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

In the

United States Court of Appeals

for the

Tenth Circuit

STATE OF COLORADO,
Plaintiff-Appellee,

– v. –

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellants,

&

CHANTELL and MICHAEL SACKETT,
Intervenor-Defendant-Appellants,

&

AMERICAN FARM BUREAU FEDERATION, et al.,
Intervenor-Defendant-Appellants.

Appeal from the U.S. District Court for the District of Colorado,
Judge William J. Martinez
No. 1:20-cv-01461-WJM-NRN

REPLY BRIEF OF 14 CONSTRUCTION, MINING, MANUFACTURING, FORESTRY, AGRICULTURE, LIVESTOCK, AND ENERGY TRADE ASSOCIATIONS AS INTERVENOR-DEFENDANT-APPELLANTS

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No oral argument is requested.

CORPORATE DISCLOSURE STATEMENT

Intervenor-defendant-appellants are the following national trade associations:

American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association.

Intervenors certify that none of them issues stock and none is owned, either in whole or in part, by any publicly held corporation.

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GLOSSARY

Agencies:	Together, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers
APA:	Administrative Procedure Act
Business Intervenors:	Together Intervenor-Defendant-Appellants American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association
CWA:	Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (as amended)
Repeal Rule:	Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).
WOTUS:	Waters of the United States
2015 Rule:	Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)

2020 Rule:	The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020)

INTRODUCTION

The stay entered by the district court should be vacated. First, Colorado is not likely to succeed on the merits of its claims. In their opening brief, the Business Intervenors explained that Justice Kennedy's significant nexus test from his concurring opinion in *Rapanos v. United States* does not foreclose the Agencies from interpreting the phrase "waters of the United States" ("WOTUS") in the manner they have in the 2020 Rule. Justice Kennedy's *Rapanos* concurrence was not the precedential holding of that case, and to the extent there is a governing common denominator between the *Rapanos* plurality and concurrence, the 2020 Rule is faithful to it. As a matter of well-settled administrative law, the Agencies are authorized to fill the gaps in an ambiguous statutory scheme—even one that has already been judicially interpreted—and that is what the Agencies did in the 2020 Rule.

Colorado raises alternative arguments that the district court did not address, but those claims are equally without merit. The 2020 Rule is not inconsistent with the purposes underlying the Clean Water Act ("CWA"); it *serves* those purposes by properly drawing the line between federal jurisdiction and state authority over land and water use. And the Agencies

provided the required reasoned explanation for the change from their prior regulatory regime to the 2020 Rule. They were cognizant that they were changing prior policy, considered states' reliance interests on the prior regulatory regime, and provided detailed reasoning for replacing the existing vague and unwieldy regulations with bright line rules that protect state authority and increase regulatory predictability.

Many of Colorado's complaints are based on the State's belief that the Agencies "ignored science." They did not; but more important, as the Agencies correctly reasoned, CWA jurisdiction is a legal, not scientific, question that requires consideration of the statutory language, the Act's purposes, and the applicable constitutionally imposed limitations on federal jurisdiction over matters traditionally within state authority.

Balanced against the low probability that Colorado's claims will be found to have merit are the harms to the regulated community. Colorado largely ignores these harms, instead exalting its speculative enforcement issues that, even if they do exist, are entirely of the State's own making. Nonetheless, Business Intervenors have provided detailed evidence establishing the harm to the regulated community resulting from prior

regulations, regulatory uncertainty, and the risk of patchwork regulations that is made manifest by the stay order.

For these reasons, the stay should be vacated.

ARGUMENT

I. COLORADO IS NOT LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. Justice Kennedy's *Rapanos* concurrence is not controlling.

Business Intervenors explained in their opening brief (at 17-31) that Justice Kennedy's significant nexus test is not the controlling opinion from *Rapanos*, the 2020 Rule is consistent with the common denominator of the *Rapanos* opinions concurring the Court's judgment, and, in any event, the Agencies retained their authority to interpret the ambiguous provisions of the CWA in a reasonable manner even if that interpretation was inconsistent with a prior judicial interpretation. In response, Colorado offers a convoluted argument about the precedential effect of *Rapanos* but fails to respond to Business Intervenors' arguments on these points.

The crux of Colorado's argument is that the 2020 Rule ignores "the Supreme Court's controlling interpretation of the statute." Colo. Br. 20. The State believes that "controlling interpretation" to be Justice Kennedy's *Rapanos* concurrence, *id*. at 25-26, and it argues that five Justices (Justice

Kennedy and the four dissenters) "rejected" the *Rapanos* plurality's construction of the statute. *Id.* at 21-22. Colorado, however, ignores the legal framework to determine what, if anything, from *Rapanos* is controlling.

That issue involves the intersection of two legal doctrines. One doctrine is that under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984), an administrative agency's interpretation of truly ambiguous terms in a statute it is empowered to enforce will be given deference. That is because resolving actual statutory gaps "involves difficult policy choices that agencies are better equipped to make than courts." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Pursuant to this rule, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows *from the unambiguous terms of the statute* and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982 (emphasis added).

In analyzing whether the 2020 Rule was an improper exercise of the Agencies' discretion, the court must determine whether there has been a

precedential judicial interpretation of unambiguous statutory language. There can be no dispute that WOTUS is, overall, an ambiguous term. Still, courts may find that the term unambiguously has (or does not have) certain core attributes. *See* Opening Br. at 29. For instance, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"), the Court held that WOTUS may not be interpreted to include ponds and mudflats based on the "Migratory Bird Rule." That does not mean that WOTUS is unambiguous in all of its other applications. Thus, to determine whether *Rapanos* cabins the Agencies' authority, the court must determine what, if anything, is the legal holding of that case, and whether that holding was a construction of ambiguous or unambiguous language in context.

That is where the second relevant legal doctrine comes into play. *Rapanos* was a fractured decision without a majority opinion. As Business Intervenors have explained (at 19-20), the Supreme Court's guidance in this situation is that "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (emphasis added). Business Intervenors also explained (at 22-26), that

under *Marks*, Justice Kennedy's significant nexus test cannot be the holding of *Rapanos*. That conclusion is compelled by this Court's understanding that "the *Marks* rule produces a determinative holding 'only when one opinion is a logical subset of other, broader opinions.'" *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1141 (10th Cir. 2012); *see U.S. v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (same). Under that analysis, neither the plurality opinion nor Justice Kennedy's concurrence is the logical subset of the other—they are distinct approaches to defining the scope of WOTUS. *See* Opening Br. 23-26. Therefore, under *Marks*, neither opinion is the binding holding of *Rapanos*.

Colorado concedes this application of *Marks* is correct and neither the plurality nor the concurrence is a logical subset of the other: "[a]s 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." Colo. Br. 24. To get from that concession to its conclusion that Justice Kennedy's concurrence "provides the controlling rationale and rule of law," Colorado counts Justice Kennedy and the four dissenters. *Id.* at 22-23. But *Marks* makes clear that, in divining the holding of a fractured decision, it is only the opinions of the judges who concurred in the

judgment that matter. 430 U.S. at 193. Business Intervenors explained (at 19-20) why *Marks* forecloses consideration of the *Rapanos* dissent, and Colorado makes no response to their argument. *See King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("*Marks* has never been so applied by the Supreme Court, and we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."); Jonathan H. Adler, *Reckoning With Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L & POL'Y REV. 1, 14 (2006) ("[I]t would be wrong to view any part of Justice Stevens' dissent as a 'holding' of the Court. Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent is part of the actual holding of the case.").

Without offering any reasoning why a dissenting opinion may be considered in determining the "controlling rationale and rule of law" of a fractured decision, Colorado simply cites two cases: *Vasquez v. Hillery*, 474 U.S. 254 (1986), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Business Intervenors explained in their opening brief (at 21-22) that *Vasquez* does not support using a dissenting opinion to fashion a legal holding under *Marks* because in

Vasquez the "dissenters" explicitly *concurred* in the relevant part of the judgment. *See King*, 950 F.2d at 783. Colorado offers no response to this.

Moses H. Cone likewise offers no support for Colorado's position. The issue there was whether the Court's fragmented decision in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), "undermined" or "at least modifie[d]" the Supreme Court's *Colorado River* abstention analysis. 460 U.S. at 17. In *Will*, the Court reversed the appellate court's grant of mandamus relief ordering the district court to consider certain claims instead of abstaining from them in light of pending state court litigation presenting the same issues. A four-Justice plurality decision by Justice Rehnquist applied a version of the *Colorado River* test and held that the district court did not abuse its discretion by staying the federal court action. 437 U.S. at 664-67 (Rehnquist, J. plurality). Justice Blackmun concurred in the reversal of the mandamus writ, stating that the court of appeals should consider whether the district court stay was proper under *Colorado River* (which had been decided subsequent to the stay order). *Id.* at 667-68 (Blackmun, J., concurring). The four-Justice dissent stated that abstention was not proper under *Colorado River*. *Id.* at 668-77 (Brennan, J., dissenting).

In rejecting the argument that the plurality opinion in *Will* changed the elements of the *Colorado River* test, the Court in *Moses H. Cone* stated that "it is clear that a majority of the Court reaffirmed the *Colorado River* test" in *Will*. 460 U.S. at 17. The Court explained that the *Will* plurality's supposed modification of *Colorado River* "was opposed by the dissenting opinion" and Justice Blackmun's concurrence, and that on remand "the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test." *Id.* The Court in *Moses H. Cone* thus did not rely on the *Will* dissent to derive any new rule of law. Instead, it simply performed a head count to verify that the existing law had not changed. By contrast, Colorado seeks to erect a new legal interpretation of WOTUS based on the views of four dissenting Justices and directly contradicted by the plurality.

Business Intervenors also explained in their opening brief (at 26-27) that, in the absence of a controlling opinion under *Marks*, the court should still determine whether there is common ground between the *Rapanos* plurality and concurrence. *See King*, 950 F.2d at 781 (the focus of the *Marks* analysis and the logical subset test is on finding "a common denominator of the Court's reasoning"). Both the plurality and Justice

Kennedy agreed that (1) the word "navigable" in the CWA must be given some effect; (2) WOTUS includes some waters and wetlands not navigable-in-fact but which bear a substantial connection to navigable waters; (3) environmental concerns cannot override the statutory text; and (4) WOTUS cannot include drains, ditches, streams remote from navigable-in-fact water and carrying only a small volume water toward navigable-in-fact water, or waters or wetlands that are alongside a drain or ditch. Opening Br. 26-27.

Under *Brand X*, those are conclusions about the core meaning of WOTUS that the Agencies cannot ignore in their subsequent rulemaking, and the 2020 Rule is consistent with those requirements. *Id.* at 27.

B. The 2020 Rule Is Consistent With The Purposes Of The CWA.

Colorado also argues that "[b]y stripping federal protections away from headwaters and wetlands that meet the *Rapanos* significant nexus test, the 2020 Rule undermines the basic goal of the [CWA]." Colo. Br. 28. According to Colorado, the 2020 Rule "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.'" *Id.* But Colorado does not offer any meaningful analysis as to why this is so.

To the extent that the state's claim is based on its belief that simply narrowing federal jurisdiction hurts the "federal-state partnership," that argument is unfounded. To start, there can be no dispute that it is also a purpose of the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use * * * of land and water resources, and to consult with the [EPA] in the exercise of [its] authority under this chapter." 33 U.S.C. § 1251(b). It is congressional policy "that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title" and that the federal government will "support and aid research" and "provide Federal technical services and financial aid" to states in connection with pollution prevention, reduction, and elimination. *Id.*

Congress defined the form of the federal-state relationship in the CWA. That relationship features non-regulatory federal support for states in controlling pollution in "waters" and federal regulatory responsibility over a subset of those waters known as "navigable waters." *See* 85 Fed. Reg. 22,253. For instance, Congress authorized the EPA to make grants to states to develop techniques to control pollution in "any waters," 33 U.S.C.

§ 1255(a)(1), and to fund research "for prevention of pollution of any waters," *id*, § 1255(c). Thus, the federal government is to provide a support role to states as they exercise their authority over the broad category of "any waters." By contrast, federal regulatory authority extends not to "any waters" but only to "navigable waters" defined as WOTUS. *Id.*, § 1362(7). An interpretation of the CWA that recognizes that federal regulatory authority over WOTUS does not reach as far as state authority over "any waters" therefore cannot be in violation of the "federal-state partnership" created by the CWA.

Further defining the contours of the federal-state relationship, Congress provided "for grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution, including enforcement directly or through appropriate State law enforcement officers or agencies." *Id.*, § 1256(a). That provision also reflects the important role of states in pollution prevention and the non-regulatory support role Congress assigned the Agencies under the CWA.

Thus, the federal-state relationship that the CWA envisions reserves a major role to the states while providing a federal baseline of standards

and support. The 2020 Rule preserves that essential state role by restricting federal overreach but still providing categorical jurisdiction rules that confer federal authority over a large amount of water and wetlands. *See* 85 Fed. Reg. 22,252 ("Congress provided a major role for the States in implementing the CWA, balancing the preservation of the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation."); *id.* (the 2020 Rule "strikes a reasonable and appropriate balance between Federal and State waters and carries out Congress' overall objective to restore and maintain the integrity of the nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources").

Additionally, the 2020 Rule is consistent with the structure of the federal-state relationship contemplated by the Constitution. *SWANCC* explained that Congress did not manifest a clear intent in the CWA for federal regulation to extend to the very limits of the Agencies' constitutional authority. 531 U.S. at 172-73. Statement of such a clear intent is necessary because an interpretation of WOTUS to be as broad as the federal government's Commerce Clause authority would "alter[] the

federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. Consistent with *SWANCC*, the 2020 Rule defers to the states' sovereign rights and in that way preserves an appropriate federal-state relationship.

Relatedly, Colorado also argues that the 2020 Rule "undermines the [CWA]'s structure of cooperative federalism." Colo. Br. 29. According to the state, the CWA "supports overlapping state and federal jurisdiction over waters, not the narrow and separate approach of the 2020 Rule." *Id.* But the 2020 Rule still provides for substantial federal jurisdiction—just not as much as Colorado apparently would like—and the plain text of the CWA, which refers to state authority over "any waters" and federal authority over "waters of the United States" establishes that there will not be complete jurisdictional overlap in any event.

Tellingly, Colorado provides no reasoned assessment of how much federal jurisdiction "cooperative federalism" requires. If Colorado believes that Justice Kennedy's significant nexus test achieves the requisite amount of cooperation between the governments, it has offered no principled explanation for why that is so.

C. Colorado's Legislative History Argument Lacks Merit.

Colorado claims that the legislative history of the CWA requires that WOTUS be given "a broad interpretation" that would "extend as far as was permissible under the Commerce Clause." Colo. Br. 32. But Colorado makes no effort to reconcile its argument with *SWANCC*, which found that Congress did *not* indicate a clear intent in the CWA to regulate to the constitutional limit and struck down an agency rule that tested that limit. 531 U.S. at 172-73. In any event, the isolated statements of a couple of legislators that Colorado relies on (at 32) to equate "navigable waters" with "all of the waters of the United States in a geographical sense, not limited to waters navigable in a technical sense" do not overcome the plain text of the CWA, which draws a distinction between "any waters" subject to state authority and "navigable waters" subject to federal jurisdiction.

D. The 2020 Rule Does Not Violate The APA.

Colorado asserts that the 2020 Rule violates the APA because (1) the Agencies did not adequately justify their policy change from prior rules and (2) the Agencies did not provide sufficient opportunity to comment on the "typical year" concept used in the 2020 Rule. Neither argument is correct.

1. The Agencies provided a reasoned explanation for the 2020 Rule.

Agency action is invalid if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Under that "narrow" standard of review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Agencies need not rigidly adhere to past policies, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), but "may change their policies over time." *Oregon Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019). "'An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis,' for example, in response to changed factual circumstances, or a change in administrations." *Brand X*, 545 U.S. at 981 (internal citations and ellipsis omitted). An agency may thus consider new information, reconsider past information, reinterpret statutory provisions, review prior assumptions, and set new policies based on its current understanding of the facts and the law. *See U.S. v. Eurodif S.A.*, 555 U.S. 305, 315 (2009) ("a court's choice of one reasonable reading of an ambiguous statute does not preclude

an implementing agency from later adopting a different reasonable interpretation").

When an agency changes direction, it must provide a "reasoned explanation" for doing so. *Encinco Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Fox*, 556 U.S. at 516. But the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Fox*, 556 U.S. at 515; *see Brand X*, 545 U.S. at 980 (court must accept agency's reasonable construction of an ambiguous statute "even if the agency's reading differs from what the court believes is the best statutory interpretation").

"The reasoned explanation requirement" is intended "to ensure that agencies offer genuine justifications for important decisions," not "contrived reasons." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). The agency "must 'display awareness that it is changing position' and 'show that there are good reasons for the new policy,'" and it must explain why it "disregard[ed] facts and circumstances that underlay or were engendered by the prior policy." *Renewable Fuels Ass'n v. U.S. EPA*, 948 F.3d 1206, 1255 (10th Cir. 2020). "Courts cannot 'second guess' an agency's rulemaking decision when it provided 'reasons for its chosen

course of action.'" *New Mexico Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1167 (10th Cir. 2019) (internal brackets omitted).

Colorado claims that the Agencies' explanation fails this test for three reasons: (1) they failed to address the states' reliance interests on the significant nexus test; (2) they failed to explain why they did not rely on the science underlying the 2015 Rule; and (3) the Agencies' economic analysis was flawed. Colo. Br. 37-50. None of those arguments is persuasive.

First, when an agency changes its prior policy it is "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020). The court's job is not to determine which is the "better" policy. *Fox*, 556 U.S. at 515. So long as the Agencies were "cognizant" that "longstanding policies" may have led to "reliance interests," their new rule should be upheld. *Encino Motorcars*, 136 S. Ct. at 2126. The Agencies have "considerable flexibility in carrying out [this] responsibility." *Dep't of Homeland Security*, 140 S. Ct. at 1915.

Business Intervenors explained in their opening brief (at 32) that the Agencies recognized the 2020 Rule would affect states, and they discussed how states may adapt to the change in federal jurisdiction. 85 Fed. Reg. 22,270, 22,333-34. The Agencies explained in the Rule that they "evaluated potential effects of the final rule across CWA regulatory programs." *Id.*, 22,333. The Agencies reasoned that states "may elect to make changes to their statutes or regulations to regulate waters that are no longer jurisdictional under the final rule." *Id.* The Agencies also noted that states may choose to focus their resources "on a more targeted range of waters and could accelerate adoption of plans and standards on waters that may have more ecological value." *Id.*, 22,333-34. The Agencies provided the example of a western state that would no longer be required "to assess dry washes in the desert and establish CWA water quality standards for those typically dry 'waters'" so the state could instead focus its "research and restoration resources on waters with more substantial aquatic habitat." *Id.*, 22,334. The Agencies acknowledged that some states may need to change their existing laws if they want to expand their regulatory reach, and such states "without comprehensive pre-existing

programs that seek to regulate waters no longer jurisdictional under this final rule may incur new costs and administrative burdens." *Id*., 22,270.

This discussion shows that the Agencies were "cognizant" of the states' reliance interests on the earlier versions of the rule, and those reliance interests cut different ways for different states—some states will be unaffected, some states will want to increase regulations, and some states will welcome less regulation. The Agencies weighed those varied interests in concluding that the change in federal jurisdiction may lead to "more efficient[] allocate[ion]" of state "resources towards environmental protection." *Id*., 22,334. In other words, the agencies provided a reasoned explanation for their policy change. *See Dep't of Homeland Security*, 140 S. Ct. at 1915 (agency "was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns").

Colorado does not acknowledge any of this, instead claiming that "[t]he 2020 Rule abandons the significant nexus standard and the prior Agencies' position without addressing the 2020 Rule's impacts on states like Colorado" that have "relied on the comprehensive federal regulatory regime." Colo. Br. 38. But, as discussed, the Agencies plainly were

"cognizant" of the fact that some states may want to increase their environmental regulation to make up for the change in federal regulation, and they noted that this will require "political capital and fiscal resources" that will vary from state to state. 85 Fed. Reg. 22,334. That is a sufficient acknowledgement and consideration of state reliance interests. *See Dep't of Homeland Security*, 140 S. Ct. at 1915; *Encino Motorcars*, 136 S. Ct. at 2126.

Second, Colorado argues that the Agencies "disregard[ed] science in adopting the 2020 Rule" and "failed to establish that the scientific backing for the 'significant nexus' test had changed." Colo. Br. 41, 44. Colorado, however, misses the point. To start, while "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), the 2020 Rule nonetheless makes clear that the Agencies did apply scientific standards. *E.g.*, 85 Fed. Reg. 22,274-75, 22,288.

In any case, contrary to Colorado's argument, the Agencies were not required to show that the science underlying the 2015 Rule, principally the Connectivity Report, was no longer valid. Instead, they explained that a scientific analysis of the interconnectedness of remote waters and

wetlands cannot alone answer the legal question of the scope of federal jurisdiction under the statute. As the Agencies wrote, "science cannot dictate where to draw the line between Federal and State or tribal waters, as those are *legal* distinctions that have been established within the overall framework and construct of the CWA." 85 Fed. Reg. 22,271 (emphasis added). The Agencies continued that the definition of WOTUS "must be grounded in a *legal* analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law." *Id.* (emphasis added). They further stated that the 2015 Rule, which rested in large part on the Connectivity Report, "did not implement the legal limits on the scope of the agencies' authority under the CWA" which were recognized by the district court in *Georgia v. Wheeler* when it held the 2015 Rule to be unlawful. 418 F. Supp. 3d 1336 (S.D. Ga. 2019); 85 Fed. Reg. 22,272.

The Agencies' reasoned explanation did not need to contain a scientific rebuttal of the Connectivity Report (which the 2020 Rule partially incorporated anyway, *e.g.*, 85 Fed. Reg. 22,314). The Agencies were focused on jurisdictional issues, and those issues, while informed by science, depended chiefly on statutory text and constitutional limitations. Whether or not the science underlying the Connectivity Report is correct,

what matters is the legal analysis of how far federal jurisdiction can reach under the CWA. The Agencies explained their reasoning for their recalibration of federal jurisdiction, and nothing more is required under the reasoned explanation standard. *See Fox*, 556 U.S. at 515-16.

For these reasons, Colorado's reliance (at 44) on this Court's decision in *Renewable Fuels* for the proposition that an agency must explain why it changed its view about the science is misplaced. At issue in *Renewable Fuels* were three EPA orders granting extensions of time to small refineries to come into compliance with clean air rules. In granting those petitions, the EPA did not address studies that it had previously relied upon suggesting that small refineries could pass through compliance costs and thus mitigate the hardship that compliance would create. 948 F.3d at 1256-57. Because the EPA either ignored the studies it relied on in "other litigation," or abandoned those studies and the agency's prior analysis *sub silentio*, its orders were arbitrary and capricious. *Id*. at 1257.

Here, the Agencies did not ignore or abandon the Connectivity Report but rather addressed the Report throughout the 2020 Rule. *E.g.*, 85 Fed. Reg. 22,261, 22,271 n.33, 22,288, 22,314. Further, the science involved in *Renewable Fuels* was directly relevant to the compliance

extension requests the agency was adjudicating. In this case, however, the science does not resolve the legal question of federal jurisdiction under the CWA.

Third, Colorado claims that the Agencies' economic analysis supporting the 2020 Rule was flawed. Colo. Br. 45-51. This argument is a nonstarter because Colorado admits that the CWA "does not require the Agencies to conduct a cost-benefit analysis when promulgating water quality rules." *Id.* at 47. In the 2020 Rule, the Agencies explained that "[w]hile the economic analysis is informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this final rule." 85 Fed. Reg. 22,335. A "serious flaw undermining" a cost-benefit analysis can render a rule unreasonable only "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). Because the Agencies explicitly did *not* rely on the economic analysis as part of their rulemaking, any flaws Colorado perceives in the analysis are irrelevant to the reasonableness of the Rule.

2. The Agencies adequately explained the "typical year" metric.

In the 2020 Rule, the Agencies "use the term 'typical year' to help establish the surface water connection between a relatively permanent body of water and traditional navigable waters, and between certain wetlands and other jurisdictional waters, that is sufficient to warrant federal jurisdiction." 85 Fed. Reg. 22,274. Thus, for instance, a jurisdictional "adjacent wetland" may be a wetland that is inundated by flooding from a territorial sea, tributary, lake, or pond "in a typical year." *Id.*, 22,338. "Typical year" is defined to mean "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." 33 C.F.R. § 328.3(c)(13); 40 C.F.R. § 120.2(3)(xiii); 85 Fed. Reg. 22,339. This metric helps "ensure that flow characteristics are not assessed under conditions that are too wet or are too dry." 85 Fed. Reg. 22,274.

Colorado complains (at 53) that the Agencies' proposed rule did not "include sufficiently specific tools or resources" to "determine application of the 'typical year' concept to streams and wetlands in Colorado." But other than this conclusory statement, Colorado never explains specifically what

was stated in the proposed rule and why it was inadequate. To the extent Colorado argues that the typical year metric in the final rule was not a logical outgrowth of the proposed rule, it has offered no argument supporting that claim. *See Market Synergy Grp., Inc. v. U.S. Dep't of Labor*, 885 F.3d 676, 681-82 (10th Cir. 2018) (explaining logical outgrowth requirement).

To the extent that Colorado claims (at 55-56) it is unclear how the typical year metric will be applied to its rivers and streams, the Agencies set forth in detail the methodology they will "generally use." 85 Fed. Reg. 22,274-75. The Agencies also explained that they "currently use professional judgment and a weight of evidence approach as they consider precipitation normalcy along with other available data sources," and they list three such data sources and where they can be found. *Id.*, 22,275. Further, the Agencies are permitted to develop the typical year rule through application to specific aquatic resources. *See Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1206 (D.C. Cir. 2020) ("under the APA an agency has virtually unlimited discretion as to the procedures it uses to implement its legal/policy choices (assuming its substantive statutes don't

restrict those procedures).”). No greater specificity in the 2020 Rule was required.

II. THE STAY HARMS THE REGULATED COMMUNITY.

Business Intervenors explained in their opening brief (at 34-37) that the 2020 Rule addresses the debilitating regulatory uncertainty under which they have long suffered and about which they have long complained (and against which they have long litigated). In particular, they cited evidence that staying operation of the 2020 Rule and returning to the pre-2020 regulatory regime will be extremely costly and they likely will be forced to abandon projects or take land out of use. *Id.* at 36-37.

In response, Colorado states that a stay will simply “allow” Business Intervenors “to continue operating under current permitting regimes.” Colo. Br. 87. But Business Intervenors suffer “under current permitting regimes.” The 2020 Rule creates bright line definitions that allow construction, building, mining, farming, and other businesses to operate without the delays, costs, and uncertainties of the previous rules. *See* Opening Br. 35-36. Staying that Rule leaves Colorado farmers and ranchers unclear whether a puddle on their land is a jurisdictional water. *See id.* at 36. And a stay harms other businesses because it once again

subjects them to the uncertainty that was a hallmark of the pre-2020 rules and to expensive jurisdictional determinations, which are cost-prohibitive for many of them. *Id.* at 37.

Colorado also tries to downplay the harm caused by the regulatory inconsistency that results from a stay. Colo. Br. 89-93. But the stay will have the effect of requiring application of different federal rules in different states. This regulatory patchwork is unquestionably harmful because it rolls back the regulatory certainty provided by the 2020 Rule, subjects the regulated community to unnecessary expense in trying to comply with multiple federal regulatory regimes at once, and can create unsolvable dilemmas for property owners and businesses whose land crosses a state line where a different federal standard is applicable on either side of the line. Thus, the State's claim (at 89-90) that preserving the status quo in Colorado does not create any burdens ignores (1) the harmful uncertainty caused by that status quo and (2) the increased burden and uncertainty on the regulated community with land in multiple states.

Colorado asserts (at 90-91) that Business Intervenors are not harmed "as evidenced by the economic activity" under the pre-2020 regimes they

cited in their opening brief. The State misses the point that many businesses or operators in a wide swath of economic sectors—including farmers, ranchers, builders, manufacturers, miners, and energy companies—had to leave land undeveloped or unused or otherwise put off projects under the prior regimes because of uncertainty about the jurisdictional reach and the costs of jurisdictional determinations. To be sure, economic activity took place, but additional economic activity was forestalled. For instance, many smaller businesses were unable to afford the cost of the jurisdictional determination process or unwilling to risk the criminal penalties if they guessed wrong about what the opaque prior rules meant. Opening Br. 36-37 (citing Parrish Decl. ¶¶ 26-30, 33, 50, 53, 56).

Next, Colorado curiously argues (at 91-92) that a patchwork regulatory regime "results from Congress's decision to grant jurisdiction over these challenges to the district court." That in no way detracts from the harm that a patchwork regime in fact causes the regulated community.

Colorado also claims (at 92-93) that regulatory uncertainty is not a reason "to implement an illegal rule," but as explained the 2020 Rule is not illegal. Nor should this Court credit Colorado's argument (at 93) that the 2020 Rule increases regulatory uncertainty because the application of the

typical year metric is unclear. Even if the nuances of the typical year metric will be developed as additional data become available or through case-specific assessments, the categorical rules of the 2020 Rule still provide much greater certainty and predictability than the unwieldy significant nexus test under the 2015 Rule and the pre-existing regime.

As the Agencies explained in the 2020 Rule, "field work may frequently be necessary to verify whether a feature is a water of the United States; however, replacing the multi-factored case-specific significant nexus analysis with categorically jurisdictional and categorically excluded waters in the final rule provides clarifying value for members of the regulated community." 85 Fed. Reg. 22,270; *see id.*, 22,250 ("This final definition increases the predictability and consistency of Clean Water Act programs by clarifying the scope of 'waters of the United States' federally regulated under the Act."); *id.*, 22,273 ("The final rule eliminates the case-specific application of the agencies' previous interpretation of Justice Kennedy's significant nexus test in the *Rapanos* Guidance, and instead establishes clear categories of jurisdictional waters.").

CONCLUSION

For these reasons and those set forth in Business Intervenors' opening brief, the decision of the district court should be reversed and the stay of the 2020 Rule should be vacated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Timothy Bishop, counsel for the Business Intervenors certify that I am a member in good standing of the Bar of this Court. I certify that all required privacy redactions have been made. I further certify that the attached brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,084 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared using Microsoft Word and is set in Century Schoolbook in a typeface size equivalent to 14 points or larger.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on August 14, 2020. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via the appellate CM/ECF system.

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