IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

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.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The federal government's proposed new definition of "waters of the United States" conflicts with the text of the Clean Water Act, contravenes controlling Supreme Court precedent, contradicts the Act's objective, and ignores sound science. For Colorado, if implemented, this definition will significantly reduce the waters in Colorado protected by the Clean Water Act. Because Colorado directly implements and works closely with the federal government to implement the Clean Water Act within Colorado, this new rule will deprive the state of effective tools to

keep its streams and wetlands clean.

2. The federal government's flawed definition violates the Administrative Procedure Act and the National Environmental Policy Act. Colorado therefore requests that this Court set it aside and require the government to develop a definition that respects controlling law, is grounded in sound science, and reflects a reasonable economic analysis.

3. The State of Colorado, through its Attorney General, brings this Complaint to protect Colorado's critically important streams and wetlands from a dramatic reduction in federal Clean Water Act jurisdiction that will result from the adoption of the *Navigable Waters Protection Rule: Definition of "Waters of the United States,*" 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401) (the "2020 Rule"). By dramatically changing how the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (the "Corps") (together the "Agencies") will define "waters of the United States" – and consequently waters that will be subject to federal Clean Water Act regulatory jurisdiction – the 2020 Rule would leave a substantial portion of Colorado's ephemeral streams and wetlands without the federal regulatory protections that the State has relied on for many years and jeopardize the integrity and quality of Colorado's waters.

4. The fundamental purpose of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33

U.S.C. § 1251(a). Consistent with this purpose, pollutants, including dredged and fill materials, may not be discharged from a point source into "navigable waters" without a permit. *See* 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(12). The term "navigable waters" is defined in the Clean Water Act as "waters of the United States, including the territorial seas." *Id*. § 1362(7). The Clean Water Act does not define "waters of the United States."

5. Consistent with United States Supreme Court precedent, the Agencies previously considered "waters of the United States" to include intermittent and ephemeral streams that have a "significant nexus" to an otherwise jurisdictional water. Prior to the 2020 Rule, the Agencies evaluated the scope of federal jurisdiction over intermittent and ephemeral streams using guidance in a joint memorandum titled *Clean Water Act Jurisdiction following the Supreme Court Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008) ("2008 Guidance"). The 2020 Rule shrinks federal jurisdiction far below that of the 2008 Guidance – to a smaller number of Colorado waters than at any time since the passage of the Clean Water Act in 1972 – due to the new definitions of tributaries and adjacent wetlands and the 2020 Rule's reliance on the concept of the "typical year."

6. The narrowed definition of "waters of the United States" fundamentally undermines and contradicts the requirements of the Clean Water Act. With the exception of the clarifications provided by the Agencies on the

statutory limits of federal jurisdiction related to water rights administration and agricultural activities, the 2020 Rule violates the language and purpose of the Clean Water Act, as well as binding judicial precedent interpreting the scope of federal jurisdiction over "waters of the United States." It also lacks any reasoned basis in science and is otherwise arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. Moreover, the U.S. Army Corps of Engineers (the "Corps") has failed to consider the significant environmental impacts of this major federal action in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*.

7. In an attempt to justify the new rule, the Agencies have applied an incorrect legal standard for determining the scope of waters subject to federal jurisdiction under the Clean Water Act. Without a reasoned basis, the Agencies have abandoned both the governing "significant nexus" test for defining waters subject to the Clean Water Act's jurisdiction and their prior scientific findings supporting that test. In doing so, they have arbitrarily and capriciously eliminated federal jurisdiction over a significant number of Colorado's tributaries, adjacent waters, and wetlands that significantly affect downstream waters, without providing any rational basis for the rule.

8. Accordingly, Colorado seeks a declaration that the 2020 Rule's new definition of "waters of the United States" violates the Clean Water Act, the APA, and NEPA, and requests that the Court vacate and set aside the rule.

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a). Jurisdiction is also proper under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702. This Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 705–706.

10. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiff the State of Colorado, represented by and through the Attorney General, is a sovereign state in the United States of America. A substantial part of the events or omissions giving rise to this complaint occurred and continue to occur within this district.

PARTIES

11. Plaintiff, the State of Colorado, is a sovereign entity that regulates land use, water quality, and water resources within its borders through duly enacted state laws. The State of Colorado is also charged with directly administering certain provisions of the Clean Water Act, *see* 33 U.S.C. § 1251 et seq., and has been delegated authority to implement additional programs under 33 U.S.C. § 1342(b). The State of Colorado brings this action in its sovereign and proprietary capacity and as *parens patriae* on behalf of its citizens and residents to protect public health, safety, welfare, its waters and environment, and its economy.

12. Defendant Environmental Protection Agency ("EPA") is an agency of the United States within the meaning of the APA. 5 U.S.C. § 551(1). EPA is charged with administering certain provisions of the Clean Water Act on behalf of the federal government. 33 U.S.C. §§ 1251 *et seq*.

13. Defendant Andrew Wheeler is sued in his official capacity as the Administrator of EPA. Administrator Wheeler signed the 2020 Rule on April 21, 2020.

14. Defendant United States Army Corps of Engineers ("Corps") is an agency of the United States within the meaning of the Administrative Procedure Act. 5 U.S.C. § 551(1). The Corps is charged with administering certain provisions of the Clean Water Act on behalf of the federal government. 33 U.S.C. §§ 1251 *et seq*.

15. Defendant R.D. James is sued in his official capacity as the Assistant Secretary of the Army for Civil Works. Mr. James signed the 2020 Rule on April 21, 2020.

STATUTORY BACKGROUND

A. The Clean Water Act

16. The Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). Consistent with this purpose, 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" without a permit. *See id.* §§ 1311(a), 1342(a), 1344(a), 1362(12). The term "navigable waters" is defined in the Clean Water Act as "waters of the United States, including the territorial seas." *Id.* § 1362(7). The Clean Water Act does not define "waters of the United States."

17. To accomplish this purpose, the Clean Water Act makes it unlawful to discharge pollutants into the "waters of the United States" from a point source unless the discharge is in compliance with certain enumerated sections of the Act, including the requirement to obtain authorization to discharge under the Section 402 National Pollutant Discharge Elimination System permit program or the section 404 dredged or fill material permit program. *Id.* §§ 1342, 1344. Enforcement under the Clean Water Act's permitting programs requires proof that pollutants are discharged to waters of the United States from a point source in violation of a permit's terms, or without a permit. *Id.* § 1311(a).

18. Responsibility for Clean Water Act permitting programs is split between the Corps and EPA, unless delegated to a state to administer. Permits for the discharge of dredged and fill materials into waters of the United States are issued by the Corps under Section 404 of the Act, unless a state is authorized by EPA to operate this permit program for discharges within its borders. *Id.* § 1344(a), (h). Permits for the discharge of other pollutants from point sources into waters of the United States are issued by EPA under Section 402 of the Act, unless EPA authorizes a state to operate this permit program for discharges within its borders.

Id. § 1342(a), (b).

19. States like Colorado work closely with the EPA to administer the Clean Water Act permit programs. Under the Clean Water Act, states are primarily responsible for developing water quality standards for waters of the United States within their borders and reporting on the condition of those waters to EPA every two years. *Id.* §§ 1313, 1315. States must develop total maximum daily loads for waters that are not meeting established water quality standards that must be submitted to the EPA for approval. *Id.* § 1313(d). States also have authority to issue Section 401 water quality certifications or waive certification for federal permits or licenses issued within their borders that may result in a discharge to navigable waters. *Id.* § 1341. Because this Section 401 authority reserved to the states is linked to discharges to navigable waters, the definition of waters of the United States determines the scope of activities subject to state certification under the Act.

20. In 1975, EPA delegated the authority to administer the discharge permitting program under Section 402 of the Clean Water Act to the State of Colorado, which enacted the Colorado Water Quality Control Act to establish the current state program. *See* 40 Fed. Reg. 16713 (April 14, 1975); §§ 25-8-101 to 25-8-803, COLO. REV. STAT. Colorado's Section 402 discharge permitting program is administered by the Water Quality Control Division of the Colorado Department of Public Health and Environment. However, Colorado does not have a regulatory scheme in place to administer Section 404 dredge and fill permits for waters within

the state. Instead, Colorado relies on Section 404 permits issued by the Corps to regulate dredge and fill activity and protect critical streams and wetlands, and on federal oversight and enforcement of those permits. Under current law in Colorado, the State may only issue permits for discharges of pollutants if such discharges comply with State water quality standards and do not compromise the water body's classified uses.

B. The Administrative Procedure Act

21. The APA, 5 U.S.C. §§ 551 *et seq*., governs the procedural requirements for federal agency decision-making, including the agency rulemaking process. The APA requires an agency to publish notice of proposed rulemaking in the Federal Register, including a statement of the time, place, and nature of the proceedings; reference to the rule's legal authority; and the substance of the proposed rule. 5 U.S.C. § 553(b). Following the required notice, the agency must provide an opportunity for public participation through submission of comments or other information. *Id.* § 553(c). After considering relevant information, the agency must incorporate into the final rules "a concise general statement of their basis and purpose." *Id.*

22. Under the APA, a rule is unlawful and must be set aside when an agency acts "in excess of statutory jurisdiction, authority [and] short of statutory right," "without observance of procedure required by law," and in a manner that is "arbitrary, capricious [and] not in accordance with law." *Id.* § 706(2). A rule must be

based on a consideration of the relevant factors; the agency must examine relevant data and articulate a satisfactory explanation for its action. A rule is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that is counter to evidence before the agency, or is so implausible that it could not be attributable to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

23. Additionally, "[a]gencies are free to change their existing policies," but they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005)). While an agency need not show that a new rule is "*better*" than the rule it replaced, it still 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." *Federal 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." *National Cable & Telecomms. Ass'n*, 545 U.S. at 981.

C. The National Environmental Policy Act

24. NEPA, 42 U.S.C. §§ 4321 *et seq*., 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).

25. 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). Although Section 511(c)(1) of the Clean Water Act exempts EPA from compliance with NEPA for certain kinds of rulemakings, the same does not apply to the Corps.

26. 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. In the alternative, the Environmental Assessment may conclude that the action qualifies for a Finding of No Significant Impact. 40 C.F.R. § 1508.9. A Finding of No Significant Impact is

only appropriate if the proposed action will have no significant impact on the human environment. *Id.* § 1508.13. If there are questions as to the significance of effects associated with the proposed action, an Environmental Impact Statement is required.

27. When an Environmental Impact Statement is required, it must include analysis of (i) the environmental impact of the proposed action; (ii) unavoidable adverse environmental effects; (iii) alternatives; (iv) the relationship between local short-term uses and long-term productivity; and (v) any irreversible and irretrievable commitments of resources involved in the proposed action. 42 U.S.C. § 4332(C). The Environmental Impact Statement must analyze not only the direct impacts of the proposed actions, but also indirect and cumulative effects. 40 C.F.R. § 1508.25.

28. In "certain narrow instances," an agency does not have to prepare an Environmental Assessment or Impact Statement if the action to be taken falls under a categorical exclusion. *See Coalition of Concerned Citizens to Make Art Smart v. Federal Transit Admin. of U.S. Dep't of Transp.*, 843 F.3d 886, 902 (10th Cir. 2016) (citing 40 C.F.R. § 1508.4). Agencies may invoke a categorical 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).

FACTUAL AND PROCEDURAL BACKGROUND

A. Development of the Navigable Waters Protection Rule: Definition of "Waters of the United States"

29. The Clean Water Act's core permitting programs are defined and limited by the Agencies' regulatory jurisdiction. The statutory reach of the Act extends to "navigable waters," which are in turn defined as the "waters of the United States." *See* 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(7), 1362(12). Thus, the definition of "waters of the United States" is crucial to effective regulatory programs that accomplish the purposes of the Clean Water Act.

30. The scope of the Agencies' jurisdiction over waters of the United States has long been the subject of litigation and efforts to clarify the statutory definition through guidance and rulemaking from the Agencies. The Agencies issued regulations defining "waters of the United States" in 1977, 1980 and 1982. *Permits for Discharges of Dredged or Fill Material into Waters of the United States,* 42 Fed. Reg. 37122, 37,144 (July 19, 1977); *Guidelines for Specification of Disposal Sites for Dredged or Fill Material,* 45 Fed. Reg. 85,336, 85346 (Dec. 24, 1980); *Interim Final Rule for Regulatory Programs of the Corps of Engineers*, 47 Fed. Reg. 31,794, 31,897 (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; Section 404 State Program Regulations*, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988). These regulations 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.

31. The Supreme Court has noted that Congress' concern for the protection of water quality and aquatic ecosystems indicated an intent to confer Clean Water Act jurisdiction over wetlands with a significant nexus to "navigable waters." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineer*s, 531 U.S. 159, 167 (2001). In *Rapanos v. United States*, five justices of the United States Supreme Court agreed that water quality is the determining factor in defining the jurisdictional reach of the Clean Water Act. 547 U.S. 715, 779-80 (Kennedy, J., concurring) and 793-94 (Stevens, J. et al., dissenting) (2006).

32. In his concurring opinion, Justice Kennedy adopted a water quality-based definition of "waters of the United States," holding that wetlands fall within the scope of the Clean Water Act if, either alone or in combination with "similarly situated lands in the region," they had a "significant nexus" to traditional navigable waters. *Id*. at 779-80. 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. Every court of appeals that has considered the issue since *Rapanos* has held that if a wetland or other water satisfies the significant nexus test, then it is a "water of the United States." *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); *U.S. v. Donovan*, 661 F.3d 174, 183–84 (3d Cir. 2011); *U.S. v. Bailey*, 571 F.3d 791, 798–800 (8th Cir. 2009); *U.S. v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *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).[1]

33. Since *Rapanos*, the Agencies have consistently included a significant nexus analysis in making jurisdictional determinations under the Clean Water Act. The 2008 Guidance issued in the wake of the Rapanos decision[2] indicated that the Agencies would assert jurisdiction over traditional navigable waters and the adjacent wetlands, relatively permanent nonnavigable tributaries of traditional navigable waters and wetlands that abut them, nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water, and wetlands adjacent to nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water. The determination of significant nexus is based on the ecological relationship

[1] Other circuits have not established a clear interpretation of *Rapanos*, but none has adopted the plurality's test alone or rejected Justice Kennedy's standard. *See, e.g.*, *U.S. v. Cundiff*, 555 F.3d 200, 208, 210–13 (6th Cir. 2009) (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] *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), *available at* http://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf

between tributaries and their adjacent wetlands documented in scientific literature and reflected by physical proximity as well as shared hydrological and biological characteristics. Under the 2008 Guidance, the Agencies considered 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 is present.

34. The Agencies have long recognized an exclusion from the definition of "waters of the United States" for prior converted cropland. *Clean Water Act Regulatory Programs*, 58 FR 45008, 45031 (Aug. 25, 1993). The Agencies have further recognized the primary and exclusive authority of states to allocate quantities of water within their jurisdictions, consistent with Section 101(g) of the Clean Water Act. 33 U.S.C. § 1251(g). This is of particular importance to western states like Colorado, where water resources are often limited and water rights carefully administered.

35. In 2015, the Agencies issued a final rule again attempting to clarify the definition of "waters of the United States ("2015 Rule"). The definition covered waters having a "significant nexus" with the integrity of downstream navigable-in-fact waters—the standard adopted by a majority of the Supreme Court in *Rapanos*. *See Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (Jun. 29, 2015).

36. 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. *Id.* at 37,106. It relied on a scientific literature review to support federal jurisdiction over certain waters. *See Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*, EPA, EPA/600/R-14/475F (Jan. 2015) (the "Connectivity Report").

37. In February 2017, the President issued Executive Order 13778 entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States Rule.'" Exec. Order No. 13778, 82 Fed. Reg. 12497 (Mar. 3, 2017). Executive Order 13778 directed the Agencies to review the 2015 Rule and issue new rules rescinding or revising the rule consistent with the Order, including a direction to interpret the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*, rather than the analysis articulated in Justice Kennedy's concurrence that garnered majority support.

38. In March 2017, the Agencies announced that they would implement Executive Order 13778 in a two-step approach. For the first step, on July 27, 2017, the Agencies published a notice of proposed rulemaking for "Definition of 'Waters of the United States' – Recodification of Pre-Existing Rules," which proposed to repeal the 2015 Rule and recodify the regulatory text that governed prior to the 2015 Rule.

39. On October 22, 2019, the Agencies published a final rule repealing the

2015 Rule and recodifying the pre-existing regulations as an interim measure (the "2019 Repeal Rule"). 84 Fed. Reg. 56,626 (Oct. 22, 2019). The 2019 Repeal Rule became effective on December 23, 2019. Under this rule, the regulations defining the scope of federal Clean Water Act jurisdiction are those that existed prior to the 2015 Rule, which were implemented using the 2008 Guidance. Various legal challenges to the 2019 Repeal Rule are pending.

40. In the meantime, the Agencies began working on the second step, a new rule redefining "waters of the United States." On February 14, 2019, the Agencies published the proposed rule, which interpreted the term "waters of the United States" to encompass: traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters. The Agencies provided a 60-day comment period for the proposed rule, closing on April 15, 2019.

41. Colorado submitted comments on the proposed rule during the public comment period raising a number of objections to and questions about the proposed rule. Colorado asked the Agencies to consider the proposed rule's specific economic impacts to Colorado prior to issuing the final rule, including the impact of the "404 permitting gap" created by the rule on state government, construction projects, and other Colorado businesses, and the rule's impact on the state's large recreation industry.

42. As part of its comments, Colorado asked the Agencies to incorporate language from 33 U.S.C. § 1251(g) into the final rule and to clarify that neither the Clean Water Act nor the 2020 Rule can alter or impair any State's rights, duties, or obligations under interstate compacts or decrees of the Supreme Court of the United States equitably apportioning the flows of an interstate stream.

43. In its comments, Colorado also asked the Agencies to consider the proposed rule's specific environmental impacts to Colorado. Specifically, Colorado asked the Agencies to consider the impacts that the rule would have on specific Colorado species, and how the rule could harm the quality of Colorado's state waters. In addition, Colorado requested that the Agencies:

- Re-notice the proposed rule to provide more clarity as to how the Agencies will determine jurisdiction as a practical matter using the intermittent tributary definition and provide Colorado the opportunity to provide comments upon the clarified process;
- Engage in formal consultation with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), to ensure that narrowing the reach of Clean Water Act jurisdiction is not likely to jeopardize the continued existence of or destroy or adversely modify the critical habitat of any listed species in Colorado; and
- Prepare an analysis of the impacts of the proposed rule under the National Environmental Policy Act.

44. The Agencies engaged with the EPA's Science Advisory Board ("SAB") during the development of the rule. The SAB issued a draft commentary on the proposed rule on December 31, 2019 (submitted largely unchanged as a final commentary on February 27, 2020) 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." Letter from Michael Honeycutt, Chair, Science Advisory Board to Andrew R. Wheeler, Administrator, U.S. Environmental Protection Agency (Feb. 27, 2020) EPA-SAB-20-002, at 2.[3] The Board 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 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." *Id.*

- "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]." *Id.* at 3.

- 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." *Id.*

[3] *Available at* https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/729C61F75763B8878525851F00632D1C/$File/EPA-SAB-20-002+.pdf

- 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." *Id.*

45. While the Agencies made some changes to the proposed rule to address concerns raised by commenters and the SAB, the 2020 Rule maintains a significantly narrower definition of "waters of the United States" than any prior definition in the history of the Clean Water Act.

B. Definition of "Waters of the United States" under the 2020 Rule

46. The 2020 Rule removes protections under the Clean Water Act for an extensive but unquantified number of waters previously protected by the 2008 Guidance.

47. Under the 2020 Rule, "waters of the United States" means: "(i) 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; (ii) Tributaries; (iii) Lakes and ponds, and impoundments of jurisdictional waters; and (iv) Adjacent wetlands." 33 C.F.R. § 328.3(a); 40 C.F.R. §120.2(1).

48. The 2020 Rule excludes from the definition of "waters of the United States:" (1) Waters not specifically identified as jurisdictional; (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) Certain ditches; (6) "Prior converted cropland; (7) Artificially irrigated areas;" (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 non-jurisdictional waters;" (9) "Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel; (10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off; (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." 33 C.F.R. § 328.3(b); 40 C.F.R. § 120.2(2).

49. The rule includes several definitions that serve to further limit how the Agencies will define "waters of the United States."

50. The 2020 Rule 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.

51. The 2020 Rule limits protections for tributaries to those that contribute perennial or certain levels of intermittent flow to a traditional navigable water or territorial sea in a "typical year." 33 C.F.R. § 328.3(c)(12); 40 C.F.R. § 120.2(3)(xii).

52. "Typical year" is defined as when precipitation and other climactic variables are within the normal periodic range 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). The rule does not explain how the Agencies will obtain data on precipitation or other climactic variables, or how they will determine the normal periodic range or applicable geographic area.

53. The Agencies have not provided sufficient information on how they will determine a "typical year" as that term is used in the definition of "tributaries" and "adjacent wetlands." Nor have the Agencies provided sufficient information on how intermittent waters will be evaluated as to their contribution of flow to traditional navigable waters. The Agencies provide no flow model or other evaluative tool for evaluating the flow of intermittent waters. Thus, a critical aspect of the 2020 Rule – how the Agencies will determine whether intermittent waters are within federal jurisdiction – is missing. Without this critical information, those affected by the 2020 Rule, including the State of Colorado, were unable to provide meaningfully informed comment on the rule, and cannot determine whether large numbers of waters within the State are subject to federal jurisdiction.

C. The 2020 Rule Lacks Legal, Factual, or Scientific Support

54. The 2020 Rule excludes ephemeral streams from protection regardless of their significant effects on downstream waters. It removes the Clean Water Act's protections for interstate waters and interstate wetlands, and eliminates protections for waters previously determined on a case-by-case basis to have a significant nexus to traditional navigable waters. In doing so, the Agencies are reversing long-standing practice, guidance and regulations interpreting Clean Water Act jurisdiction over ephemeral and intermittent waters, tributaries, and wetlands in ways that are inconsistent with the purpose and intent of the Clean Water Act and unsupported by any scientific literature or economic analysis.

55. 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." 33 U.S.C. § 1251(a). 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. By stripping federal protections away from headwaters and wetlands that meet the *Rapanos* significant nexus test, the 2020 Rule threatens, if allowed to go into effect, to fundamentally undermine the basic goal of the Clean Water Act.

56. The Agencies used the reasoning in the *Rapanos* plurality opinion authored by Justice Scalia instead of the controlling Justice Kennedy concurring opinion in interpreting the term "the waters" in the phrase "the waters of the

United States" to encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are inseparably bound with such waters.

57. The Agencies' approach is inconsistent with case law defining the scope of federal jurisdiction under the Clean Water Act, which uniformly holds that the Kennedy concurrence in *Rapanos* is the controlling opinion from that case. 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).

58. Justice Kennedy's concurring opinion in *Rapanos* focused on water quality as a determining factor in defining the jurisdictional reach of the Clean Water Act, finding that adjacent wetlands would fall within the scope of the Act if, either alone or in combination with "similarly situated lands in the region," they had a "significant nexus" to traditional navigable waters. *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring). Following *Rapanos*, until the promulgation of the 2020 Rule, the Agencies consistently included significant nexus analyses in making jurisdictional determinations under the Act, and have acknowledged that the "use of the significant nexus standard is consistent with every circuit decision." Brief for

Respondents at 49, *Murray Energy Corp. v. U.S. Envtl. Prot. Agency*, No. 15-3751 (6th Cir. Jan. 13, 2017), ECF No. 149-1.

59. This unprecedented contraction of federal Clean Water Act jurisdiction is not supported by any factual or scientific findings. Indeed, the Agencies state that "science cannot be used to draw the line between federal and state waters, as those are legal distinctions that have been established within the overall framework and construct of the Clean Water Act." *Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22,250, 22,261 (Apr. 21, 2020) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401) . 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: EPA and Army Corps of Engineers, *Economic Analysis for the Proposed Revised Definition of "Waters of the United States"* (Dec. 14, 2018)[4] ("EA" or "Economic Analysis); and U.S. Environmental Protection Agency and Department of the Army, *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* (Jan. 23, 2020)[5] ("RPA" or "Resource and Programmatic Assessment"). Neither of these reports provide a scientific underpinning for the Agencies' change in approach. The Corps did not complete an

[4] *Available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf

[5] *Available at* https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf.

Environmental Assessment or Environmental Impact Statement under NEPA.

60. Determining whether waters or wetlands satisfy the significant nexus test requires the application of scientific principles addressing hydrology and connectivity of water sources, and science is fundamental to the overall framework and construct of the CWA. For instance, the Supreme Court itself has grounded its "waters of the United States" analyses in scientific concepts like wetland functionality. *See, e.g. Rapanos*, 547 U.S. at 780. Without scientific underpinning and support, any conclusion as to what is or is not "waters of the United States" is arbitrary and capricious.

61. The Connectivity Report, prepared by the Agencies to support the 2015 Rule, included detailed factual findings based on a review of more than 1200 peer-reviewed publications. The Connectivity Report's 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." Connectivity Report, at ES-1.

62. The Connectivity Report and the recent SAB Commentary 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. Nonetheless, the 2020 Rule largely ignores the Connectivity Report and the recommendations of the SAB. The Agencies offer no new scientific evidence contradicting their previous findings that tributaries and adjacent wetlands can

have a significant nexus to downstream jurisdictional waters even without a direct surface water connection.

63. The scientific literature discussed in the Connectivity Report demonstrates that ephemeral waters play a large collective role in maintaining and defining the physical, chemical, and biological integrity of perennial waters. This literature demonstrates that intermittent and ephemeral system impairment, loss, unregulated fill, or pollution would have considerable and long-lived negative consequences for fisheries, ecosystem services, and economies dependent on them.

64. There is unlikely to always be a bright line between ephemeral and intermittent waters in Colorado. In one year, a stream may appear ephemeral, and in others it may appear intermittent. Some streams may appear perennial (flowing for years at a time) but may lose surface flow during periods of drought. Particularly in the west and other arid climates, streams and stream reaches may be devoid of surface flow, with a channel morphology indicative of ephemeral flow, but may flow for years at a time after large precipitation events fill perched aquifers (which occur where impermeable layers of rock or sediment hold water above the main water table) that sustain baseflow in streams thought to be ephemeral.

65. Finally, the Connectivity Report concluded that tributary streams, wetlands, and open waters in floodplains and riparian areas are connected to and strongly affect the water quality of downstream traditional navigable waters, interstate waters, and the territorial seas. The EPA's SAB reiterated these

conclusions. The 2020 Rule does not reflect these scientific findings.

D. The Agencies' Economic and Programmatic Analyses Are Insufficient to Support the 2020 Rule.

66. The Agencies claim to rely on their 2020 Economic Analysis and "Resource and Programmatic Assessment" as a basis to support the 2020 Rule. In these reports, the Agencies argued that the 2020 Rule's expected cost savings outweigh its expected foregone water quality-related benefits, and that the rule would have minimal adverse impacts on water quality in three watersheds that were analyzed.

67. The Agencies' Economic Analysis, however, did not comply with the EPA Guidelines for Preparing Economic Analyses and did not comply with basic professional standards for cost-benefit analysis. It is structurally flawed, internally inconsistent, utilizes assumptions or analytics unsupported by the economics literature, or is otherwise unclear or inadequately explained.

68. The Agencies made no comparisons between the 2015 Rule and the 2020 Rule (let alone the 2008 Guidance), and failed to determine the degree to which the 2020 Rule would result in a loss of federal jurisdiction over waters that were previously determined to be jurisdictional.

69. The Agencies' methodology for quantifying the value of wetlands is unsupported by economics literature and underestimates the value of lost wetlands benefits.

70. The Agencies' analysis incorporated speculative state regulatory

changes in response to reduced federal jurisdiction, contrary to EPA Guidelines stating that only regulations already promulgated, imminent, or reasonably certain to be promulgated should be considered. *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.[6]

71. The Economic Analysis makes incorrect assumptions with regard to 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." Economic Analysis, 39. Contrary to this conclusion, and as noted in Colorado's comments on the proposed rule, the State expects the 2020 Rule to impose significant costs upon Colorado related to developing and implementing an entirely new dredge and fill permitting program, notwithstanding that the State regulates state waters, including wetlands, more broadly than the Clean Water Act. The Economic Analysis also concludes that Colorado is "[u]nlikely to increase state regulatory practices to address changes in federal jurisdiction," Economic Analysis, 39-40 (Tables II-1 and II-2), despite Colorado's explanation in its comments that it would need to create a new program to permit fill to the waters now excluded from federal jurisdiction. The Economic Analysis relies on a number of other faulty assumptions and incomplete data

[6] *Available at* https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses.

relating to cost savings and the impacts on the recreation and construction industries.

72. The Agencies' Resource and Programmatic Assessment is similarly flawed. The Agencies used a Soil and Water Assessment Tool in only three watersheds to evaluate potential water quality impacts. There is no indication that the Soil and Water Assessment Tool models were peer reviewed or properly calibrated. Thus, their output cannot support any reasonable conclusions about water quality impacts.

73. In the Agencies' analysis of the 2020 Rule's effect on the Section 404 permit program, the combined effect of analytic deficiencies results in estimates of the monetary value of lost wetland benefits that are unreasonably low, and estimates of cost savings that are unreasonably high.

E. The Corps Failed to Conduct the Environmental Impact Analysis of the 2020 Rule Required by NEPA.

74. The Corps has promulgated the 2020 Rule without the required NEPA analysis that would have provided crucial information about the potential environmental impacts of the new approach to determining the scope of Clean Water Act federal regulatory jurisdiction. Although section 511(c)(1) of the Clean Water Act exempts EPA from compliance with NEPA for a rulemaking such as this, the exemption does not apply to the Corps. The 2020 Rule makes no mention of an accompanying NEPA analysis to assess the environmental impacts of the rule, along with those of reasonable alternatives. 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.

75. Tellingly, the Corps performed a NEPA analysis of 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. Unlike that rule, the 2020 Rule here will reduce federal Clean Water Act jurisdiction, which will likely result in significant adverse impacts. Accordingly, the Corps was required to conduct a NEPA analysis before promulgating the 2020 Rule.

F. Impact of the 2020 Rule on Colorado

76. The 2020 Rule will remove from federal jurisdiction numerous waters that are currently within federal jurisdiction under the 2008 Guidance. This will have negative impacts on Colorado's resources, economy, and water quality. These impacts are not reflected in the 2020 Rule's economic or resource analysis and appear not to have been considered by the Agencies.

77. Colorado places the highest priority on protection of the State's land, air, and water, and relies upon a combination of federal and state regulations to ensure that protection. The headwaters of Colorado provide a water supply to nineteen states and Mexico–providing millions of people with water for drinking, agriculture, industries, and recreation–and are critical to the survival of numerous species of concern.

78. Colorado's water must be of a high quality to be useful for drinking,

agriculture, aquatic life, and other critical purposes. Polluted, low quality water hurts Colorado and the nation. Protecting water quality in headwater states like Colorado has been a national priority since the passage of the Act in 1972. In the last forty years, Colorado and the Agencies have worked together to make enormous progress in protecting water quality throughout Colorado, including Colorado's headwaters.

79. Healthy aquatic and wetland habitats and good water quality are also critical for preserving Colorado's native species and for providing outstanding recreational fishing, which contributes $2.4 billion in economic output per year and supports over 17,000 jobs in Colorado. Protecting the physical, chemical, and biological integrity of waters is necessary to preserve these natural resources and recreational opportunities.

80. As with many Western states, the large majority of Colorado's stream miles are classified by the United States Geological Survey ("USGS") as either intermittent or ephemeral. The USGS National Hydrography Dataset estimates that 44% of Colorado's streams are intermittent and 24% are ephemeral, meaning that at least 68% of Colorado's waters are temporary in nature.

81. The 2020 Rule shifts the burden onto Colorado to protect federally excluded wetlands and waters, thereby saddling Colorado with the burden of protecting the quality of water received by nineteen states that receive Colorado waters.

82. Colorado defines its "state waters" more broadly than "waters of the United States." Under the Colorado Water Quality Control Act, state waters are "any and all surface and subsurface waters which are contained in or flow in or through this state," with minor exceptions for treatment system waters. *See* COLO. REV. STAT. § 25-8-103(19). The law bars discharges of pollutants to state waters without a state or federal permit. See COLO. REV. STAT. § 25-8-501(1).

83. Colorado does not have its own program to permit discharges of fill to state waters. Instead, Colorado relies on the Corps to operate the Section 404 program that regulates the dredging and filling of waters within the State and requires compensatory mitigation for unavoidable impacts, and relies on federal oversight and enforcement of this program.

84. Under the 2020 Rule, all ephemeral waters, some previously jurisdictional intermittent waters, and many of Colorado's wetlands will be excluded from federal jurisdiction and therefore ineligible for section 404 fill permits. The Agencies acknowledge that the 2020 Rule will protect fewer wetlands than the current rule, and as a result the Corps will issue fewer Section 404 permits limiting dredging or filling in wetlands under the 2020 Rule. RPA, 27, 84; *see* Economic Analysis, 93. Under the Section 404 program, "[w]here no federal permit is required, compensatory mitigation under federal regulation will not be required for unavoidable impacts to non-jurisdictional waters." RPA, 86. Without such federal permits, the Colorado Water Quality Control Act treats discharges of fill the

same as any other discharges of pollutants – these discharges cannot result in exceedances of water quality standards or compromise the classified uses of those waters. Without a permit, such discharges would be illegal under the Colorado Water Quality Control Act.

85. Establishing its own permitting program for fill activities to address the sudden decrease in federal jurisdiction under the 2020 Rule would require that the State of Colorado amend the Colorado Water Quality Control Act, promulgate new regulations, and appropriate millions of dollars for new permitting and mitigation programs – the outcomes of which are far from certain and would likely take years to complete. Until Colorado does this, fill activities cannot occur in waters that are not subject to federal jurisdiction. The narrowed definition of waterbodies subject to federal Clean Water Act jurisdiction creates a "404 permitting gap" where certain development and infrastructure activities will not be able to take place.

86. The restriction on fill activities could have enormous negative economic consequences to Colorado's economy. Between 2012 and 2017, the Corps issued more than 3,696 general and nationwide permits in Colorado, many of which were for the kinds of waters that will now be excluded from federal jurisdiction. These permitted fills in Colorado include projects that are directly related to protecting Colorado's infrastructure and economy. Slowing or stopping those projects could harm the construction industry, including small construction

companies; large and small retail and manufacturing businesses that are expanding; and local governments. It will also harm Colorado's transportation department by preventing it from obtaining permits for fill activity necessary to complete highway projects.

87. The shrinking of federal jurisdiction will also contribute to the degradation of Colorado waters in multiple ways:

- The current section 404 permitting program allows for the authorization of stream stabilization and other related projects with mitigation for project impacts to wetlands. Without a legal permitting mechanism for fill activity, Colorado is likely to see illegal fills of wetlands and excluded tributaries without any mitigation, potentially resulting in significant loss of wetland habitat.

- State regulations also currently require all projects receiving section 401 certifications to implement best management practices to ensure that the potential for adverse water quality impacts due to construction activities is minimized. The removal of federal jurisdiction from certain waters will mean projects involving the dredge and fill of those waters will no longer require a section 404 permit, and the State will therefore no longer issue a section 401 certification requiring implementation of protective or remedial best management practices for those projects, and no implementation of protective or remedial best management practices. In addition, people may fill in wetlands or waters that are so sensitive the Corps would not have issued a permit at all.

- Illegal filling in ephemeral and intermittent streams and wetlands excluded by the 2020 Rule from federal jurisdiction is likely to cause damage to habitat, refuge, and breeding grounds for species life in Colorado.

- The 2020 Rule will result in degradation of waters entering Colorado. While Colorado is a headwaters state, it does contain a number of waters that are connected to upstream ephemeral and intermittent headwaters in Wyoming, Oklahoma, Utah, New Mexico, and the Southern Ute reservation. Some of those states and tribes lack

> separate state or tribal protections for non-federal waters, meaning that at least non-jurisdictional tributaries and wetlands are likely to be filled in or polluted without controls. The degradation of waters coming from other states and tribes will adversely affect Colorado's water quality and aquatic life and could lead to increased costs for water users, who may have to take extra measures to treat the degraded water.

88. Many of the waters currently within federal jurisdiction in Colorado under the 2008 Guidance that are excluded under the 2020 Rule provide high quality water for drinking and agriculture. Within Colorado, 10,510 miles of intermittent and ephemeral streams provide water for surface water intakes supplying public drinking water systems. Headwater and wetlands fills upstream of those intakes may degrade the quality of water used by those systems, jeopardizing downstream drinking water supplies. Private well users whose wells are close to surface water bodies may also find their drinking water degraded. Degradation of water quality compromises the ability of farmers downstream to use water rights for agriculture. Water degradation will also have significant impacts to Colorado's water-based recreation industry, which is an important component of Colorado's economy.

89. Consequently, Colorado has suffered a legally cognizable harm and concrete injury as a result of the Agencies' action and have standing to bring this suit. Declaring portions of the 2020 Rule ultra vires and arbitrary and capricious, and vacating those provisions, will redress the harm suffered by Colorado.

CAUSES OF ACTION

COUNT 1
Violation of the Administrative Procedure Act
Agency Action not in Accordance with Law

90. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

91. Under the APA, a court must "set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A).

92. The Clean Water Act requires the Agencies to assert jurisdiction over "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(7), 1362(12). The United States Supreme Court has interpreted this authority to mean that adjacent wetlands would fall within the scope of the Clean Water Act if, either alone or in combination with "similarly situated lands in the region," they had a "significant nexus" to traditional navigable waters. *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring).

93. The 2020 Rule defines "waters of the United States" in a way that is inconsistent with the Agencies' statutory authority as established by existing case law defining the scope of federal jurisdiction under the Clean Water Act, which uniformly holds that the Kennedy concurrence in *Rapanos* is the controlling opinion from that case. Contrary to this controlling law, the 2020 Rule categorically excludes waters that may have a significant nexus to traditional navigable waters.

94. The 2020 Rule's definition is also inconsistent with the Clean Water

Act's statutory objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). 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, in particular those that satisfy the Significant Nexus test. By stripping federal protections away from those protected headwaters and wetlands, the 2020 Rule will undermine the basic goal of the Clean Water Act.

95. The 2020 Rule must be set aside because it is inconsistent with the Clean Water Act's scope as interpreted by the controlling analysis in *Rapanos* and is therefore "not in accordance with law." 5 U.S.C. § 706(2)(A),(C).

COUNT II
Violation of the Administrative Procedure Act
Arbitrary and Capricious Agency Action

96. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

97. Under the APA, an agency engaging in rulemaking must examine relevant data and articulate a satisfactory explanation for its action. A court must "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

98. Under this standard, agency action is arbitrary, capricious, or an abuse of discretion when an agency fails to articulate a satisfactory explanation for its action backed by relevant data, fails to consider an important aspect of the problem,

or offers an explanation for its decision that runs counter to the evidence before the agency.

99. An agency's departure from prior practice can also serve as a basis for finding an agency's interpretation to be arbitrary and capricious if the change in policy constitutes an "unexplained inconsistency."

100. The 2020 Rule constitutes a significant departure in the definition of Waters of the United States from past agency practice, guidance, and rules, resulting in a substantial reduction in the number of ephemeral streams, intermittent streams, tributaries, and wetlands that are subject to federal Clean Water Act jurisdiction compared to the status quo under the 2008 guidance and controlling case law. The Agencies did not provide a satisfactory explanation for this change, which ignores important scientific data that was before the Agencies and which was relied on in a prior rulemaking action, including the Connectivity Report.

101. In making this significant regulatory change, the Agencies also failed to provide a reasoned explanation for their departure from long-standing agency guidance on how jurisdictional determinations should be made under the Clean Water Act in conformance with the significant nexus test.

102. The 2020 Rule is not grounded in scientific principles, and contradicts scientific information developed by and previously relied on by the Agencies in prior rules and guidance. The 2020 Rule's exclusion of intermittent and ephemeral waters currently within federal jurisdiction under the 2008 Guidance ignores basic

science regarding wetlands hydrology and connectivity and the importance of intermittent and ephemeral waters to downstream water quality in the West. The 2020 Rule's reliance on flow during a "typical year" to make jurisdictional determinations lacks any explanation or guidance on how it will be applied and is not supported by science. Because these conclusions are not "reasonable conclusions regarding 'technical or scientific matters within the [Agencies'] area of expertise,'" they are not entitled to deference and are arbitrary and capricious. *Zzyym v. Pompeo*, 2020 WL 2393789 at *8 n.5 (10th Cir. May 12, 2020) (internal citation omitted).

103. Establishing a fundamental rule for the scope of the Clean Water Act without relying on science is contrary to the purpose and structure of the Clean Water Act. Without scientific underpinning and support, the Agencies' conclusion of what is and what is not waters of the United States is arbitrary and capricious.

104. In adopting the 2020 Rule, the Agencies also failed to consider other important aspects of the problem and other relevant evidence, including but not limited to the economic harm that the 2020 Rule could create in Colorado, the creation of a "404 permitting gap" in Colorado, the potential degradation of Colorado waters from the 2020 Rule, and the potential harm to Colorado species from the 2020 Rule. The failure of the Agencies to consider these important aspects of the problem was arbitrary and capricious.

105. The 2020 Rule must be set aside because it constitutes a change in

policy unsupported by sufficient scientific or other satisfactory explanation and is therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C).

COUNT III
Violation of the Administrative Procedure Act
Agency Action in Reliance on Faulty Economic Analysis

106. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

107. Under the APA, an agency engaging in rulemaking must examine relevant data and articulate a satisfactory explanation for its action. A court must set "aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

108. If federal agencies engage in and rely on an economic analysis to justify a decision, that analysis is subject to scrutiny under the arbitrary and capricious standard. A serious flaw undermining an economic analysis can render a rule arbitrary and capricious.

109. The Agencies' Economic Analysis contains significant flaws, as articulated above. It did not comply with the EPA Guidelines for Preparing Economic Analyses or with basic professional standards for cost-benefit analysis.

110. The Economic Analysis fails to examine the degree to which the 2020 Rule would result in a loss of federal jurisdiction over waters that were previously determined to be jurisdictional; underestimates the value of lost wetlands benefits;

incorporates speculative state regulatory changes in response to reduced federal jurisdiction; and relies on incorrect assumptions with regard to Colorado.

111. The 2020 Rule must be set aside because it relies on a faulty Economic Analysis and is therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT IV
Violation of the Administrative Procedure Act
Agency Action – Procedural Defects

112. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

113. 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, and arguments. 5 U.S.C. § 553.

114. A final rule must be set aside if it was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

115. The 2020 Rule was promulgated without sufficient opportunity to comment on how the Agencies will determine a "typical year" for the purposes of determining whether waters are jurisdictional. The Agencies have not provided information on how data will be aggregated to determine whether a year is "typical" under the Rule. Without this information, Colorado could not fully comment on the

impacts of the new definition of "typical year" on its waters, and does not have a basis for assessing what would constitute a "typical year" in certain watersheds.

116. The 2020 Rule was promulgated without sufficient opportunity to comment on how the Agencies will evaluate whether intermittent streams contribute flow to traditional navigable waters. The vast majority of temporary stream systems do not possess streamflow gages or flow records, the timing of seasonal flows is dependent on local hydrology and regional climatic conditions, and flow may occur at different times of year. The Agencies failed to provide information on these issues as part of the proposed rule, and as a result Colorado did not have sufficient opportunity to analyze and comment on the proposal's treatment of intermittent waters.

117. The 2020 Rule must be set aside because it exceeds the Agencies' statutory authority under the Clean Water Act and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT V
Violation of the National Environmental Policy Act by the U.S. Army Corps of Engineers

118. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

119. The National Environmental Policy Act ("NEPA") requires federal agencies to prepare Environmental Impact Statements for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §

4332(C).

120. The Corps was subject to the procedural mandates of NEPA when promulgating the 2020 Rule.

121. The Corps' decision to forego preparation of an Environmental Impact Statement violates NEPA because the 2020 Rule is a "major Federal action" subject to 42 U.S.C. § 4332(C).

122. The Corps' action violates NEPA and should be set aside as "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The 2020 Rule was also not adopted in "observance of procedure required by law." *Id*. § 706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, the State prays this Court to enter judgment in its favor and issue an order:

A. Declaring that the 2020 Rule is unlawful because it was promulgated in violation of the Clean Water Act, the Administrative Procedures Act, and the National Environmental Policy Act;

B. Vacating and setting aside the 2020 Rule in its entirety, allowing the regulations and 2008 Guidance in effect prior to the 2020 Rule's promulgation to continue to govern Clean Water Act jurisdictional determinations;

C. Issuing injunctive relief prohibiting the Agencies from using, applying, implementing, enforcing, or otherwise proceeding on the basis of the 2020 Rule;

D. Remanding the matter to the Agencies with instruction to issue a rule that complies with the statutory provisions of the Clean Water Act, and the procedural mandates of the National Environmental Policy Act and the Administrative Procedure Act;

E. Awarding the State costs and attorneys' fees; and

F. Granting the State such additional relief as may be necessary and appropriate, or the Court deems just and proper.

Respectfully submitted this May 22, 2020.

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