado has established sufficient likelihood of success on the merits of at least one of its claims.

A. The 2020 Rule is not a reasonable exercise of agency discretion.

The Agencies and Intervenors contend that the district court abused its discretion in holding that the definition of "waters of the United States" in the 2020 Rule is inconsistent with the purpose and structure of the Clean Water Act as interpreted by the United States Supreme Court. Citing *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"), they argue that the Agencies may adopt a new regulatory definition of "waters of the United States" and that prior court decisions, particularly a decision as fractured as *Rapanos*, do not limit the Agencies' authority. Colorado argues, and the district court held, that the 2020 Rule is inconsistent with the Clean Water Act's purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" as explained by a controlling majority of the Supreme Court in *Rapanos*.

To determine what the terms in the Clean Water Act mean, the Supreme Court recently looked to the text, legislative purpose, statutory structure, legislative history, and longstanding regulatory

practice. *See County of Maui v. Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1470-73 (2020). An examination of these factors, particularly the Supreme Court's rejection of the 2020 Rule's interpretation of "waters of the United States," demonstrates that the 2020 Rule is unlawful as not in accordance with the law.

1. The text of the Clean Water Act, as interpreted by *Rapanos*, forecloses the 2020 Rule.

The Agencies' new definition of "waters of the United States" is unreasonably narrow; in short, it ignores the language of the Clean Water Act and the Supreme Court's controlling interpretation of the statute. The Agencies and Business Intervenors contend that the Agencies are entitled to broad latitude in interpreting the phrase "waters of the United States" because the Clean Water Act does not define it. But their argument overstates the scope of agency discretion. Under the second step of the *Chevron* analysis and *Brand X*, the question is whether the Agencies' interpretation is reasonable. *Chevron*, 467 U.S. at 843; *Brand X*, 545 U.S. at 980. In the view of five justices in *Rapanos*, it is not.

Rapanos addressed the question of whether the Clean Water Act's protections covered wetlands that "are not adjacent to waters that are navigable in fact." 547 U.S. at 759 (Kennedy, J., concurring in the judgment). No opinion garnered a majority of the Court. Justice Scalia, joined by three other justices, adopted a narrow definition, stating that "waters of the United States" covers only waters with "a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water." *Id*. at 739, 742.

Five Justices rejected Justice Scalia's approach and found that "waters of the United States" covered a much broader array of waters. *Id*. at 759-86 (Kennedy, J. concurring in the judgment), 786-812 (Stevens, J., joined by Souter, Breyer, and Ginsburg, JJ., dissenting). Four justices would have upheld the Corps' broad definition which included "wetlands adjacent to tributaries of traditionally navigable waters." *Id.* at 787. Justice Kennedy would have somewhat narrowed the Corps' definition, limiting "waters of the United States" to waters that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. at 759 (quoting

SWANCC, 531 U.S. at 167, 172). But both 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, regardless of whether they have a continuous surface connection. *See id.* at 773-75 (Kennedy, J., concurring in the judgment) (rejecting the plurality's requirement of a continuous surface connection); 807-08 (Stevens, J., dissenting) (noting that jurisdiction extends to adjacent wetlands because of the "significant nexus" between the wetlands and navigable waters.)

The Agencies' observation that *Rapanos* did not issue a single controlling opinion leaving no room for agency discretion, *see Brand X*, 545 U.S. at 982, does not resolve the question. A majority of the Justices in *Rapanos* found that the plurality's narrow construction of "waters of the United States" was inconsistent with the Act's text, structure, and purpose. *See Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986) (noting that the agreement of five justices, including dissenters, on an issue "carr[ies] the force of law"); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (discussing the impact of a

fractured Supreme Court decision on the *Colorado River* exceptional-circumstances test, observing that the controlling test was that adopted by the concurrence and four dissenting justices). To the extent *Brand X* applies at all to an agency's discretion to adopt regulations that are contrary to statutory interpretations by the U.S. Supreme Court (as opposed to lower courts), it certainly does not permit the Agencies to adopt a standard that lacked the support of a majority of justices and is inconsistent with the scientific record. The Agencies, therefore, cannot disregard the Kennedy concurrence—which provides the controlling rationale and rule of law—in favor of the rejected plurality analysis.

Contrary to the argument of Intervenor Defendants-Appellants the Sacketts, *Marks v. U.S.*, 430 U.S. 188 (1977), does not lead to the conclusion that the *Rapanos* plurality opinion is controlling. The *Marks* framework "produces a determinate holding only when one opinion is a logical subset of other, broader opinions." *U.S. v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (internal quotations and citation omitted). *Marks* does not apply when there is no single standard that constitutes the narrowest ground for a decision or when "one opinion

supporting the judgment does not fit entirely within a broader circle drawn by the others." *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1141 (10th Cir. 2012) (internal quotations and citation omitted). As noted by the Business Intervenors, that is the case here, where the two approaches have very little common ground and each rejects the other's view. *See U.S. v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *see also, e.g., U.S. v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011) (finding that the *Marks* framework is unworkable as applied to *Rapanos*); *U.S. v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (same); *U.S. v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (same). While the narrowest grounds of the five justices who concurred in the *Rapanos* judgment is that the Clean Water Act covers waters with a surface connection to navigable waters, this means only that a regulatory definition that excluded such waters would be unlawful. It does not mean, as the Sacketts suggest, that a broader definition is unlawful. No federal circuit court has applied *Marks* to find the plurality opinion controlling, or that it is a "logical subset" of the Kennedy concurrence.

Indeed, following *Rapanos*, until the promulgation of the 2020 Rule, the Agencies recognized that Justice Kennedy's analysis is controlling and consistently included significant nexus analyses in making jurisdictional determinations under the Act. *See, e.g.*, Aplee. Supp. App. Vol. 1 at 12-24. As the Solicitor General of the United States noted in a 2019 filing with the United States Supreme Court, "[e]very court of appeals to have considered the issue [since *Rapanos*] has determined that the [Clean Water Act] covers at least those waters that satisfy the test set forth in Justice Kennedy's concurrence." Brief for the United States in Opposition at 18-19, *U.S. v. Robertson*, 704 Fed.Appx. 705 (Sup. Ct. 2019); *see, e.g.*, *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288-89 (4th Cir. 2011); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011); *Donovan*, 661 F.3d at 183–84; *Bailey*, 571 F.3d at 798–800; *Johnson*, 467 F.3d at 66; *U.S. v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007); *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006). Other circuits have neither adopted the plurality's test from *Rapanos*, nor rejected Justice Kennedy's standard. *See, e.g., Cundiff*, 555 F.3d at 208 (finding

evidence to support jurisdiction under both Justice Kennedy's and the plurality's standards and reserving question of "which test controls in all future cases"); *U.S. v. Lucas*, 516 F.3d 316, 325–27 (5th Cir. 2008) (finding evidence presented at trial "supports all three of the *Rapanos* standards").[2]

Thus, under the test articulated in *Chevron* and *Brand X*, the Agencies' interpretation is not reasonable. Justice Kennedy's concurrence found that the plurality's bright-line test was "inconsistent with the Act's text, structure, and purpose." *Rapanos*, 547 U.S. at 776. Justice Stevens' four-justice opinion found that the test was "'without support in the language and purposes of the Act or in our cases interpreting it.'" *Id*. at 800 (quoting Kennedy concurrence). Although the Agencies and Business Intervenors point out that, in response to comments, the Agencies did add some language to the final Rule incorporating limited aspects of the "significant nexus" test, they did

[2] The Sacketts' assertion that the Supreme Court itself cites to the plurality opinion when seeking guidance from *Rapanos* is beside the point. Those cases, including *County of Maui*, 140 S. Ct. 1462, cite the case for other issues, such as the definition of "point source," not the plurality's test for defining waters of the United States.

not change the 2020 Rule's reliance on a surface connection to define waters of the United States—the hallmark of Justice Scalia's plurality decision, and an approach rejected by a majority of the Supreme Court.[3] Thus, the Agencies did not create a new rule that is consistent with the Act's text, but instead adopted a standard that the Supreme Court rejected as inconsistent with it. The district court's holding that Colorado is likely to succeed on the merits of this claim was therefore not an abuse of discretion.

[3] The Agencies point to two purported examples of the 2020 Rule's divergence from the *Rapanos* plurality's test: the inclusion of intermittent tributaries and certain wetlands separated from a jurisdictional water by only a natural feature. *See* Agencies' Opening Br. at 12-13, 32 n.6. However, both of these categories of waters are marked by a surface connection to traditional navigable waters as contemplated by the *Rapanos* plurality, which provides the cornerstone of the 2020 Rule, as the Agencies concede. *See* Agencies' Opening Br. at 12 (citing 85 Fed. Reg. at 22,252) ("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.'") (emphasis added).

2. The 2020 Rule is contrary to the Clean Water Act's purpose to protect the nation's waters.

The restoration and maintenance of the chemical, physical, and biological integrity of "the Nation's waters" depends on the protection of headwaters and headwater wetlands. *See* Aplee. Supp. App. Vol. 1 at 48-51; Aplt. App. at 60-62. By stripping federal protections away from headwaters and wetlands that meet the *Rapanos* significant nexus test, the 2020 Rule undermines the basic goal of the Clean Water Act.

The Agencies have abandoned the "significant nexus" test from *Rapanos* in favor of a categorical rule that shifts to Colorado the regulatory burden to protect a significant number of waters that may not have direct surface connections to traditional navigable waters, but which nonetheless have impacts on such waters. This attempt to severely narrow the scope of the Clean Water Act conflicts with Congress' intent to create a federal-state partnership in which both the Agencies and states would work together to protect the "waters of the United States." *See Int'l Paper Co. v. Ouellette*, 479 U.S 481, 489-490 (1987) (observing that the Clean Water Act "establishes a regulatory

'partnership' between the Federal Government and the source State"). By removing significant swaths of waters, including waters that have a significant nexus to downstream waters, from the reach of the Clean Water Act, the 2020 Rule weakens this federal-state partnership, a core purpose of the Act.

3. The 2020 Rule undermines the Clean Water Act's structure of cooperative federalism.

The Clean Water Act's structure supports overlapping state and federal jurisdiction over waters, not the narrow and separate approach of the 2020 Rule. The Act is one of the core examples of cooperative federalism, a regulatory structure where federal and state regulatory regimes complement each other, requiring a baseline of protection but giving states flexibility on how to meet that baseline. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev 663, 665 (2001).

The federal environmental laws, including the Clean Water Act, call for a model of cooperative federalism where EPA plays a critical role in maintaining a level regulatory playing field among the states in helping to define common national goals while providing support to

further those programmatic goals. The Clean Water Act provides a framework for the federal government to develop policy while relying on states to "maintain[] the authority to control their own resources in partnership with enforcement and financial support from the federal government." B. Zolitsch, *Cooperative Federalism: Finding the Right Balance between Federal and State Roles in Implementing the Clean Water Act*," Wetland News, Vol. 29 No. 3, May/June 2019, at 3.[4]

Consider, for example, the administration of the Section 402 National Pollutant Discharge Permit System program. Under that program, EPA provides annual funding to delegated states in the form of grants under Section 106 of the Act, which is in turn used by the states for day-to-day administration and enforcement of discharge permits that are issued to protect the classified uses of waterbodies. *See* 33 U.S.C. § 1256. State administration of Section 402 is pervasive across the country in that all but three states and the District of Columbia administer their own delegated programs under Section 402

[4] Available at https://www.aswm.org/wetland_news/061819.pdf.

with EPA oversight.[5] Section 101(b) of the Act simply recognizes the important role that states play in this cooperative regulatory scheme and that Congress did not intend to preempt the entire field.

The Agencies rely on Section 101(b) of the Act to claim that federalism supports the 2020 Rule. Agencies' Opening Br. at 47. But the Act's statement that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation and enhancement) of land and water resources," 33 U.S.C. § 1251(b), does not support the narrow scope of the 2020 Rule. Rather, as discussed above, the structure of the Clean Water Act maintains these responsibilities and rights of States through a system of cooperative federalism. And there is nothing at all in the structure of the Act to support the "theory of competitive federalism" advanced by the Agencies. Agencies' Opening Br. at 47.

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[5] *See* https://www.epa.gov/sites/production/files/2020-04/documents/npdes_authorized_states_2020_map.pdf.

4. The legislative history contradicts the 2020 Rule

In *County of Maui*, the Court reviewed the legislative history to determine the scope of the Clean Water Act's coverage over point source pollution. 140 S. Ct. at 1471. Here, the legislative history indicates that Congress intended a broad interpretation of "waters of the United States" that would extend as far as was permissible under the Commerce Clause. *See* 118 Cong.Rec. 33692, 33699 (1972) (statement of Senator Muskie) (stating that the "Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which may have been made or may be made for administrative purposes"); 118 Cong.Rec. 33756–57 (1972) (statement of Rep. Dingell) (noting that the intent of term "navigable waters" was intended to mean all of the waters of the United States in a geographical sense, not limited to waters navigable in a technical sense). The purpose of the 1972 Amendments was to expand, not narrow federal protection of water quality. *See* S. Rep. No. 92-414, 92d Cong. 1st Sess. 7 (1972) (prior

mechanisms for abating water pollution "ha[d] been inadequate in every vital respect.").

5. The longstanding practice of the Agencies runs counter to the 2020 Rule.

Finally, the narrow 2020 Rule contravenes "longstanding regulatory practice" of the agencies. *County of Maui*, 140 S. Ct at 1472. The Agencies have never claimed such a narrow definition of "waters of the United States" in administering the Act as they now do in the 2020 Rule. And, as discussed below, Colorado implemented its regulatory regime in reliance on the Agencies' prior regulatory practice. *See infra* Section II(B)(1)(a).

This longstanding practice undercuts the Agencies' claim that the 2020 Rule "resolved decades of uncertainty about the federal reach of the Clean Water Act." Agencies' Opening Br. at 1. The Agencies have administered the Act using a much broader definition of "waters of the United States" for years and this history, "by showing that [the prior interpretation] of the statute is administratively workable, offers some additional support" for Congressional intent. *County of Maui*, 140 S. Ct. at 1473.

Much of the prior uncertainty about the reach of the Clean Water Act arose from judicial decisions, not the practice of the Agencies. And to the extent these judicial decisions impact the Agencies' practices, they uniformly did not narrow the reach of the Act beyond Justice Kennedy's *Rapanos* opinion. *See* discussion, *supra* Section II(A)(1).

B. The 2020 Rule was also promulgated in violation of the APA and NEPA.

This Court can affirm the stay on any grounds supported by the record. *United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, 633 F.3d 951, 958 (10th Cir. 2011). Although the district court focused only on the 2020 Rule's inconsistency with the structure and purpose of the Clean Water Act, Colorado also explained that the adoption of the 2020 Rule violated the Administrative Procedure Act and the National Environmental Policy Act. These other claims provide additional grounds to find a likelihood of success on the merits that do not require parsing the *Rapanos* opinions.

Agencies are not free to reverse national rules based on "political winds and currents" without "measure[d] deliberation" and a "fair grounding in statutory text and evidence." *N.C. Growers' Ass'n, Inc. v.*

United Farm Workers, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). Agencies may change existing policies, but in doing so must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Brand X*, 545 U.S. at 981–82). To allow otherwise would leave regulated entities and states to the whim of bureaucracy with no ability to plan. And *County of Maui* recognized that "many years" of "longstanding regulatory practice" can provide "additional support" when interpreting the Clean Water Act. 140 S. Ct. at 1472-73.

While an agency need not show that a new rule is "better" than the rule it replaced, it must demonstrate that "it is permissible under the statute, that there are good reasons for it, and that the agency *believes it* to be better, which the conscious change of course adequately indicates." *Fed. Commc'ns. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original). Further, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy," "or when

its prior policy has engendered serious reliance interests that must be taken into account." *Id.* (internal citation omitted). Any "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, 545 U.S. at 981; *see, e.g.*, *Renewable Fuels Ass'n. v. U.S. Envtl. Prot. Agency*, 948 F.3d 1206 (10th Cir. 2020) (finding that EPA action ignoring or failing to provide reasons for deviating from prior studies in making decisions was arbitrary and capricious).

1. The Agencies have not provided the factual or legal support necessary to justify their dramatic change of policy.

While the Agencies point to the "more than 1,500 pages" of supporting documentation to attempt to demonstrate that they have acted in accordance with the APA, Agencies' Opening Br. at 15, a large page count does not, without more, mean that the Agencies have fulfilled their obligation under the APA to consider the correct factors and support the 2020 Rule with valid scientific findings. When a new policy is based on factual findings contradicting those that supported the prior policy, "the agency must provide a reasoned explanation 'for

disregarding facts and circumstances that underlay or were engendered by the prior policy.'" *Renewable Fuels Ass'n*, 948 F.3d at 1255 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515-16).

a. The Agencies failed to address reliance interests in the significant nexus test.

The 2020 Rule ignores the reliance interest created by the Agencies' long-standing implementation of the significant nexus test. An agency that changes its long-standing position is required to consider and take into account significant reliance interests that the agency's prior position has created. *See Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (finding agency action violated APA because it did not account for reliance interests). Specifically, the agency must acknowledge the serious reliance interests of those impacted by the change, evaluate these interests, and explain why it felt appropriate to change its position. An agency that fails to even mention the fact that its prior policy had engendered reliance has acted arbitrarily and capriciously. *See id.* at 1913-15 (holding that DHS's failure to assess reliance interests in discontinuing the Deferred Action for Childhood Arrivals policy was arbitrary and capricious).

Colorado has relied on the Agencies' long-standing position articulated in regulations adopted in the 1970s and 1980s and the 2008 Guidance issued to interpret those rules and has structured its water quality pollution control programs accordingly. As discussed below, Colorado, like most states, relies on the Section 404 permitting program administered by the Corps to regulate dredge and fill activity and protect critical streams and wetlands. Aplt. App. at 81. The 2020 Rule abandons the significant nexus standard and the prior Agencies' position without addressing the 2020 Rule's impacts on states like Colorado. Indeed, Colorado relied on the comprehensive federal regulatory regime embodied in this standard and would be greatly harmed by a changed standard.

The Agencies do not even acknowledge that their historic use of the "significant nexus" test has created a legitimate reliance interest, instead arguing below that replacing the case-specific analysis with a categorical rule provides "better clarity" and that Colorado had long been on notice that the Agencies would be rewriting the regulations. *See* Aplee. Supp. App. Vol. 4 at 66-67. But a general statement in 2008 that

the Agencies were considering rewriting the regulations does not relieve them from the reliance interests generated over a decade of implementation. *See* Aplt. App. at 81. Given the Agencies' statement in the 2008 Guidance that the significant nexus standard in Justice Kennedy's opinion in *Rapanos* was controlling, it was reasonable for Colorado to rely on the continuation of a regulatory regime consistent with this standard. This is the standard Colorado sought to reinstate when it challenged the 2015 Rule, the standard it argued for in comments on the proposed rule, and the status quo it seeks to maintain in this case. Moreover, because the 2020 Rule lowers the level of protection below that ever adopted under the Clean Water Act and violates controlling Supreme Court precedent, it is implausible to argue that Colorado was on notice of such a possibility.

b. The Agencies failed to support their departure from the significant nexus test with sound science.

The Agencies' explanation for the 2020 Rule's radical change to the scope of federal Clean Water Act jurisdiction is inadequate. The 2020 Rule reverses decades of agency policy, excluding ephemeral

streams from protection regardless of their effects on downstream waters and eliminating protections for waters previously determined on a case-by-case basis to have a significant nexus to traditional navigable waters. The Agencies explicitly reject science in establishing the 2020 Rule, 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 [Clean Water Act]." *The Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22,250, 22,261 (April 21, 2020).

This rejection of science is evident in the 2020 Rule's definition of tributary, which includes waters that flow continuously during certain times of a typical year, but categorically excludes ephemeral waters, despite the Agencies' statements in the record showing that ephemeral waters have significant downstream impacts on navigable waters. *See* Aplee. Supp. App. Vol. 3 at 81 (quoting EPA SAB findings); *see also* Aplee. Supp. App. Vol. 1 at 51 ("[T]he aggregate contribution of [a specific ephemeral stream] over multiple years, or by all ephemeral

streams draining [a] watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters."), 53 ("[T]he evidence for connectivity and downstream effects of ephemeral streams was strong and compelling.").

The disregard of science in adopting the 2020 Rule is in marked contrast to the Agencies' prior, long-standing reliance on science to support their jurisdictional determinations. The Connectivity Report, prepared by the Agencies to support the 2015 Rule, included detailed factual findings based on a review of more than 1,200 peer-reviewed publications. Its purpose was "to summarize current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters." Aplee. Supp. App. Vol. 1 at 47. The Connectivity Report concluded a wetland need not abut a jurisdictional water or have a direct surface water connection to it for the wetland to have a significant nexus to the jurisdictional water. Aplee. Supp. App. Vol. 1 at 241-43.

While the Agencies did consider some aspects of the Connectivity Report in developing the 2020 Rule and potential implementation tools, they disregarded the conclusions of EPA's own Science Advisory Board ("SAB") in adopting the Rule. Moreover, the Agencies took this action without developing or citing any new scientific evidence. The SAB's commentary on the proposed rule makes this point plainly, stating that the revised definition of "waters of the United States" "decreases protection for our Nation's waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining 'the chemical, physical and biological integrity' of these waters." Aplee. Supp. App. Vol. 4 at 3.[6] The SAB articulated several findings to support this conclusion:

- The 2020 Rule "does not fully incorporate the body of science on connectivity of waters reviewed previously by the SAB and found to represent a scientific justification for including functional connectivity in rule making" – the Connectivity Report. That report "illustrates that a systems approach is imperative when defining the connectivity of waters, and

[6] The SAB's October 2019 draft commentary, which was part of the administrative record, was submitted largely unchanged as a final commentary after the final 2020 Rule was issued. Citations herein are to the final commentary because the draft commentary states it is not to be cited.

> that functional relationships must be the basis of determining adjacency. The [2020] Rule offers no comparable body of peer reviewed evidence, and no scientific justification for disregarding the connectivity of waters accepted by current hydrological science."
>
> - "There is no scientific justification for excluding connected ground water from WOTUS if spring-fed creeks are considered to be jurisdictional. The [2020] Rule neglects the connectivity of ground water to wetlands and adjacent major bodies of water with no acknowledgement of watershed systems and processes discussed in [the Connectivity Report]."
>
> - The exclusion from jurisdiction of adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters "is inconsistent with previous SAB review which justified scientifically the inclusion of these wetlands (U.S. EPA Science Advisory Board 2014). No new body of peer reviewed scientific evidence has been presented to support an alternative conclusion."
>
> - The 2020 Rule "does not present a scientific basis for adopting a surface water based definition of Waters of the U.S. The proposed definition is inconsistent with the body of science previously reviewed by the SAB, while no new science has been presented. Thus, the approach neither rests upon science, nor provides long term clarity."

Aplee. Supp. App. Vol. 4 at 2-3.

In the face of these compelling concerns, the 2020 Rule rejects (1) the undisputed significant science developed in connection with previous rulemaking; (2) the analyses and evidence in the Connectivity

Report; and (3) the recommendations of the SAB. *See* Aplt. App. at 57-58. In so doing, the Agencies fail to offer any new scientific evidence to contradict their previous findings that tributaries and adjacent wetlands can have a significant nexus to downstream jurisdictional waters even without a direct surface water connection.

In short, the Agencies failed to establish that the scientific backing for the "significant nexus" test had changed with any updated scientific literature or provide any analysis of how the change would impact states like Colorado. *See Renewable Fuels Ass'n*, 948 F.3d at 1257 (finding that EPA's failure to provide reasons for deviating from prior studies when making Clean Air Act exemption determinations was arbitrary and capricious). The Agencies assert that it is sufficient that they "considered" the scientific evidence. In this case, however, it is more accurate to state that they ignored and failed to engage with the scientific evidence, effectively rejecting science altogether as a relevant basis for their decision.

c. The Agencies relied on improper factors to justify the policy change, including a flawed economic analysis.

A regulation is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983). An agency fails to consider an important aspect of the problem when it fails to address evidence that runs counter to the agency's decision. *Genuine Parts Co. v. Envtl. Prot. Agency*, 890 F.3d 304, 308 (D.C. Cir. 2018). In a Clean Water Act rulemaking, protection of water quality is more than "an important aspect of the problem," it is the very objective of the Clean Water Act. *See, e.g.*, 33 U.S.C. § 1251(a) (objective to restore and maintain national water integrity); § 1251(a)(2) (goal to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water"). In promulgating Clean Water Act regulations, the Agencies must consider and weigh the water quality impacts of their rules. *Nat'l*

Cotton Council of Am. v. U.S. Envtl. Prot. Agency, 553 F.3d 927, 939 (6th Cir. 2009) (EPA cannot "ignore[] the directive given to it by Congress in the Clean Water Act, which is to protect water quality"); *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 158 (3d Cir. 2004) (a rule is arbitrary and capricious if it "frustrates the regulatory goal" of the agency); *Office of Commc'n of the United Church of Christ v. Fed. Commc'n Comm'n*, 779 F.2d 702, 707 (D.C. Cir. 1985) ("Rational decisionmaking also dictates that the agency simply cannot employ means that actually undercut its purported goals.").

The Agencies' only analysis of the 2020 Rule's impacts on water quality and potential benefits is set forth in "supporting analyses" described in two reports: *Economic Analysis for the Proposed Revised Definition of "Waters of the United States"* (Dec. 14, 2018) (Aplee. Supp. App. Vol. 2 at 163-300 and Aplee. Supp. App. Vol. 3 at 1-177); and *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* (Jan. 23, 2020) (Aplee. Supp. App. Vol. 3 at 179-294). But the Agencies asserted that they did not rely on those documents as a basis for the

final Rule, 85 Fed. Reg. at 22,335, so the documents cannot stand in for an adequate assessment of the Rule's impacts. And in any event, both of these documents rely on fundamentally flawed assumptions and fail to satisfy the Agencies' obligation to consider the water quality impacts of the 2020 Rule.

The Clean Water Act does not require the Agencies to conduct a cost-benefit analysis when promulgating water quality rules. However, if federal agencies rely on an economic analysis to justify a rule, "a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see City of Portland v. Envtl. Prot. Agency*, 507 F.3d 706, 713 (D.C.Cir. 2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses"). Although the Agencies claim they did not rely on the economic analysis, they point to the Economic Analysis and Resource and Programmatic Assessment to "outline the agencies' assessment of the potential effects of the revised definition on types of aquatic resources (e.g., wetlands, tributaries, impoundments) across the country and on [Clean Water

Act] programs." 85 Fed. Reg. at 22,333. This assessment is synonymous with an economic analysis.

In adopting the 2020 Rule, the Agencies evaluated state laws defining and regulating state waters. *See* Aplee. Supp. App. Vol. 3 at 232-239. The 2020 Rule, for example, assumes that states will protect waters removed from federal jurisdiction, but does not give the appropriate time for states to implement such protections in the wake of the dramatic and sudden reduction in federal protections. As discussed below, Colorado cannot simply step in and begin administering a non-existent dredge and fill permit program as soon as the 2020 Rule becomes effective. Indeed, the Agencies admit that they were unable to "predict what changes [in state regulations] might result from the final rule." Aplee. Supp. App. Vol. 2 at 221.

The Clean Water Act created a comprehensive approach to water quality protection that depends on strong federal baseline requirements for states to follow. *See Riverside Bayview Homes*, 474 U.S. at 133 (noting that Congress granted "broad federal authority to control pollution"). While the states play an important role in implementing

permit programs and retain sovereign authority over the allocation of water quantities within their jurisdictions, the Clean Water Act places the overarching responsibility on the Agencies to set the agenda for water quality protection nationwide. In adopting the 2020 Rule, the Agencies relied on factors that Congress did not intend the Agencies to consider by incorporating an expectation that states would be able to fill in the gaps in clean water protection.

The Agencies evaluated the states' responses to a contraction of federal jurisdiction as part of an effort to determine the avoided costs and foregone water quality and wetland benefits of the Rule. Aplee. Supp. App. Vol. 2 at 230-31. But in so doing, the Agencies relied on the speculative assumption that states will assume jurisdiction of waters no longer covered by the federal Act. This assumption is contrary to EPA guidelines stating that only regulations already promulgated, imminent, or reasonably certain to be promulgated are appropriate to consider in relevant comparative analyses. *See* National Center for Environmental Economics, Office of Policy, U.S. Environmental

Protection Agency, *Guidelines for Preparing Economic Analyses* (Dec. 17, 2010, May 2014 update), 5-13.[7]

The Agencies' Economic Analysis also makes incorrect assumptions about Colorado. For example, it states that "[i]n states that regulate waters, including wetlands, more broadly than the [Clean Water Act], the agencies would expect little to no direct effect on costs or benefits." Aplee. Supp. App. Vol. 2 at 225. Colorado regulates waters, including wetlands, more broadly than the federal Act in the context of Section 402 discharge permits. For Colorado, however, the 2020 Rule will result in significant costs and administrative challenges, particularly due to the Section 404 permitting gap. Aplt. App. at 85-87. The Economic Analysis ignores this issue (discussed *infra* at Section III(C)), concluding that Colorado is unlikely to increase state regulatory practices to address changes in federal jurisdiction. *See* Aplee. Supp. App. Vol. 2 at 226-27. This conclusion disregards Colorado's explanation in its comments that it would need to create a new Section 404-type

[7] Available at https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf.

program to permit filling of the waters that would be excluded from federal jurisdiction under the then proposed new rule. Aplee. Supp. App. Vol. 2 at 142-43. In short, the Agencies failed to consider Colorado's comments or explain why they knew better about the actual consequences to Colorado from the new rule than Colorado.

The Agencies' reliance on the speculative prediction that state regulation would fulfill the fundamental federal obligation to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), lacks an evidentiary basis or, indeed, any rational basis. This conclusion is, therefore, arbitrary and capricious.

2. The 2020 Rule was promulgated without sufficient opportunity to comment on how the concept of "typical year" will be used to determine whether certain waters are jurisdictional

The 2020 Rule relies on a vague and undefined concept—a "typical year"—to determine which streams fall within the Clean Water Act's reach. The Agencies recognized the importance of the definition of "typical year," but have not provided the information necessary for

Colorado to determine what test applies to determine what a "typical year" means.

Before an agency may finalize a rule, it must provide the public with a meaningful opportunity to participate in the rulemaking process, including an opportunity to submit comments on the proposed rule and the information supporting the rule "through the submission of written data, views, or arguments." 5 U.S.C. § 553(c). The purpose of this requirement is to give the affected public an opportunity to provide meaningfully informed comment on an agency's proposal. *See Home Box Office, Inc. v. Fed. Commc'ns Comm'n*, 567 F.2d 9, 35-36 (D.C.Cir. 1977); *see also Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (holding an agency's notice must "describe the range of alternatives being considered with reasonable specificity" so that interested persons can focus their comments in a meaningful way (internal citation omitted)). Where a proposed regulation eliminates protections that were previously adopted by an agency, notice and comment also "ensures that … [the] agency will not undo all that it accomplished through its rulemaking without giving all parties an

opportunity to comment on the wisdom of [the removal of protections]." *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983). The APA's notice and comment requirement is not satisfied if an agency "fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Texas v. U.S. Envtl. Prot. Agency*, 389 F. Supp. 3d 497, 505 (S.D. Tex. 2019) (quoting *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007)).

The Agencies failed to include sufficiently specific tools or resources in the proposed regulation to determine application of the "typical year" concept to streams and wetlands in Colorado. This is problematic because what constitutes a "typical year" is critical to the federal jurisdictional status of thousands of Colorado waterbodies. Under the new definitions the jurisdictional status of intermittent waters depends on whether they contribute surface flow to a traditional navigable water in a typical year. But what constitutes a "typical year"

in practice is far from clear from either the draft or final 2020 Rule. That lack of clarity made it impossible for Colorado to provide meaningful comments on this critical issue.

The 2020 Rule defines a "typical year" to mean a year within the normal range of precipitation over a rolling thirty-year period for a particular geographic area, not including times of drought or extreme flooding. 33 C.F.R. § 328.3(c)(13); 40 C.F.R. § 120.2(3)(xiii). This definition fails to sufficiently explain how the Agencies will evaluate what constitutes a "typical year." For instance, presumably an intermittent stream that usually has continuous seasonal flow in response to melting snowpack would be considered jurisdictional even if it lacks continuous flow after a dry winter. But this is not clear in the Rule. Moreover, much of this data is not available for Colorado streams that flow only part of the year. Aplee. Supp. App. Vol. 4 at 16.

During one of the State outreach meetings, the Agencies stated that they were in the process of developing, but had not yet finalized, a tool to aggregate National Oceanic and Atmospheric Administration data for watersheds in order to determine whether a year is "typical."

See Aplee. Supp. App. Vol. 2 at 155; Meeting Summary of March 26, 2019 State Co-Regulators Forum in Albuquerque, New Mexico, EPA-HQ-OW-2018-0149-11581,[8] at 3. Until this tool was developed, Colorado could not determine what would constitute a "typical" year, and accordingly, had no mechanism to accurately determine how many of the state's stream segments would fall under the "intermittent" tributary category. Aplee. Supp. App. Vol. 2 at 155. Although the Agencies did identify a number of procedures for determining intermittent flow, their disjointed list of "complementary data sources and tools" provides no direction or examples regarding how these sources are to be used. *See* EPA, *Navigable Waters Protection Rule Fact Sheet*, at 4.[9] Similarly, the Agencies have provided no direction regarding what degrees of uncertainty or model error will be tolerated or what constitutes representative data stations. The "typical year" concept creates particular problems in Colorado because its streams are

[8] Available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11581.

[9] Available at https://www.epa.gov/sites/production/files/2020-01/documents/nwpr_fact_sheet_-_typical_year.pdf.

greatly affected by wide-ranging climatological conditions and influenced by snowmelt and groundwater. Aplee. Supp. App. Vol. 4 at 16-17.

The Agencies did not provide direction regarding the essential data sources and inputs needed to meaningfully comment on the scope and the environmental impacts of the Agencies' proposal. The Agencies' failure to convey this essential technical information to Colorado and other members of the public during the rulemaking process violates the APA.

3. The Corps failed to comply with the requirements of NEPA

Colorado's claim that the Corps violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., in promulgating the 2020 Rule provides another basis to find that it will succeed on the merits and uphold the district court's stay. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The fundamental purposes of the statute are to ensure that "environmental information is available to public officials and citizens before decisions are made and before actions are taken," and that

"public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* §§ 1500.1(b)-(c).

NEPA requires federal agencies to prepare a detailed Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An agency may prepare an initial Environmental Assessment to determine whether a federal action qualifies as "major" and therefore must be supported by an Environmental Impact Statement. *See Greater Yellowstone Coal. v Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004) (citing 40 C.F.R. § 1501.4(b)). In the alternative, the Environmental Assessment may conclude that the action qualifies for a Finding of No Significant Impact if the proposed action will have no significant impact on the human environment. 40 C.F.R. §§ 1508.9, 1508.13.

In "certain narrow instances," an agency does not have to prepare an Environmental Assessment or an Environmental Impact Statement if the action to be taken falls under a categorical exclusion. *See Coal. of*

Concerned Citizens to Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transp., 843 F.3d 886, 902 (10th Cir. 2016) (citing *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006). Agencies may invoke a categorial exclusion, however, only for "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of [NEPA] regulations." 40 C.F.R. § 1508.4; *see also id*. § 1507.3(b)(2)(ii).

Promulgation of the 2020 Rule is a major federal action significantly affecting the quality of the human environment within the meaning of NEPA, requiring an analysis of the Rule's impacts. *See* 40 C.F.R. § 1508.18 (defining "major Federal action" as "actions with effects that may be major and which are potentially subject to Federal control and responsibility," including "[a]doption of official policy, such as rules, regulations, and interpretations"). Although actions of the EPA Administrator under the Clean Water Act are exempt from NEPA, the plain language of the exemption does not apply to the Corps. *See* 33

U.S.C. § 1371(c)(1).[10] And when the Corps issues Section 404 permits under the authority of the Clean Water Act, those decisions are subject to NEPA requirements as "major Federal action[] significantly affecting the quality of the human environment." *Greater Yellowstone Coal.*, 359 F.3d at 1274 (quoting 42 U.S.C. § 4332(C)).

Tellingly, the Corps performed a NEPA analysis for the 2015 Rule, ultimately issuing a Finding of No Significant Impact based on a determination that the 2015 Rule would result in increased Clean Water Act jurisdiction. 80 Fed. Reg. 37,054, 37,104 (June 29, 2015). Unlike the 2015 Rule, the 2020 Rule here will reduce federal jurisdiction, which will likely result in significant adverse impacts. The Corps has promulgated the 2020 Rule without the required NEPA analysis that would have provided crucial information about the

[10] One case in the Ninth Circuit has applied the exemption to find that an operational agreement between the Corps and EPA under the Clean Water Act was not subject to NEPA review. *Municipality of Anchorage v. U.S.*, 980 F.2d 1320, 1328-29 (9th Cir. 1992). That case is both not binding on this Court and distinguishable, as it did not involve a rulemaking.

potential environmental impacts of the new approach to determining the scope of Clean Water Act federal regulatory jurisdiction.

III. The record supports the district court's determination that Colorado established the required irreparable harm.

The district court did not abuse its discretion in finding irreparable injury to Colorado associated with an increased enforcement burden under the narrowed definition of waters of the United States. A district court does not abuse its discretion on the element of irreparable injury unless there is "no rational basis in the evidence for the ruling." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (quotations and citation omitted). Factual findings are reviewed for clear error. *Heideman*, 348 F.3d at 1188. This Court must defer to the district court's findings with respect to harm, unless the district court's decision "finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record." *Id.* (quoting *U.S. v. Robinson*, 39 F.3d 1115, 1116 (10th Cir. 1994).

The record contains ample evidence to support Colorado's claim of immediate, irreparable harm stemming from the increased compliance and enforcement burden it would bear under the 2020 Rule. The Agencies do not dispute that the Rule leaves almost half of Colorado's wetlands and ephemeral/intermittent streams unprotected, and thus open to degradation and destruction by development. And, as the district court correctly acknowledged, choosing 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." Aplt. App. at 108. Colorado also provided evidence of likely environmental harms stemming from the substantial narrowing of federal jurisdiction where enforcement is not successful, which provides an additional basis to uphold the district court's stay order.

A. Colorado specifically alleged and supported an "immediate compliance and enforcement burden" as a legally cognizable irreparable harm.

In addressing the harm to Colorado from its increased enforcement burden under the 2020 Rule, the district court discussed both the "irreparable harm" factor necessary for granting a preliminary injunction and the "cognizable injury" showing necessary to establish Article III standing. The district court ultimately correctly determined that Colorado had satisfied both Article III standing and the irreparable harm requirement of the preliminary injunction test, *see* Aplt. App. at 110, but also noted Colorado did not cite case law regarding what the court termed the State's "diversion of resources" argument, finding that it was "barely" preserved. *Id*. at 107-08, n.6.[11] The Agencies seize this

[11] "Cognizable" harms, for the purpose showing irreparable harm in the context of a preliminary injunction motion, are a subset of injuries that can establish Article III standing. *See Awad*, 670 F.3d at 1131 (relying in part on the reasoning from the court's standing analysis to find harm for a preliminary injunction motion); *see also Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2nd Cir. 2005) ("At the preliminary injunction stage, the only cognizable harms are those that cannot be remedied at the end of trial if the movant were to prevail."). Colorado demonstrated that the 2020 Rule would require a diversion of resources

opportunity to assert that Colorado did not make the "enforcement harm" argument credited by the district court, contending that Colorado did not satisfy its evidentiary burden on this issue. Agencies' Opening Br. at 36-38. This argument ignores substantial factual content in the declaration of Nicole Rowan, the Clean Water Program Manager for the Water Quality Control Division, which outlines in detail the harm associated with Colorado's increased enforcement burden.

Ms. Rowan's declaration states that the 2020 Rule "will create an immediate compliance and enforcement burden in Colorado." Aplt. App. at 84. She goes on to explain, among other things, that (1) this new obligation will take effect immediately; (2) the Water Quality Control Division lacks the dedicated funding to undertake such enforcement; (3) Colorado will thus have to divert resources from other programs (to the

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to a new enforcement effort, which is a legally cognizable injury. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017). The district court properly found that this cognizable injury supported a finding of irreparable harm along with the finding that this injury was sufficiently likely to occur absent an injunction. Colorado preserved this issue by presenting evidence of imminent and irreparable harm related to its enforcement burden. *See* Aplt. App. at 107, n.6.

detriment of those programs); and (4) the estimated annual number of projects and enforcement actions would require Colorado to provide oversight. *Id.* at 84-85. Additional evidence to support Colorado's claim of irreparable harm related to dredge and fill enforcement is inherent in Ms. Rowan's discussion of the "404 permitting gap." *Id.* at 81-84. As the district court properly found, Colorado satisfied its evidentiary burden to allege facts to support irreparable economic harm related to an increased enforcement burden. The Agencies' attempt to argue otherwise is flatly contradicted by the record.

Similarly, the Agencies' assertion that Colorado failed to allege and support the immediacy of its injury must fail. The single case cited by the Agencies to support their timing argument stands for 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. *See Greater Yellowstone Coal. v. Flowers,* 321 F.3d 1250, 1260 (10th Cir. 2003). By contrast, Colorado alleged "an *immediate* compliance and enforcement burden" that would begin as soon as the 2020 Rule takes effect. *See* Aplt. App. at 84 (emphasis added).

Moreover, the Agencies' contention that Colorado's stated harms do not rise to the level of specificity needed for the timing of an injury is without merit. Agencies' Opening Br. at 39. This Court need only evaluate if the district court properly found that "[t]he injury [is] *likely* to occur before the district court rules on the merits." *N.M. Dep't of Game and Fish*, 854 F.3d at 1250 (citing *Greater Yellowstone Coal.*, 321 F.3d at 1260) (internal quotations omitted) (emphasis added). Courts do not require litigants to specify exactly when harm will occur, only that it is imminent and irreparable. *See, e.g.*, *Id.*, *Greater Yellowstone Coal.*, 321 F.3d at 1260; *Diné Citizens Against Ruining the Environment v. Jewell*, 2015 WL 4997207 at 48 (D.N.M. Aug. 14, 2015). Based on the evidence in the record, the district court found that Colorado's injury is not "hypothetical" (Aplt. App. at 109) and that the State's share of enforcement burden "is not at all minimal or speculative." *Id*. The district court's findings were supported by the record evidence and do not constitute an abuse of discretion.

Finally, the Agencies challenge the district court's methodology for assessing the likelihood of future enforcement actions by the State,

including the court's use of EPA's past enforcement activity to infer continuing violations and enforcement actions. The district court cited to evidence in the record—uncontested by the Agencies—that "EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations"[12] as demonstrating that "violations of Section 404 consistently happen, requiring enforcement action." *Id*. The court's finding that evidence of consistent dredge and fill violations and resulting enforcement supports the likelihood of continuing violations and enforcement is far from irrational and must

[12] The Agencies do not dispute these enforcement numbers. They argue, however, that the record does not contain sufficient evidence of the certainty of Colorado's harm to support a preliminary injunction because the State's claim relies on past EPA enforcement actions, and the State has no legal entitlement to such actions because enforcement is discretionary in nature. However, the numbers relied upon by the district court are evidence of historical practice that already takes into account past discretionary determinations made by EPA. The court properly looked to this information as evidence for its finding that "violations of Section 404 consistently happen, requiring enforcement action" and that "[a]t least some of the enforcement burden … will now fall in Colorado's lap." Aplt. App. at 109. Based on the record evidence, the district court found that dredge and fill violations consistently occur in Colorado and that EPA has chosen to enforce three to five of cases each year. It was entirely reasonable for the Court to conclude that the State would choose to pursue a similar number of enforcement actions going forward in order to protect the quality of its waterways.

therefore be upheld.[13] *Heideman*, 348 F.3d at 1188 (the district court's findings must be upheld unless they follow from "a plainly implausible, irrational, or erroneous reading of the record" (internal citation omitted).

B. Colorado should not have to forfeit environmental protection during this lawsuit because it has relied on a protective dredge and fill program under the Clean Water Act's cooperative federalism framework.

The Agencies assert that Colorado's harm should be disregarded as self-inflicted because the 404 permitting gap and its increased enforcement burden are the result of its own legislative and executive decisions on how to structure its dredge and fill program. Agencies' Opening Br. at 41-42. This argument is at odds with the well-established understanding of cooperative federalism that is a cornerstone of the Clean Water Act. *See Catskill Mountains Chapter of*

[13] The Agencies further contend that the stay ordered by the district court has the effect of requiring EPA enforcement to continue. This is not the effect of the Court's stay, which simply returns the scope of the Act's coverage in Colorado to the status quo (consistent with EPA's 2008 Guidance) while the legality of the 2020 Rule is being litigated.

Trout Unlimited v. EPA, 846 F.3d 492, 502-03 (2d Cir. 2017); *supra* Section II(A)(3). The Agencies claim that the 2020 Rule honors and promotes cooperative federalism principles by allowing each state the opportunity to tailor its program to meet individual needs and address unique challenges.[14] But in fact, the Rule is simply an abdication of the federal government's most basic responsibilities under the Clean Water Act.

The definition of "waters of the United States" in the Act is the foundation of the entire statute because the Act establishes a uniform nationwide level of protection that states are required to meet in

[14] The Agencies' position in another rulemaking undercuts their claims here. In a separate Clean Water Act rulemaking, EPA has vastly limited longstanding state authority under Section 401 of the Act. *See Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020). In that context, EPA purports to foster cooperative federalism by placing new restrictions on state authority in order to "clarify" the appropriate parameters of the states' role under the Act. *Id.* at 42,226. The principle of cooperative federalism cannot be used on one hand to support restricting longstanding state authority under Section 401, while on the other, to support a massive unfunded shift in responsibility to the states under the guise of promoting state autonomy over state waterways by narrowly redefining "waters of the United States." The common result of these new rules, however, is that they both represent a systematic weakening of the nation's water quality protections.

implementing the Act's requirements for all waters under its scope. *See Catskill Mountains Chapter of Trout Unlimited,* 846 F.3d at 502-503 (noting that the states' primary role in abating pollution is "subject to the federal floor on environmental protection set by the Act and regulations promulgated thereunder by the EPA") (internal citations omitted). Abandoning federal oversight responsibility to establish a sufficient "floor on environmental protection" in favor of individual treatment by the states will result in a haphazard patchwork of protections separated by state lines, which will not serve to protect and maintain the integrity the nation's inner-connected waterways.

Indeed, the Section 404 dredge and fill program stands in stark contrast to the section 402 NPDES program, in which 47 states have assumed delegated permitting authority. Only two states (Michigan and New Jersey) have opted to assume the federal 404 permit program.[15] While Congress provided a mechanism in Section 404(g) for states to assume responsibility of the dredge and fill permit program, unlike with

[15] *See* https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404.

the Section 402 program it failed to provide a funding mechanism to give states the incentive to do so. This lack of funding for such a resource-intensive endeavor, along with other factors, explains why states have been historically reluctant to take on the federal 404 program. *See* Leah Stetson and Jeanne Christie, *Expanding the States' Role in Implementing CWA § 404 Assumption*, Association of State Wetland Managers (Nov. 18, 2010).[16]

In any event, assumption of the federal 404 program would not, by itself, resolve Colorado's 404 permitting gap because Colorado would still be beholden to the less protective federal definition of "waters of the United States." In order to continue to safeguard its valuable headwaters from the impacts of unfettered development, Colorado would have to enact a broader dredge and fill program to cover its now-unprotected waters, which would also require significant funding going forward. Aplt. App. at 86-87.

[16] Available at https://www.aswm.org/pdf_lib/expanding_states_role_implementing_cwa_section_404_assumption_111810.pdf.

This is exactly what Colorado attempted to accomplish during Colorado's 2020 legislative session after it became clear that the Agencies were planning to maintain their initial course of action proposed in January 2019 in spite of substantial comments identifying problems with that approach, that is, to greatly diminish the longstanding protections of the nation's water resources upon which states have relied for decades as a nationwide baseline. Despite the Colorado Water Quality Control Division's best efforts to support legislation that would fill the gap, the measure failed, in large part because COVID-19-related priorities necessitated vast funding cuts for various state programs and an abridged legislative session. Aplt. App. at 90-91.

Considering this effort to secure new authority to establish a dredge and fill program after the 2020 Rule was announced and the subsequent disruption in the legislative session and state budget from COVID-19, the Agencies' claim that "Colorado's harm here is self-inflicted," Agencies' Opening Br. at 41, is meritless.

C. The "404 permitting gap" is a legitimate injury.

The fact that Colorado did not attempt to create a dredge and fill permit program earlier does not negate the harm caused by the narrowing of Clean Water Act jurisdiction under the 2020 Rule. The Agencies point to the U.S. Supreme Court's decisions in *SWANCC* in 2001 and *Rapanos* in 2006, both of which had the effect of narrowing the definition of "waters of the United States," which they argue should have put the state on notice of a less expansive definition. *SWANCC*, however, only limited the definition insofar as it eliminated non-navigable, isolated, intrastate waters from protection under the Clean Water Act. *SWANCC*, 531 U.S. at 167. In reaching its holding, the *SWANCC* Court relied upon the concept of "adjacency," reiterating its reasoning in *Riverside Bayview Homes*, 474 U.S. at 134, in which the Court had found that the Clean Water Act's focus on the protection of water quality and aquatic ecosystems indicated Congress' intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167. The importance of wetlands' connectivity to navigable waters formed the basis of the term

"significant nexus" as first coined in *SWANCC* in describing the extent of federal jurisdiction to waterways that are not navigable. *Id.*

Furthermore, Justice Kennedy's controlling concurring opinion in *Rapanos* did not have the effect of narrowing the definition of waters of the United States beyond the *SWANCC* Court's reasoning. *Rapanos* instead solidified the "significant nexus" concept. *Rapanos*, 547 U.S. at 780 (holding that wetlands fall within the scope of the Act if, either alone or in combination with "similarly situated lands in the region," they have a "significant nexus" to traditional navigable waters) (Kennedy, J., concurring). Since *Rapanos*, the Agencies have consistently included a significant nexus analysis in making jurisdictional determinations under the Clean Water Act. *See* Aplee. Supp. App. Vol. 1 at 12-24. Only Scalia's plurality test in *Rapanos*, if controlling, would have vastly limited the universe of federally protected waters. In sum, up until the Agencies proposed the 2020 Rule, Colorado has been satisfied with the scope of environmental protections afforded the definition of waters of the United States, including use of the significant nexus test as clarified by EPA's 2008 Guidance.

Until the Agencies announced the "Repeal and Replace" plan for the definition of waters of the United States in 2017, Colorado could not have reasonably anticipated the extent to which longstanding Clean Water Act protections would be narrowed. And even at that point, Colorado was not aware of the drastic extent of the narrowing until the Rule was proposed in January 2019. In short, like the 47 other states that also rely on the federal dredge and fill permit program, Colorado justifiably relied upon a long-established baseline of federal water quality protection consistent with the objectives of the Clean Water Act, and the State had no reason to believe the scope of that protection would be so dramatically undercut with the 2020 Rule. Colorado's decades-long reliance on the protections of a federal statute that is intended to establish the baseline scope of water quality protection for the entire nation does not amount to "self-inflicted injury" because that is exactly what is called for by the framework of the Clean Water Act. *See Dep't of Homeland Security*, 140 S. Ct. at 1913 (holding that an agency changing course must recognize and address serious reliance interests engendered by prior policies).

Until now, as *amici* point out, Colorado was content with the extent of its "404 permitting gap" and has generally allowed dredge and fill projects to move forward in "state waters" that were not covered under the definition of "waters of the United States." But this is because the number of impacted waters was relatively small and the degree of federal coverage was sufficient to protect the quality and beneficial uses of Colorado's waters under the *Rapanos* significance nexus test and the associated 2008 Guidance. Now that the 2020 Rule narrows the universe of federally protected waters so greatly, Colorado can no longer rely on the federal government to manage all dredge and fill projects appropriately.[17]

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[17] The Colorado Water Congress, as *amicus curiae*, argues that the Colorado Water Quality Control Act's prohibition against applying the Act in a way that would supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with Colorado water law defeats the conclusion that the Act includes a flat ban on the discharge of dredge and fill material. *See* Amended Brief of the Colorado Water Congress as *Amicus Curiae* Urging Reversal at 15-16 (citing § 25-8-104(1), COLO. REV. STAT.). The Colorado Water Congress suggests that the construction of water supply conduits and storage structures requires dredging and filling, and thus the state statute precludes regulation of these activities because such regulation would interfere with water rights. *Id.* However, water infrastructure construction

In the past, Section 404 permits would have ensured consideration of less damaging alternatives and mitigation (where necessary). Under the 2020 Rule, however, the State currently has no comparable program in place to protect these waterbodies from detrimental impacts.[18] Consequently, Colorado must seek to enforce its current statutory scheme, which does not allow for dredge and fill activities in state waters that are no longer covered by the federal Act, if it wishes to avoid "an environmental free-for-all." Aplt. App. at 108.

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projects are not the only type of projects that involve dredge and fill activities. Various types of development and road infrastructure projects that entail filling of ephemeral and intermittent streams and unprotected wetlands do not invoke the water rights protections of § 25-8-104, COLO. REV. STAT., and would still be flatly prohibited in the absence of a new statutory scheme to authorize dredge and fill activities in Colorado.

[18] Requiring consideration of less damaging alternatives and mitigation through a comparable state dredge and fill permit would not amount to a violation of § 25-8-104, COLO. REV. STAT., because, although it might add cost to a water supply project, it does not impair any rights to divert water or to put water to beneficial uses.

D. Colorado demonstrated that the loss of federal protections is likely to cause significant environmental harm to Colorado.

Colorado also presented evidence in support of its motion that the removal of federal protections from half of the State's waters would likely result in significant environmental harms within the State, though the district court did not credit this evidence. *See* Aplt. App. at 60-62, Aplee. Supp. App. Vol. 4 at 12-18, 21-27, 34-38, 43-48. These harms provide an alternate basis on which to uphold the district court's stay. *See United Fire & Cas. Co.*, 633 F.3d at 958.[19] For this evidence, Colorado need only show "a significant risk that [it] will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal.*, 321 F.3d at 1258 (quoting *Adams v. Freedom*

[19] Although these alternate grounds rely on points the district court chose not to credit, a cross-appeal is not necessary for this Court to consider them. A cross-appeal is only required when an appellee is asking for a modification of the judgment. *See Shaw v. Patton*, 823 F.3d 556, 560 n.5 (10th Cir. 2016); *Montgomery v. City of Ardmore*, 365 F.3d 926, 944 (10th Cir.2004).

Forge Corp., 204 F.3d 475, 484–85 (3d Cir. 2000)). The record establishes that Colorado met this burden.

Under the 2020 Rule, Colorado will suddenly find itself with approximately 54 percent of its watershed area unprotected by the federal Section 404 permit program, without any state dredge and fill permit program to replace it. *See* Aplee. Supp. App. Vol. 4 at 34; Aplt. App. at 83; *see also* Aplee. Supp. App. Vol. 4 at 13 (68 percent of Colorado's stream miles are ephemeral or intermittent).[20] Without a new state permitting program to require mitigation and other protective measures for dredge and fill projects in state waters, which has not been authorized by the state legislature, Aplt. App. at 90-91, the 2020 Rule's significant narrowing of federal jurisdiction will likely contribute to the degradation of Colorado's environment in multiple ways.

[20] Contrary to the Agencies' suggestion, Colorado identified specific waters that would be affected by the 2020 Rule. *See* Agencies' Opening Br. at 2-3. For example, waters that would otherwise qualify as "waters of the United States" absent the 2020 Rule include 8,378 acres of wetlands located in the South Platte Headwaters. Aplee. Supp. App. Vol. 4 at 33-34, 40.

In the absence of a state program, it is likely that some parties will proceed with discharging fill to the "gap waters" that are no longer subject to federal jurisdiction without taking the needed steps to protect downstream waters and mitigate any remaining environmental harm. Indeed, although Colorado will seek to enforce against such illegal discharges when it identifies them, some take the view that Colorado has no such authority under state law. *See* Amended Brief of the Colorado Water Congress as *Amicus Curiae* Urging Reversal at 11-12; Amended Brief of the Colorado Farm Bureau, et al. as *Amici Curiae* Supporting Appellants and Urging Reversal at 14-16.

Colorado does not have a permitting program for this activity. Permitting programs require the actor to identify the conduct they seek to engage in and explain how they plan to mitigate any pollution. This approach efficiently discloses the relevant information in advance to the regulator. Without such a permitting program, whether project sponsors proceed with fill activities without a permit in "gap" waters because they believe the state has no authority over these projects or because they are willing to risk after-the-fact enforcement, Colorado

will not know in advance of planned activity likely to result in the discharge of pollutants or what steps parties might to take to reduce or mitigate such pollution, requiring even more resources to enforce. Colorado does not have—and without new legislation, will not have—the resources or staffing to undertake a mass enforcement effort aimed at these newly unpermitted discharges without having a dramatic impact on its entire clean water compliance and enforcement program. Aplt. App. at 84-85. Without proper regulatory oversight, these fill activities will create significant water quality impacts in Colorado. The threat of these impacts is not speculative, especially with a number of entities claiming that the State has no authority to prohibit or permit such discharges. *See* Amended Brief of the Colorado Water Congress as Amicus Curiae Urging Reversal at 11-12; Amended Brief of the Colorado Farm Bureau, et al. as *Amici Curiae* Supporting Appellants and Urging Reversal at 14-16.

First, dredge and fill activities in wetlands that are no longer subject to federal permitting and mitigation requirements would impair important wetland functions and lead to additional downstream

impacts. Wetlands perform critical ecological and water quality-related functions within a watershed, such as providing life-cycle dependent habitat for fish and other aquatic organisms and offering feeding and nesting grounds for wildlife like water birds. Aplee. Supp. App. Vol. 4 at 34. Biogeochemical processes that occur in wetlands can transform nutrients and break down pollutants, potentially reducing the need for treatment before human consumption and improving the chemical quality of water used for recreation and agriculture. *Id.* In addition, the hydrologic characteristics of wetlands allow for sediment retention and the capture and storage of floodwaters, which can mitigate potential threats to infrastructure. *Id.*

The exposure of a large proportion of Colorado's wetland acres to dredge and/or fill activities that are not subject to federal permitting requirements, such as compensatory mitigation, could result in significant loss of important fish and wildlife habitat. *Id.* at 36. Filling in these ecologically critical wetlands, even in the absence of any other harms, constitutes irreparable environmental harm significant enough to merit a preliminary injunction. *Utahns For Better Transp. v. U.S.*

Dept. of Transp., No. 01-4216, 01-4217, 01-4220, 2001 WL 1739458, *2 (10th Cir. Nov. 16, 2001) (making finding of irreparable harm to wetlands from highway construction because "wetlands such as these, once filled, rarely can be restored to their original state").

Second, dredge and fill projects in areas no longer subject to Section 404 permits are likely to lead to a loss of aquatic habitat in Colorado's headwaters, where ephemeral and intermittent waters comprise at least 68 percent of Colorado's stream miles. Aplee. Supp. App. Vol. 4 at 13. These temporarily flowing systems play a large collective role in maintaining and defining the physical, chemical, and biological integrity of perennial waters. *Id.* at 12. Impairment or loss of such waters due to unregulated fill would have considerable and enduring harmful consequences for aquatic life and the ecosystem services these systems provide. *Id.* Colorado is home to a wide variety of species of aquatic organisms, including sensitive macroinvertebrates and endangered species of fish and amphibians, that inhabit ephemeral and intermittently flowing streams or non-adjacent wetlands. *Id.* at 12, 21-27. Because the vast proportion of Colorado's stream networks are

ephemeral or intermittent, the narrowing of the federal Clean Water Act jurisdiction leaves a large percentage of Colorado's stream miles, as well as the diversity of life within them, without the federal protections they currently enjoy.

Multiple threatened and endangered species rely on intermittent and ephemeral stream networks as predator and invasive species refuge and as seasonal spawning habitat. *Id.* at 13-14, 26, 46. Moreover, a wide diversity of macroinvertebrates, fish, and other vertebrates inhabit these systems, and many of these species are specifically adapted to the unique physical and chemical conditions in these streams. *Id.* at 13-14. These stream networks export vast quantities of aquatic food chain resources in the form of macroinvertebrates, algae, and organic matter to downstream species occupying perennial waters. *Id.* at 14. If fill occurs in these waters because of the loss of federal jurisdiction, and once sediment is mobilized downstream, injury to the State's wildlife will likely have already occurred. Aplee. Supp. App. Vol. 4 at 48.

Other harms from fill activity are also likely. Many of the waters currently within federal jurisdiction in Colorado under the 2008

Guidance that are excluded under the 2020 Rule also provide high quality water for domestic use. Headwater and wetlands fills upstream of drinking water intakes may degrade the quality of water used by those systems, jeopardizing downstream drinking water plants. *Id.* at 36-37. Private well users whose wells are influenced by surface water bodies may also find their drinking water degraded. *Id*. Similarly, the degradation of quality of sensitive headwaters may compromise Colorado farmers' ability to use downstream water rights for agriculture by potentially increasing total dissolved solids and salinity instream. *Id.* at 14. These changes in water quality could impact cattle and crop irrigation. *Id.*[21]

[21] The amicus brief submitted by various Colorado agricultural interests suggests that a stay of the 2020 Rule impedes agricultural activity. *See* Amended Brief of the Colorado Farm Bureau, et al. at 16-17. In its comments on the proposed rule, Colorado supported the reinforcement and clarification of the scope of existing agricultural exemptions that exclude prior converted cropland from the definition of WOTUS and other exemptions set forth in the Clean Water Act. Aplee. Supp. App. Vol. 2 at 140-41. Colorado did not challenge the 2020 Rule on the basis of the agricultural exemptions. Because guidance and agency practice in place prior to the adoption of the 2020 Rule included agricultural exemptions, Colorado would expect these existing agricultural exemptions to remain in effect even while the 2020 Rule is enjoined in

Thus, the likelihood of imminent harm to Colorado's wetlands, wildlife, and water resources provides an alternative basis in the record that entitles the State to a stay. *See San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife*, 657 F.Supp.2d 1233, 1240-41 (D. Colo. 2009) (concluding that drilling of wells in wildlife refuge would be likely to cause irreparable injury to plaintiffs' environmental and procedural interests based in part on evidence that construction will impact creeks and other water sources and could harm endangered species); *Envtl. Def. Fund, Inc. v. Corps of Eng'rs. of U.S. Army*, 324 F.Supp. 878, 880 (D.D.C. 1971) (granting preliminary injunction and finding irreparable harm when there existed "a strong probability that further construction and related operations as now planned might irreparably damage marine and plant life and a primary source of drinking water for the State of Florida").

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the State. *See* 85 Fed. Reg. at 22,320 (discussing historical application of exclusion for prior converted cropland); 33 U.S.C. § 1344(f).

IV. The district court properly determined that the balance of equities and public interest weigh in favor of maintaining the status quo.

The final factors the Court must consider are whether the balance of equities and the public interest weigh in favor of granting the stay. The district court's determination that these factors weigh in Colorado's favor is well within the court's discretion.

A. Neither the Agencies nor the Intervenors can articulate harm that outweighs Colorado's injury.

The balance of equities is an internal balancing test, requiring that "the possible harm to the Plaintiff if the injunction is not entered be balanced against the possible harm to the Defendant[s] if the injunction is entered." *Pelletier v. U.S.*, 11-CV-01377-WJM-CBS, 2011 WL 2077828, *4 (D. Colo. May 25, 2011). The balance of harms weighs in favor of the prohibitory injunction requested by Colorado because delaying implementation of the 2020 Rule will cause the Agencies and Intervenors no harm. As demonstrated above, Colorado will suffer significant, imminent, and irreparable harm from implementation of the 2020 Rule. In contrast, delaying implementation of the Rule will

simply preserve the status quo and allow the Agencies to continue applying current guidance and regulations to Clean Water Act jurisdictional determinations, and the Intervenors to continue operating under current permitting regimes. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (favoring injunctions that preserve the status quo).

The Agencies have not articulated any real harm from the delay of implementation of the 2020 Rule. Although they argue that temporarily enjoining the Rule in Colorado could undermine their interest in efficient and uniform administration of laws, this interest does not outweigh the significant irreparable harm that Colorado will suffer if the 2020 Rule goes into effect. Enjoining implementation of the 2020 Rule in Colorado is narrowly tailored to address that harm while the court considers the merits of the case, and is consistent with how other courts have handled challenges to Clean Water Act rulemaking. *See, e.g., N.D. v. U.S. EPA*, 127 F. Supp. 3d 1047, 1060 (D. N.D. 2015); *Am. Farm Bureau Fed'n v. U.S. EPA*, 3:15-CV-00165, 2018 WL 6411404, at *1 (S.D. Tex. Sept. 12, 2018) (noting that failing to enjoin the rule "risks

asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review").

B. The interests of administrative efficiency do not outweigh the significant public interest in maintaining water quality.

When a case is brought under an environmental statute like the Clean Water Act, the courts place extraordinary weight on a general concern for the public interest. *See Wilson v. Amoco Corp.*, 989 F.Supp. 1159, 1171 (D. Wyo. 1998) (citing U.S. *v. Bethlehem Steel Corp.*, 38 F.3d 862, 868 (7th Cir.1993); *U.S. Environmental Protection Agency v. Envt'l Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir.1990)); *U.S. v. Power Eng'g Co.*, 10 F. Supp. 2d 1145, 1149 (D. Colo.), *aff'd*, 191 F.3d 1224 (10th Cir. 1999). Here, the district court appropriately determined that the public interest is served by enjoining implementation of the 2020 Rule until its legality has been thoroughly reviewed. The purpose of the Clean Water Act is to protect the integrity of the nation's waters. Enjoining a rule that will significantly narrow the Agencies' jurisdiction over ephemeral and intermittent streams and wetlands, with resulting

environmental degradation and economic consequences to Colorado, protects rather than harms the public's interest in clean water and a functioning Clean Water Act permitting system. *See Amoco Prod. Co.*, 480 U.S. at 545 (noting that if environmental injury "is sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment").

Both the Agencies and the Business Intervenors argue that enjoining the 2020 Rule in Colorado creates additional uncertainty for the regulated community and administrative difficulty for the Agencies, which must implement a different rule in Colorado than elsewhere. *See* Agencies' Opening Br. at 45-46; Business Intervenors' Br. at 40-41. Neither claim outweighs the public interest in favor of the stay.

First, as noted above, the stay entered by the district court simply preserves the pre-existing legal status quo in Colorado.[22] The Agencies

[22] Although the Agencies mischaracterize the stay as mandatory rather than maintaining the status quo, the Agencies have previously characterized the pre-2015 Rule, 2008 Guidance regime as the "legal *status quo*" during the period in which the 2015 Rule was enjoined nationwide. *See Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5200, 5200

have extensive experience with implementing the pre-2020 definition of WOTUS and the 2008 Guidance, and the Business Intervenors are adept at seeking permits under these rules. Indeed, when the Agencies issued the Repeal Rule in October 2019, they announced that, until publication of a new rule, they would implement the "pre-2015 [1986] Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice." *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019). Continued implementation of these regulations and guidance in Colorado during the pendency of this litigation creates no unmanageable uncertainty or administrative difficulty for the Agencies.

Similarly, the regulated public is also not unduly harmed by continuing to be subject to the current rule, as evidenced by the economic activity cited in the Business Intervenors' brief that occurred

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(Feb. 6, 2018) (final rule seeking to postpone applicability of 2015 Rule, which was later vacated by two district courts in South Carolina, *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D. S.C. 2018), and Washington, *Puget Soundkeeper All. v. Wheeler*, 2018 WL 6169196 (W.D. Wash. 2018)).

under the prior rules and 2008 Guidance, or even potentially under the 2015 Rule. *See* Business Intervenors Br. at 1-4 (describing economic activity from 2017 to 2019). Although the Business Intervenors may benefit from a more relaxed regulatory regime that reduces federal oversight of their activities at the expense of water quality protection, reducing their regulatory burden by allowing implementation of a flawed rule is not in the public interest. *See Colo. Wild, Inc. v. U.S. Forest Serv.*, 523 F.Supp.2d 1213, 1222 (D. Colo. 2007) (rejecting developer's contention that the balance of harms weighed against the issuance of an injunction where it would suffer "pecuniary, lost opportunity and investment risks" because such harm was not irreparable and did not outweigh the serious risk that irreparable environmental harm would result from allowing development activity).

Next, the possibility of a patchwork from different district court decisions results from Congress's decision to grant jurisdiction over these challenges to the district court, and is not a basis to overturn an appropriately issued injunction. As the Supreme Court has explained, Congress chose to rest jurisdiction over challenges to the definition of

"waters of the United States" with the federal district courts, regardless of the policy arguments for uniformity that might have dictated otherwise. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. at 634. While the Agencies and the Business Intervenors point to the experience of the patchwork implementation of the 2015 Rule, in fact the Agencies navigated the different district court legal rulings around the country for several years, and made jurisdictional determinations and issued permits under the applicable legal regime in each state. And while the 2015 Rule was eventually enjoined in 28 states and implemented in 22 states,[23] the district court's stay in this case applies only to Colorado and should be even easier to administer than the legal regime that applied as a result of various injunctions of the 2015 Rule.

Finally, any uncertainty claimed by the Appellants is not a reason to allow the Agencies to implement an illegal rule, and Colorado has

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[23] *Waters of the United States" (WOTUS): Current Status of the 2015 Clean Water Rule*, Congressional Research Service, 6 (December 12, 2018) (noting that in the 28 states where the 2015 Clean Water Rule was enjoined, "regulations promulgated by the Corps and EPA in 1986 and 1988, respectively, are in effect"). Available at: https://www.everycrsreport.com/files/20181212_R45424_0e40d77c4246e4ca5760991d8a7a1fac88d7be85.pdf.

shown it is likely to succeed on the merits. *See supra* Section II*; see also N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 340 F.Supp.3d 1112, 1182 (D. N.M. 2018) (holding that the uncertainty that would result from vacating an arbitrary and capricious rule was not greater than the uncertainty that existed under the status quo regulatory scheme). And contrary to the Appellants' suggestion, the 2020 Rule actually increases uncertainty in Colorado because of the vague definition of typical year and lack of sufficient guidance on how typical year will be evaluated with respect to our specific waters. *See supra* Section II(B)(2).

CONCLUSION

Based on the record before it, the district court correctly determined that Colorado would suffer imminent irreparable harm if the 2020 Rule were allowed to go into effect, and that Colorado is likely to succeed on the merits of its challenge to the 2020 Rule. This Court should affirm the district court's order granting a stay of the Rule and preserving the status quo in Colorado during the pendency of this case.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the complex issues presented, counsel believes oral argument would be helpful to the Court.

Respectfully submitted this 7th day of August 2020.

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I hereby certify the following with respect to the foregoing brief:

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Date: August 7, 2020 s/ *Eric R. Olson*
Eric R. Olson

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Date: August 7, 2020 s/ *Eric R. Olson*
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CERTIFICATE OF SERVICE

This is to certify that on this 7th day of August 2020, I have provided service of the foregoing APPELLEE'S ANSWER BRIEF through the ECF/CM filing system addressed to the following:

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

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. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

. . . .

(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. Effluent limitations

§ 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. § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

. . . .

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.…

Clean Water Act
33 U.S.C. § 1344

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites….

. . . .

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

. . . .

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of

such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

. . . .

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.…

(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 nonjurisdictional 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 nonjurisdictional 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.