IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01461-WJM

THE STATE OF COLORADO,

Plaintiff,

v.

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

Defendants.

BUSINESS INTERVENORS' [PROPOSED] OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR A PRELIMINARY INJUNCTION

The Environmental Protection Agency and Army Corps of Engineers ("agencies") promulgated the challenged rule to define Waters of the United States ("WOTUS") within the meaning of the Clean Water Act ("CWA"). Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule"). The intervenor trade groups represent businesses that use land for farming, livestock, forestry, manufacturing, mining, oil and gas production and refining, and infrastructure, home, and commercial construction. Those businesses represent much of the Nation's economic activity, provide tens of millions of jobs, and supply Americans with food, shelter, goods and services. They must often determine if land includes WOTUS subject to permitting or risk criminal and civil sanctions.

The extraordinary relief Colorado seeks would substantially harm intervenors' members. *See* Decl. of Don Parrish ("Parrish Dec."); Part IV, *infra.* It would increase the likelihood that their land includes WOTUS, increase compliance costs and risk of violations, and reduce their ability to use their land. It would make it harder to determine whether land contains WOTUS by eliminating bright jurisdictional lines drawn by the 2020 Rule. That would increase the cost of making jurisdictional determinations and make the scope of a law with harsh criminal and civil penalties less predictable. While complaining that it does not want to do the work that the agencies have previously done in regulating water, Colorado ignores these harms to the American people and economy. The balance of harms is not close and cannot justify injunctive relief.

Colorado also has not shown likelihood of success on the merits. The 2020 Rule complies with the CWA, the Administrative Procedure Act ("APA"), and the National Environmental Policy Act (which does not apply to EPA rules). After decades of shifting, ever-expanding definitions that led to crippling legal uncertainty, litigation losses for the agencies, and a patchwork in which

different rules applied in different parts of the country, the agencies have produced a legally sound rule. The 2020 Rule reflects Congress' intent, follows statutory text and Supreme Court precedent, and implements the goals of the CWA. It reasonably responds to a history in which the Supreme Court has criticized the agencies' claims of jurisdiction and in which the 2015 Rule was enjoined by multiple courts and then held unlawful by two district courts. Plaintiff provides no sound reason for a court to substitute its judgment for that of the agencies. Its motion should be denied.

A. The CWA Legal Scheme

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Two permit programs regulate the "discharge of any pollutant," which means "any addition of any pollutant to navigable waters from any point source." *Id.* §§ 1311(a), 1362(12)(A). The "navigable waters" are "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The meaning of WOTUS thus determines the agencies' jurisdiction under the CWA.

The agencies defined "waters of the United States" shortly after passage of the Act. 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974); 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). As the agencies' view of their authority expanded over the years, the Supreme Court confronted the meaning of WOTUS in a series of decisions beginning with *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). There, the Court held that Congress intended "to regulate at least *some* waters that would not be deemed 'navigable'" and that it is "a permissible interpretation" to conclude that "a wetland that actually abuts *on* a navigable waterway" is a WOTUS. *Id*. at 133, 135.

Following *Riverside Bayview*, the agencies "adopted increasingly broad interpretations" of WOTUS, asserting jurisdiction over features bearing little or no relation to traditional navigable

waters. *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality). One of those interpretations—the Migratory Bird Rule—was struck down in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). There, the Court held that, while *Riverside Bayview* turned on "the significant nexus" between "wetlands and [abutting] 'navigable waters,'" the Migratory Bird Rule regulated isolated ponds with no connection to navigable waters. *Id*. at 167. It impermissibly read the term "navigable" out of the Act; but navigability was "what Congress had in mind as its authority for enacting the CWA." *Id*. at 172.

More recently, in *Rapanos v. United States*, the Supreme Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water." 547 U.S. 715, 720-21 (2006) (plurality). Justice Scalia, writing for a four-Justice plurality, held that WOTUS include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 732, 739. Justice Kennedy, concurring, embraced a "significant nexus" test but stated that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" do not satisfy that test. *Id*. at 781 (Kennedy, J,). Such an "ominous reach," Justice Kennedy later observed, would "raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property." *Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1817 (2016) (Kennedy, J.).

B. The Unlawful 2015 Rule

Although Chief Justice Roberts warned in *Rapanos* that the "clearly limiting terms Congress employed in the [CWA]" were "inconsistent" with "the view that [the agencies'] authority was essentially limitless" (547 U.S. at 757–58 (concurring)), the agencies took a

"limitless" view of their authority when they adopted a new WOTUS Rule in 2015. 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). Despite the CWA's comprehensive programs to address water pollution, the primary role it reserves to states, and the narrower focus of the discharge prohibitions, the agencies issued a broad definition of WOTUS that swept in features remote from navigable waters. For example, the rule defined jurisdiction to sweep in distant and ephemeral features, such as minor creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes. 33 C.F.R. 328.3(c)(3); 80 Fed. Reg. 37,076. Through expansive definitions of tributaries, adjacent waters, and sufficient chemical and biological nexus, and by lumping features together within a watershed, the Rule left hardly any wet area outside federal jurisdiction. To an even greater extent than prior guidance, the 2015 Rule left "property owners . . . at the agency's mercy." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

Lawsuits were filed across the country by states and regulated parties challenging the Rule. Initially, the Sixth Circuit stayed the rule nationwide because it was "far from clear" it could be squared with even the most generous reading of Supreme Court precedent. *In re EPA & Dep't. of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015). After that court lost jurisdiction (*see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018)), district courts issued preliminary injunctions across more than half of the country. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. 2018); *American Farm Bureau Fed'n* v. *U.S. EPA*, 3:15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87; *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051 n.1, 1055 (D.N.D. 2015).

Ultimately, district courts in Texas and Georgia held the 2015 Rule unlawful. The Texas court concluded that it "is not sustainable on the basis of the administrative record'" and remanded to the agencies. *Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019). The Georgia court

addressed the substance of the 2015 Rule. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). It held that asserting jurisdiction over all "interstate waters" impermissibly reads the term "navigable" out of the statute; defining "tributary" extends federal jurisdiction beyond that allowed under the CWA; and asserting jurisdiction over all waters "adjacent" to all tributaries was an impermissible construction. *Id.* at 1363-68. And it held that "the WOTUS Rule's vast expansion of jurisdiction over waters and land traditionally within the states' regulatory authority" constituted a substantial encroachment" into state power that "cannot stand absent a clear statement from Congress." *Id.* at 1370, 1372. The court remanded the Rule to the agencies because, recognizing its serious shortcomings, the agencies had by then begun to reconsider it in new rulemakings.

C. Subsequent Administrative Rulemaking

The reasonableness of the 2020 Rule must be judged against this history in which agency claims of ever broader CWA authority led to multiple agency losses in the Supreme Court, injunctions against enforcement of the 2015 Rule by courts that believed the challengers likely to succeed on the merits, and a comprehensively-reasoned decision that the 2015 Rule "extends the Agencies' delegated authority beyond the limits of the CWA, and thus is not a permissible construction of the phrase 'waters of the United States.'" *Georgia*, 418 F. Supp. 3d at 1344.

The agencies followed a reasonable "two-step process." They first addressed the 2015 Rule's illegality and its confused patchwork application, restoring the status quo by repealing the 2015 Rule.[1] The agencies then carefully redefined WOTUS in conformity with the CWA and judicial precedent through the Navigable Waters Protection Rule at issue here.

[1] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("Repeal Rule").

Far easier to apply than its predecessors, the key feature of the 2020 Rule is the agencies' streamlined definition of WOTUS as four categories of waters: (1) traditional navigable waters that evidence the physical capacity for commercial navigation, and the territorial seas (together, "TNW"); (2) tributaries to those waters, defined as perennial or intermittent surface water channels that contribute flow to a TNW in a typical year, directly or through another WOTUS; (3) standing bodies of open water (lakes, ponds, impoundments of TNW) that contribute flow to a TNW in a typical year, directly or through another WOTUS, or that are inundated by flooding from a WOTUS in a typical year; and (4) wetlands that directly abut or touch a jurisdictional water, or are flooded from a jurisdictional water in typical year, or are separated from a jurisdictional water only by either a berm, bank, or other natural feature, or by an artificial structure through which there is a direct hydrological surface connection in a typical year (such as a culvert). Notable among 12 defined exclusions from WOTUS are ephemeral features, such as washes, rills, and gullies that flow only in direct response to precipitation; ditches that are not tributaries or constructed in jurisdictional features; diffuse stormwater runoff and sheet flow; irrigated uplands; artificial ponds; water filled depressions or pits incident to mining or construction; and waste treatment systems.

REASONS FOR DENYING COLORADO'S MOTION

I. The 2020 Rule Is Permissible Under The CWA.

A. The Agencies Were Not Required To Strictly Follow Justice Kennedy's Significant Nexus Test From His *Rapanos* Concurrence.

Plaintiff argues that Justice Kennedy's *Rapanos* concurrence controls the meaning of WOTUS. Mot. 13-14. While the 2020 Rule departs from the significant nexus analysis in favor of categorical rules that provide more certainty, *e.g.*, 85 Fed. Reg. at 22,273, it does not wholesale reject the concurrence. *See id*. at 22,291 ("this final rule incorporates important aspects of Justice

Kennedy's opinion, together with those of the plurality, to craft a clear and implementable definition [of "tributary"] that stays within their statutory and constitutional authorities").

Anyway, Justice Kennedy's significant nexus test is not a controlling legal standard that the agencies are bound to follow. An agency is not in all cases prohibited from interpreting a statute in a different manner than a prior interpretation by a court. *U.S. v. Eurodif S.A.*, 555 U.S. 305, 315 (2009); *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (agencies "are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer"). Instead, where an agency's different interpretation is consistent with the statute, it is permissible. *Id*. And an agency can change its policy when it offers a reasoned explanation for doing so. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016).

Justice Kennedy's opinion in *Rapanos* is not the holding of that case. *Marks v United States* held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977). *Marks* does not apply where there is no lowest common denominator that represents the Court's holding. *Nichols v. United States*, 511 U.S. 738, 745 (1994). *Marks* thus created a narrow rule that where a concurring opinion adopts a narrower variant of the plurality's reasoning, the concurring opinion may be considered the opinion of the Court (and vice versa). *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1141 (10th Cir. 2012). *Marks* has no application and does not permit a court to give precedential effect to a concurrence that is simply *different* from—not a broader or narrower version of the reasoning of—the plurality opinion.

The Sixth Circuit explained that this search for the "narrowest opinion" that "relies on the least doctrinally far-reaching common ground" "breaks down" in *Rapanos* because neither the plurality nor the concurrence is a "logical subset" of the other. *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). The court observed that "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction." *Id*. at 210. Under *Large* and *Cundiff*, because neither the Kennedy concurrence nor plurality opinion is a logical subset of the other, neither controls, and the agencies were under no obligation to apply Justice Kennedy's test.

Regardless of whether the plurality opinion is controlling, the agencies were entitled to find it more persuasive than a one-Justice concurrence based on a phrase, significant nexus, that is not in the statute. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), supports the conclusion that the Justices believe the plurality is the best source in *Rapanos* for guidance about the meaning of the CWA. There four Justices wrote opinions and all cited the *Rapanos* plurality's discussion of point sources under the CWA. *Id*. at 1468-78; *id*. at 1478-79 (Kavanaugh, J., concurring); *id*. at 1479-82 (Thomas, J., dissenting); *id*. at 1482-92 (Alito, J., dissenting). There can be no question that the Court believes the plurality is the source from which to draw guidance.

Still, as the agencies recognized, 85 Fed. Reg. at 22,291, there is some agreement between the plurality and Justice Kennedy on important issues. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) (court may look for common ground in plurality and concurring opinions). The plurality and Justice Kennedy agreed that "the word 'navigable' in 'navigable waters' [must] be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring); *see id*. at 731 (plurality). They also agreed that the CWA reaches some waters and wetlands that are not navigable-in-fact but that have a substantial connection to navigable waters, though they

disagreed how to determine what kind of connection is sufficient. *Id*. at 739, 742 (plurality); *id*. at 784-85 (Kennedy, J.)). And they agreed that, applying their tests, "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less waters or "wetlands [that] lie alongside [such] a ditch or drain." 547 U.S. at 781 (Kennedy, J.). Under a common-denominator approach, those are the controlling holdings of *Rapanos*. Thus, if the agencies were bound by *Rapanos*, those are the holdings that bind them, and the 2020 Rule is consistent with them.

B. The 2020 Rule Properly Relies On The CWA's Purpose Of Preserving State Authority Over Waters Within Their Borders.

Plaintiff says "nothing in the [CWA suggests] that Congress intended to balance water quality with state sovereignty by limiting [WOTUS] to the narrow definition in the 2020 Rule." Mot. 12. But one main purpose of the CWA is to protect states' authority over water and land use. 33 U.S.C. § 1251(b); 85 Fed. Reg. at 22,254, 22,262. That authority is a core aspect of state sovereignty, *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982), and agency intrusion into it violates the Tenth Amendment. *Hodel v. Va. Surface Mining Ass'n*, 452 U.S. 264, 286-87 (1981). Congress also enacted a system of federal support and assistance to states for programs to curb pollution in the "nation's waters," while authorizing direct federal regulation of a *subset* of the "nation's waters" it identified as "navigable waters." 85 Fed. Reg. at 22,253.

Plaintiff argues that "Congress intended a broad interpretation of [WOTUS] that would extend as far as was permissible under the Commerce Clause." Mot. 12. But *SWANCC* explained that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." 531 U.S. at 172. "This concern is heightened where the administrative interpretation alters the federal-state framework

by permitting federal encroachment upon a traditional state power." *Id*. at 173. Rather than point to any "clear indication" in statutory text, Plaintiff cites isolated snippets of legislative history. In the absence of a contrary textual mandate, and consistent with *SWANCC*, it cannot be irrational for the agencies to stop short of the far limit of their constitutional power. *See* 85 Fed. Reg. 22,256.

II. The Agencies Provided A Reasoned Explanation For The 2020 Rule.

Agencies need not rigidly adhere to past policies. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). They may consider new information, reconsider past information, reinterpret statutes, review prior assumptions, and set new policies based on their current understanding of facts and law. *Eurodif S.A.*, 555 U.S. at 315. When an agency changes direction, it need only provide a "reasoned explanation" for doing so. *Encino Motorcars*, 136 S. Ct. at 2125-26. It "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the old one." *Fox*, 556 U.S. at 515. It need only show that the new policy "'is permissible under the statute,'" "'believe[] the new policy is better,'" and provide "'a reasoned explanation'" why it "'disregard[ed] facts and circumstances that underlay or were engendered by the prior policy.'" *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1131 (10th Cir. 2013). So long as agency reasoning is "rational," *Cal. Ass'n of Private Postsecondary Sch. v. DeVos*, 2020 WL 516455, at *16 (D.D.C. Jan. 31, 2020), and has "even that minimal level of analysis," *Encino Motorcars*, 136 S. Ct. at 2125, its action must be upheld. The agencies here did more than required.

First, the agencies provided a "reasoned explanation" for the Rule. *Encino Motorcars*, 136 S. Ct. at 2125. It spans 75 pages of the Federal Register and meticulously sets forth the agencies' interpretation of the CWA's text, structure, and purpose, *e.g.*, 85 Fed. Reg. at 22,252-54, the regulatory history, *e.g.*, *id*. at 22,254-55, the legal precedent bearing on the phrase "waters of the

United States," *e.g.*, *id.* at 22,256-59, and the rulemaking process, including a discussion of significant comments regarding the primary subparts of the Rule, *e.g.*, *id.* at 22,259-337.

Second, the 2020 Rule balances "two national goals" of the CWA (85 Fed. Reg. at 22,252): preventing pollution and preserving states' control over their water and land resources. 33 U.S.C. § 1251(a), (b). In balancing them, the agencies concluded that the 2015 Rule "failed to adequately consider and accord due weight to the policy of the Congress" preserving States' rights and prerogatives, *id.* at 22,260, and could not be reconciled with the "major role for the States in implementing the CWA." *Id*. at 22,252. The policy change in the 2020 Rule is thus in part the result of rebalancing jurisdiction to match Congress' purposes in the CWA. That is a "good reason" for the policy change, as agencies are afforded a "wide berth" in "balancing competing statutory policies." *Nat'l Ass'n of Regulatory Util. Comm'rs v. S.E.C.*, 63 F.3d 1123, 1127 (D.C. Cir. 1995).

Third, the agencies explained that a purpose of the 2020 Rule was to provide regulatory certainty, lacking in the prior policy, by implementing categorical rules. *See* 85 Fed. Reg. at 22,325. The agencies aimed to "eliminate[] the case-specific application of the agencies' previous interpretation of Justice Kennedy's significant nexus test" in favor of "clear categories of jurisdictional waters that adhere to the basic principles articulated in the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions" and that comport with the structure of the CWA. 85 Fed. Reg. at 22,273. "Removing the source of confusion" is "a 'good reason[] for the new policy.'" *Gonzales-Veliz v. Barr*, 938 F.3d 219, 235 (5th Cir. 2019) (quoting *Fox*, 556 U.S. at 515).

III. Plaintiff's Attacks On The 2020 Rule Are Unfounded.

Colorado (Mot. 15-19) offers three mistaken critiques of the Rule: the agencies disregarded States' reliance interests, "reject science," and wrongly thought states would "fill in the gaps."

First, "[i]n explaining its changed position," an agency must "be cognizant" that "long-standing policies" may have led to "reliance interests.'" *Encino Motorcars*, 136 S. Ct. at 2126. The agencies recognized that the 2020 Rule would affect states and discussed how states may adapt to the change in federal jurisdiction. 85 Fed. Reg. at 22,270, 22,333-34. And the agencies met with states to examine implications for state and local governments. *Id*. at 22,336. The agencies also explained that the 2020 Rule "does not impose any new costs or other requirements, preempt state law, or limit states' policy discretion," but gives states "more discretion" over "how best to manage waters under their sole jurisdiction." *Id*. The agencies thus did not ignore states reliance interests.

Second, the agencies applied scientific principles. *E.g.*, 85 Fed. Reg. 22,274-75, 22,288. As plaintiff's illustration involving the definition of "tributary" shows, they really complain that the agencies did not wholly adopt the Connectivity Report underlying the 2015 Rule. But there is no requirement that the agencies defer to that scientific analysis; they receive "considerable discretion and deference" for "matters that require a high level of technical expertise" and "'it is not [the court's] role to weigh competing scientific analyses.'" *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 442 (10th Cir. 2011). And the agencies did not "ignore" the Science Advisory Board (Mot. 17); they explained why its critique was unfounded. 85 Fed. Reg. 22,261, 22,288.

Plaintiff says (at 17) the agencies "blatantly reject the undisputed significant science" that "tributaries and adjacent wetlands can have a significant nexus to downstream jurisdictional waters." But that is not true: the agencies rejected that "significant nexus" was the proper legal test to use in crafting jurisdictional limits. 85 Fed. Reg. 22,261, 22,271. And they properly "looked to scientific principles to inform" the final rule. 85 Fed. Reg. at 22,271; *see id*. at 22,288.

Third, Colorado's contention that it was improper for the agencies to believe "that states would be able to fill in the gaps in clean water protection" makes no sense. The CWA is designed to preserve states' primary responsibility over waters within their borders. It was logical for the agencies to reason that states may choose to fill any regulatory gaps created by the Rule and that states may be more efficient at allocating resources in doing so. 85 Fed. Reg. 22,334. A rule based on logical reasoning is not arbitrary or capricious. *Personal Web Techs. v. Apple, Inc.*, 848 F.3d 987, 992 (Fed. Cir. 2017). Insofar as plaintiff contends that the agencies underestimated the costs to Colorado, they offer no authority or explanation as to why the alleged flaws are so serious as to render the Rule arbitrary and capricious. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (plaintiffs bear "high" burden because "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency").

IV. The Balance Of Harms Precludes Issuance Of A Preliminary Injunction.

Colorado does not show that the balance of harms tilts in its favor. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008). It says it is unwilling or unable to expend resources to regulate discharges into Colorado waters that are not WOTUS, creating a "permitting gap." That overlooks states' role in protecting their own waters and the harm an injunction would inflict on regulated parties.

First, Colorado conflates narrower federal jurisdiction with immediate impairment. Mot. I.B. But that assumes third parties will immediately pollute features that are no longer WOTUS, in quantities that immediately impair downstream water. That assertion is neither supported, nor probable. For example, the agencies explain, "[i]f a pollutant is conveyed through an ephemeral stream to a jurisdictional water, an NPDES permit may likely still be required." *Resource and Programmatic Assessment for the Navigable Waters Protection Rule* 79 (Jan. 23, 2020) ("RPA").

Colorado wants to avoid its obligations. Congress gave the agencies authority over two permitting programs for discharges into WOTUS, but also reinforced the "primary responsibilities" "of States" to address pollution and regulate land and water use. *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)). WOTUS permits are just part of multiple programs.[2] While Colorado may prefer not to move quickly to regulate its waters, "nothing in the [2020 Rule] affects [its] ability" to "enforce independent authorities over aquatic resources." RPA 92.

Colorado's claim of harm from a "permitting gap"—limited to fill material placed in features not subject to the federal Section 404 program, since the State has a robust Section 402 program—is implausible. If there were such a gap, it was already there. Colorado law regulates "all surface and subsurface waters," yet the federal agencies have never regulated subsurface waters, nor "all" surface waters until the 2015 Rule—yet somehow only now will "important projects" be halted. Mot. 6. Colorado's Water Quality Control Commission is obligated to maintain a "a comprehensive and effective" program to protect State waters (Colo. Rev. Stat. § 25-8-202(1)), and has broad authority to adopt any regulations it needs to do so. *Id.*, § 25-8-501(3).

Second, while pointing to speculative harms it could address by its own actions, Colorado ignores the harm an injunction would cause farmers, livestock producers, forestry, home and infrastructure builders, miners, manufacturers, and other industries, which have long pointed out the burdens that expansive WOTUS jurisdiction imposes on them. Parrish Dec. ¶¶ 7-18. Bloated

[2] The CWA requires Colorado to set in-state water quality standards. 33 U.S.C. § 1313(c)(1), (2)(A). If a body of water does not achieve standards, the State must establish a total maximum daily load ("TMDL") for pollutants causing the impairment (*id.*, § 1313(d)(1)(C)) and engage in "a continuing planning process" to meet water quality. *Id.*, § 1313(e)(1). While under the 2020 Rule it may no longer be *mandatory* for states to set TDMLs for some ephemeral or remote features, Colorado may set water quality standards and develop TDMLs for those waters. And now it can target resources to the features it considers most important. *See* 85 Fed. Reg. at 22,334.

federal jurisdiction has dire economic effects. The costs of obtaining a CWA permit "are significant" and the process "arduous." *Hawkes*, 136 S. Ct. at 1812, 1815. "Over $1.7 billion is spent each year" for wetland permits. *Rapanos*, 547 U.S. at 721 (plurality). For many, these costs are uneconomic, forcing them to abandon projects or take land out of use. Parrish Dec. ¶¶ 26-30, 53.

There would also be uncertainty costs from enjoining the clear jurisdictional lines laid out in the 2020 Rule. Landowners who make a mistake face heavy penalties. Parrish Dec. ¶ 33. If the definition of WOTUS is unpredictable, businesses' ability to use land is compromised. If farmers cannot tell what land can be put to use, they may have to take land entirely out of production. *Id.* ¶ 50. Manufacturers and builders may have to delay or abandon projects. *Id.* ¶¶ 28-29. Similar concerns cut across nearly every industry and may cost jobs and impair production of essential goods. *Id.* Many businesses hit the hardest are family operations that lack resources for costly jurisdictional determinations. *Id.* ¶ 53. Federal permits must be sought long in advance. Uncertainty over what standard applies hamstrings business operations and planning. *Id.* ¶ 56.

Regulated parties suffered these harms under earlier rules with unpredictable WOTUS tests. The 2020 Rule solves the problem. Intervenors' members no longer face the risk that seeding in or building over a puddle is a federal violation, or that filling a long-dry wash may result in jail. Parrish Dec. ¶¶ 21-24, 31-32, 34-35. Enjoining the 2020 Rule would cast businesses back into the regulatory purgatory that the 2020 Rule corrects. These serious harms—documented by the intervenors over years of litigation (*Id*. ¶¶ 13-15) and rule comments (*id.* ¶14, n.2)—far outweigh Colorado's preference not to regulate its own water features.

CONCLUSION

The Court should deny Colorado's motion for a preliminary injunction.

Dated this 8th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2020 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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