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Judicial Overreach Saves the Day: The United States District Court for the District of Colorado Abuses its Discretion to Prevent the Implementation of the Navigable Waters Protection Rule in the State and Temporarily Preserve Federal Protections for Ephemeral Waters in *Colorado v. Environmental Protection Agency*

I. INTRODUCTION

This controversy follows from Colorado's challenge to the Navigable Waters Protection Rule (NWPR), a regulation that narrows the definition of "waters of the United States" to categorically exclude certain waters, including ephemeral streams.[1] This regulation is significant because the definition of "waters of the United States" determines the scope of the regulatory authority granted to the Environmental Protection Agency (EPA) and Army Corps of Engineers (ACOE) under the Clean Water Act (CWA).[2] The Trump Administration promulgated the NWPR to invalidate the broad, formulaic definition of "waters of the United States" that was established by the Obama era EPA; by removing certain waters from the definition of "waters of the United States," the NWPR eliminates all federal protections for these waters.[3] However, to promote federalism, the CWA authorizes states to adopt measures to regulate these waters that fall outside of federal jurisdiction.[4] Being such a state, Colorado has enacted its own statewide water quality programs that apply more stringent standards than present under the CWA and protect waters that are now excluded under the NWPR. Specifically, Colorado law covers any and all waters that flow in the state and Colorado law flatly prohibits filling any

1. Colorado v. Env't Prot. Agency, 445 F. Supp. 3d 1295 (D. Colo. 2020).
2. *Id.* at 1300.
3. *Id.* at 1309-10.
4. *Id.* at 1300-01.

of these waters.[5] However, Colorado does not strictly enforce this ban; instead, Colorado relies on the ACOE to circumvent state law and issue permits to dredge and fill all "waters of the United States" within the state.[6] Now, under the NWPR, about half of the waters in Colorado will no longer be within the scope of the ACOE's regulatory authority, leaving Colorado in a confusing legal quagmire.[7]

Colorado filed this action in the United States District Court for the District of Colorado. Initially, Colorado motioned for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure to prevent implementation of the NWPR in the state; however, this was improper for a challenge to an agency decision, as the Administrative Procedure Act contains its own provision for equitable relief, so the court construed Colorado's motion as a proper request for stay of an agency action under 5 U.S.C. § 705.[8] The court then granted this request, enjoining the implementation of the NWPR until after proceedings on the merits of the state's claims.[9] The United States District Court for the District of Colorado held that a preliminary injunction was necessary based on a diversion-of-resources theory that showed the NWPR would irreparably harm Colorado and the Supreme Court's decision in *Rapanos v. United States* that likely invalidated the NWPR. Colorado v. Environmental Protection Agency, 445 F. Supp. 3d 1295, 1313 (D. Colo. 2020).

II. HISTORICAL BACKGROUND

Congress originally enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and the CWA still exists as the federal government's primary mechanism for regulating water pollution and water quality.[10] However, the CWA only authorizes the regulation of a specific set of waters, and these jurisdictional waters are generally defined as "waters of the United States" or, occasionally, "navigable waters."[11] Outside of the CWA, the ACOE defines "navigable waters" as "those waters that are subject to the ebb and flow of the tide and/or . . . susceptible for use to transport interstate or

5. *Id.*
6. *Id.* at 1301.
7. *Id.* at 1301, 1307.
8. *Id.* at 1299-1300 (explaining that Rule 65 and § 705 are very similar, so Colorado's motion, although improper, contained the necessary elements to satisfy either provision).
9. *Id.* at 1299.
10. 33 U.S.C. § 1251(a); *see generally* Clean Water Act, 33 U.S.C. § 1251 *et seq.*
11. 33 C.F.R. §§ 328.1-328.3 (2019); 33 U.S.C. § 1342.

foreign commerce."[12] However, "navigable waters" is interchangeable with "waters of the United States" under the CWA; therefore, although the NWPR only alters the definition of "waters of the United States," the rule limits the scope of both terms throughout the act.[13]

For regulatory purposes, the definition of "navigable waters" is particularly relevant to the EPA's National Pollutant Discharge Elimination System (NPDES) established under Section 402 of the CWA and the ACOE's permitting program established under Section 404; these sections authorize the agencies to issue permits to discharge pollutants into "navigable waters."[14] In 1973, the EPA originally construed "navigable waters" to include six types of waters, all of which were viewed as traditionally navigable.[15] In 1974, the ACOE similarly limited "navigable waters" to include waters capable to be used for transportation or commerce, demonstrating the agency's intention to only regulate waters that were navigable-in-fact.[16] In 1977, the ACOE departed from this narrow view in two ways. First, the ACOE halted its strict use of the term "navigable waters" as a limitation on its regulatory authority and began using the term "waters of the United States" to define its jurisdiction under the CWA.[17] Second, the ACOE defined "waters of the United States" to include "navigable waters . . . isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[18]

This broad definition of "waters of the United States" survived its first challenge in 1985. In *United States v. Riverside Bayview Homes, Inc.*, the ACOE attempted to require an individual to obtain a Section 404 permit before discharging material into an isolated wetland located on his property.[19] The Supreme Court sided with the ACOE and held that defining "waters" to include "lands" was reasonable when considering the

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12. 33 C.F.R. § 329.4 (2019).

13. *See Colorado*, 445 F. Supp. 3d at 1300; *see also The Navigable Waters Protection Rule: Definition of "Waters of the United States*," 85 Fed. Reg. 22250 (2020) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401) [hereinafter *NWPR*].

14. 33 U.S.C. §§ 1342, 1344.

15. National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13529 (1973) (originally codified at 40 C.F.R. § 125.1(o) (1974)).

16. 33 C.F.R. § 209.260 (1974).

17. *See* Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37127 (1977).

18. 33 C.F.R. § 323.2(a) (1978).

19. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

CWA as a whole, despite being unreasonable on a purely linguistic level.[20] Taking this analysis a step further, the Court held that Congress's decision to define "navigable waters" as "waters of the United States" clearly indicated that "navigable" was of "limited import" as a modifier.[21] This decision cemented the agencies' power to regulate a breadth of activities that impact water quality, even those activities taking place outside of traditionally navigable waters.

Following the Court's decision in *Riverside Bayview Homes*, the ACOE extended its enforcement jurisdiction as far as the Commerce Clause allowed, regulating areas even further disconnected from traditionally navigable waters.[22] This expansion of jurisdiction was struck down by the Supreme Court in 2001; in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Court held that the ACOE had impermissibly extended its regulatory authority beyond the scope of the CWA by asserting jurisdiction over wetlands on the sole basis that the wetlands served as a habitat for migratory birds.[23] In *SWANCC*, the Court determined that the text of the CWA did not authorize the ACOE to regulate waters that were wholly unrelated to waters that were navigable-in-fact; instead, the Court held that the ACOE could only protect waters that at least maintained a "significant nexus" to traditionally navigable waters.[24] Whereas *Riverside Bayview Homes* limited the impact of the term "navigable" as a modifier of "waters of the United States," *SWANCC* clarified that the term still retained some influence on the scope of the agency's power under the CWA.[25]

Though the Court in *SWANCC* limited the scope of CWA to the regulation of waters that maintained a "significant nexus" to navigable waters, the Court did little to clarify how significant this nexus must be.[26] Capitalizing on this ambiguity, the ACOE continued to regulate tributaries, adjacent wetlands, ephemeral streams, and all other features that

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20. *Id.* at 132 (deferring to the agency's reasonable, expansive interpretation of "waters of the United States" as necessary to combat water pollution as intended by the CWA).

21. *Id.* at 133-34.

22. *See* Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (1986) (clarifying that "waters of the United States" included all waters that functioned or could function as a habitat for migratory birds and/or endangered species).

23. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

24. *Id.* at 166-68.

25. *Id.* at 172.

26. *Id.* at 167, 174.

contributed flow to jurisdictional waters, even intermittently.[27] In response, the Supreme Court once again attempted to clarify the scope of the CWA's grant of authority in the 2006 case, *Rapanos v. United States*; although, to the Court's chagrin, no opinion from this decision carried the support of a majority of the justices.[28] Even though the case only concerned the need for a permit to fill wetlands with little permanent connection to navigable-in-fact waters, Justice Scalia took *Rapanos* as an opportunity to conclusively define the outer limits of the term "waters of the United States."[29] In his plurality opinion, Justice Scalia relied on common sense and judicial "canons of construction" to categorically exclude all waters without a "continuous surface connection" to traditionally navigable waters from the scope of the CWA.[30] Opposing these exclusions, Justice Kennedy individually authored a concurring opinion and suggested that the "significant nexus" test promoted by the Court in *SWANCC* should determine the scope of "waters of the United States."[31] Partially agreeing with Justice Kennedy, the four dissenting justices argued that the Court should have upheld the ACOE's broad assertion of jurisdiction.[32]

In the wake of *Rapanos* and its lack of controlling rationale, "waters of the United States" remained an ambiguous term. To provide clarity, the EPA and ACOE issued a memorandum detailing the scope of the CWA; the agencies asserted jurisdiction over all waters that satisfied either of the tests issued by Justice Scalia and Justice Kennedy in *Rapanos*.[33] Accordingly, the agencies identified three classes of waters: categorically jurisdictional waters, waters that would be analyzed under a significant nexus test on a case-by-case basis, and non-jurisdictional waters.[34] While this memorandum offered guidance on the extent of the CWA's

27. *See* Memorandum from Env't Prot. Agency and Dep't of Army on Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters (Jan. 2001).

28. Rapanos v. United States, 545 U.S. 715, 718 (2006); *id.* at 759-87 (Kennedy, J., concurring); *id.* at 787-811 (Stevens, J., dissenting).

29. *See id.* at 731 (acknowledging that the controversy could be resolved without defining "navigable" or "of the United States," but explaining the necessity of defining "waters").

30. *Id.* at 733, 738, 742.

31. *Id.* at 767 (Kennedy, J., concurring).

32. *Id.* at 787-811 (Stevens, J., dissenting).

33. Memorandum from Env't Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States (Dec. 2008).

34. *Id.* at 1.

jurisdiction, "waters of the United States" and "navigable waters" were still ambiguous, undefined terms.

Dissatisfied with the everlasting ambiguity of the CWA, many entities and individuals requested further clarification regarding the scope of the Act; in response, the agencies finally attempted to formally define "waters of the United States" in what is known as the Clean Water Rule.[35] The Clean Water Rule still categorized "waters of the United States" into three classes, but the agencies identified more waters as "categorically jurisdictional" that were previously analyzed under the significant nexus test.[36] Unsurprisingly, many states immediately challenged the Clean Water Rule, varying the jurisdictional limits of the CWA throughout the country.[37] Nevertheless, once in power, the Trump Administration immediately began the process of repealing the rule.[38] When issuing an Executive Order encouraging the repeal of the Clean Water Rule, President Trump suggested the agencies "consider interpreting the term 'navigable waters,' . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*," marking the administration's clear shift toward limiting the jurisdiction of the CWA.[39]

After a three-year process, the agencies promulgated the Navigable Waters Protection Rule, defining "waters of the United States" to fit the plurality's reasoning in *Rapanos*.[40] In this rule, the agencies listed waters deemed "categorically jurisdictional;" however, the agencies took an unusual step to claim that "the [NWPR] excludes from the definition of 'waters of the United States' all waters or features not mentioned [as categorically jurisdictional]."[41] The agencies then limited the CWA even further by listing waters to be categorically excluded from the Act, with the most notable exclusions being ephemeral features and artificial lakes.[42] The NWPR signified a complete abandonment of the significant nexus test

35. Clean Water Rule: Definitions of "Waters of the United States," 80 Fed. Reg. 37054 (2015) (originally codified at 33 C.F.R. pt. 328 (2016) [hereinafter *Clean Water Rule*].

36. *Id.* at 37105-06.

37. *See* North Dakota v. Env't Prot. Agency, 127 F. Supp. 3d 1047 (D.N.D. 2015) (enjoining implementation of the Clean Water Rule in 13 states); *see also* Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 2018 AMC 29 (2018) (holding that jurisdiction for any challenge to the definition of "waters of the United States" is only proper in a federal district court).

38. Exec. Order 13778: Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12497 (2017).

39. *Id.*

40. *NWPR*, *supra* note 13, at 22250.

41. *Id.* at 22251.

42. *Id.* at 22251-52.

that was established by the Supreme Court in *SWANCC* and promoted by Justice Kennedy's concurrence in *Rapanos*, and much like the Clean Water Rule, the states did not welcome this new definition with open arms.[43]

III. COURT'S DECISION

In the noted case, the United States District Court for the District of Colorado reevaluated Supreme Court precedent to determine what must be included in the definition of "waters of the United States."[44] In determining the necessity of a preliminary injunction, the court evaluated the overall impacts of the NWPR. First, despite rejecting Colorado's initial showing of irreparable harm caused by the NWPR, the court concluded that Colorado would face irreparable harm absent a preliminary injunction, primarily relying on ambiguous sentences contained in three separately submitted briefs.[45] Next, the court looked to Supreme Court precedent and the text of the CWA to determine if Colorado was likely to succeed in establishing the unlawfulness of the NWPR.[46] After declining to evaluate Colorado's interpretation of the purpose of the CWA, the court determined that *Rapanos* foreclosed the NWPR's categorical exclusion of ephemeral streams from federal jurisdiction.[47] Finally, the court concluded that public interest favored an injunction, and the court determined that invalidating the NWPR after its temporary implementation would create unnecessary confusion.[48]

While the court eventually granted Colorado's motion for preliminary injunction, it was not receptive to the majority of Colorado's contentions.[49] Initially, Colorado claimed the NWPR would irreparably harm the state by creating a permitting gap that would leave developers with no legal mechanism to circumvent the state's blanket prohibition of dredging and filling; however, the court rejected this claim as too speculative.[50] The court also viewed this injury as self-inflicted, reasoning that Colorado had "categorically prioritized environmental preservation over economic gain—a prioritization in which the Agencies had no role in

43. *See* California v. Wheeler, 2020 WL 3403072 (N.D. Cali. 2020).
44. Colorado v. Env't Prot. Agency, 445 F.Supp.3d 1295, 1313 (D. Colo. 2020).
45. *Id.* at 1306 n.6; *see also id.* at 1299-1303.
46. *Id.* at 1307-11.
47. *Id.*
48. *Id.* at 1312-13.
49. *Id.* at 1302-07.
50. *Id.* at 1302 (explaining that Colorado had not given proof of any planned dredging project).

effecting."[51] Next, the court evaluated Colorado's claim that the NWPR would irreparably harm the state by inviting developers to unlawfully dredge and fill previously regulated waters.[52] While recognizing that environmental damage is a cognizable form of irreparable harm, the court rejected this claim as "pure speculation" absent evidence of a developer intending to unlawfully dredge and fill any newly disputed waters.[53] The court then evaluated Colorado's third claim of injury; here, Colorado argued that implementing a program to protect newly excluded waters would be injuriously costly.[54] As before, the court rejected this claim, finding that such a program would likely not be implemented before the conclusion of this litigation—and therefore no injury would occur—because the Colorado Legislature had already adjourned, with no date set to reconvene.[55]

Having rejected all of Colorado's plainly asserted claims of irreparable harm, the court found credence in a diversion-of-resources claim of injury, though admitting that Colorado had not fully developed this argument on its own.[56] In regard to this theory, the court reasoned that Colorado would suffer an irreparable injury if the NWPR took effect because Colorado would no longer be able to exercise discretion in enforcing its ban on dredging and filling without risking significant environmental harms.[57] The court reached this conclusion in spite of its earlier findings that Colorado's economic injury would be self-inflicted and any environmental injury too speculative. The court further concluded that Colorado would need to divert resources from other pollution control programs to fund any efforts to regulate these newly disputed waters.[58] The court noted that a diversion-of-resources claim is not an irreparable injury in most cases because plaintiffs may recover the diverted funds as compensatory damages; however, under the Administrative Procedure Act, the government maintains sovereign immunity against claims for money damages, so Colorado would not be permitted to recover any diverted funds in this case.[59] Based on this line of reasoning, the court

51. *Id.* at 1303-04.
52. *Id.* at 1304.
53. *Id.* at 1304-05.
54. *Id.* at 1305.
55. *Id.* (acknowledging that the legislative session was disrupted by the COVID-19 pandemic).
56. *Id.* at 1306 n.6.
57. *Id.* at 1306.
58. *Id.* at 1307.
59. *Id.*

found that Colorado would suffer irreparable harm if the NWPR took effect.

After espousing this diversion-of-resources theory of irreparable harm, the court delved into analyzing the likelihood of Colorado successfully proving that the EPA unlawfully promulgated the NWPR.[60] During this stage, the court refused to entertain Colorado's primary argument that the NWPR's narrowing of federally regulated waters runs contrary to the intended purpose of the CWA; instead, the court relied on one of Colorado's alternative arguments to justify granting the motion for preliminary injunction—that the NWPR's categorical exclusion of federal protections for ephemeral waters is not in accordance with the Supreme Court's decision in *Rapanos*.[61] While recognizing that no single *Rapanos* opinion carried the support of a majority of the justices, the court identified certain contentions on which at least five justices agreed.[62] First, the court found that a majority of the justices, the four dissenting justices and the concurring Justice Kennedy, rejected the plurality's categorical exclusion of ephemeral waters, holding that this exclusion was not supported by the language of the CWA; looking further, the court found that these justices also agreed that the plurality opinion ran contrary to the purpose and history of the CWA.[63] Relying on these combined holdings, the court determined that the NWPR's categorical exclusion of ephemeral waters was not in accordance with the law.[64]

Scrutinizing this conclusion, the EPA argued that the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* permits the agency to freely ignore the Court's reasoning in *Rapanos*.[65] Though the controversy in *Brand X* did not concern the CWA, the Court's opinion emphasized that filling statutory gaps "involves difficult policy decisions that agencies are better equipped to make than courts."[66] Partially agreeing with the EPA, the court recognized that the Supreme Court's statutory construction in *Rapanos* would only foreclose the agency's interpretation if the construction followed from the unambiguous language of the CWA; however, the court

60. *Id.* at 1308-12.
61. *Id.* at 1310-12.
62. *Id.* at 1308-09, 1311.
63. *Id.* at 1311.
64. *Id.*
65. *Id.* at 1312; *see* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (holding that judicial construction of a statute only trumps an agency's interpretation if it follows squarely from the unambiguous words of the statute).
66. *Brand X*, 545 U.S. at 980.

disagreed with the EPA's conclusion regarding the overall relevance of *Rapanos*.[67] Although no single opinion in *Rapanos* featured a majority of the justices agreeing on the meaning of "waters of the United States" or the scope of the CWA, the court found that the five justices forming the concurrence and dissent were "unambiguously against the construction [of the CWA] offered in the plurality opinion, on which the [NWPR] is modeled."[68] Therefore, as a matter of law, agencies could not categorically exclude ephemeral waters from the scope of the CWA. Based on this reading of *Rapanos*, the court concluded that the NWPR is likely invalid.[69] Finally, after finding that Colorado would likely succeed in showing the unlawfulness of the NWPR, the court evaluated whether public interest favored staying the effective date of the NWPR in Colorado.[70] Regarding this matter, the court concluded that public interest favored an injunction, for any temporary departure from the status quo would unnecessarily confuse developers attempting to follow the law.[71]

IV. ANALYSIS

When analyzing an agency's interpretation of an ambiguous statute, courts must defer to the agency unless the interpretation is arbitrary, capricious, or not in accordance with the law; however, as long as the agency explains its reasoning, even a policy shift based solely on a change in administration will not be invalidated as arbitrary and capricious.[72] Additionally, when evaluating an interpretation's accordance with the law, courts often ask two questions: first, courts ask if the interpretation is contrary to the purpose and spirit of the statute, and second, courts ask if the interpretation is contrary to past judicial precedent.[73] While the CWA is a historically vague statute, some courts have invalidated interpretations of the meaning of "waters of the United States" under this first query; however, prominent cases that quashed an agency's interpretation of the CWA have usually concluded that the agency overreached, and there is a

67. *Colorado*, 445 F. Supp. 3d at 1312.
68. *Id.*
69. *Id.*
70. *Id.* at 1312-13.
71. *Id.*
72. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-82 (2005).
73. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (commonly referred to as the "Chevron Deference").

noticeable lack of precedent questioning an interpretation as potentially too narrow.[74]

This lack of precedent muddies the waters for courts evaluating the NWPR. While the government contends that the NWPR provides clarity regarding the scope of the CWA and restores the regulatory balance of federalism originally intended by Congress, those opposed to the new definition of "waters of the United States" argue that the categorical exclusion of ephemeral features risks an unmitigated increase of pollution in these waters.[75] Regardless, the NWPR undeniably hampers the CWA's grant of regulatory authority, and the present opposition to the NWPR's narrowness is new and unique.[76] The court in the noted case attempted to find answers to this unprecedented argumentation in the fervently debated Supreme Court case, *Rapanos v. United States*. While prior courts experienced difficulty determining the precedential value of *Rapanos*, the court in the noted case found clarity by identifying "what *Rapanos* is against;" compiling two separate opinions, the court held that *Rapanos* unambiguously barred the NWPR's interpretation of "waters of the United States."[77]

This new interpretation of *Rapanos*, though interesting, ought to be scrutinized. Initially, it must be acknowledged that the court's interpretation of *Rapanos* directly contrasts with a decision issued on the same day as the noted case; in *California v. Wheeler*, the District Court for the Northern District of California questioned the reading of *Rapanos* featured in the noted case as a "suspect . . . attempt to cobble together a holding from the concurrence and dissent."[78] According to the court, even if a majority of the justices in *Rapanos* held that the plurality's construction was improper, "a holding that the Agencies must construe the statute more broadly [would be] a bridge too far."[79] Then, relying on *Brand*

74. *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (holding that the Migratory Bird Rule was not in accordance with Congress's intention to only regulate waters that at least maintained a significant nexus to "navigable" waters); *but see* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (upholding the agency's interpretation of "navigable waters" to include some non-navigable waters, largely based on Congress's prior approval of the agency's regulations).

75. *NWPR*, *supra* note 13, at 22317-19; *see also Colorado*, 445 F. Supp. 3d at 1304-05 (2020).

76. *NWPR*, *supra* note 13, at 22317-19; *compare* North Dakota v. Env't Prot. Agency, 127 F. Supp. 3d 1047 (D.N.D. 2015), *with* California v. Wheeler, 2020 WL 3403072 (N.D. Cali. 2020).

77. Colorado v. Env't Prot. Agency, 445 F. Supp. 3d at 1311 (emphasis omitted).

78. California v. Wheeler, 2020 WL 3403072 at *6 (N.D. Cali. 2020).

79. *Id.*

X, the court claimed that *Rapanos* would only invalidate the NWPR if it "follow[ed] from the unambiguous terms of the statute and thus [left] no room for agency discretion."[80] Accordingly, because *Rapanos* looked to more than the text of the CWA, the Court's construction could not invalidate the NWPR *per se*.[81] Contrasting with the court in *California v. Wheeler*, the court in the noted case flatly rejected the application of *Brand X* when weighing the competing interpretations of the CWA from *Rapanos* and the NWPR.[82] While the court in *California v. Wheeler* concluded that *Rapanos* was insignificant because its cobbled opinions did not follow from the unambiguous language of the statute, as required by *Brand X*, the court in the noted case claimed that *Rapanos* was unaffected by *Brand X* altogether.[83] According to the court, "*Brand X* was about affirmative statements of how a statute *must* be interpreted, not about *foreclosed* interpretations."[84] Thus, the court found that *Rapanos* retained precedential value, as *Rapanos* was "unambiguously against the construction [of the CWA] . . . on which the [NWPR] is modeled."[85]

While this interpretation of *Brand X* worked to advance Colorado's argumentation, its legal soundness is questionable. First, it appears the court in the noted case misapplied the Supreme Court's use of "unambiguous." While *Brand X* claimed that a judicial construction must "follow from the unambiguous terms of *the statute*" to trump an agency's interpretation,[86] the court in the noted case concluded that *Rapanos* foreclosed the interpretation featured in the NWPR because a majority of the justices were "unambiguously against the construction offered in the plurality opinion."[87] Though the court in the noted case made a point to distinguish *Rapanos* from the sort of cases discussed in *Brand X*, the court declined to cite to precedential support agreeing with its conclusion that *Rapanos* prohibited excluding ephemeral features from the scope of the CWA as a matter of law.[88] Further, the court admitted that its interpretation of the legal impact of *Rapanos* "arguably forecloses every formulation of 'waters of the United States' proposed in *Rapanos*, or proposed by the

80. *Id.* (quoting Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).
81. *Id.*
82. *Colorado*, 445 F. Supp. 3d at 1311-12.
83. *Id.*
84. *Id.* at 1312 n.10.
85. *Id.* at 1312 (emphasis omitted).
86. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).
87. *Colorado*, 445 F. Supp. 3d at 1312.
88. *Id.*

Agencies thus far."[89] If the court's holding is to stand, the applicability of *Brand X* will be severely limited in future cases, and judicial interpretations of statues will be afforded a much higher degree of deference. Further, if the court is correct in concluding that every construction of the CWA offered in any single *Rapanos* opinion is foreclosed by the other *Rapanos* opinions, then the Clean Water Rule and the NWPR are legally invalid interpretations of "waters of the United States," as both relied on a single *Rapanos* opinion for guidance.[90] However, this conclusion was not reached in any challenge following *Rapanos*, at least not on the same grounds as in the noted case.[91]

Disregarding the validity of the court's analysis of precedent in the noted case, it must be acknowledged that the court reached its conclusions through problematic means. When initially determining whether Colorado had standing to challenge the validity of the NWPR, the court rejected all of Colorado's fully developed claims of irreparable injury; instead, the court found that the NWPR would irreparably injure Colorado based on a diversion-of-resources claim that Colorado did not present.[92] The court admitted that Colorado did not squarely present this diversion-of-resources claim in its briefs or motions, nor did Colorado "support these assertions with case law;" nevertheless, the court claimed that this theory was preserved by three ambiguous sentences scattered in three separate briefs.[93] Additionally, the court noted that a diversion-of-resources claim, being focused on legal principles, may be more readily preserved than an argument requiring factual development; therefore, the court reasoned that it would be an error to disregard this theory of injury.[94]

By relying on inimitable rules of the Tenth Circuit to efface its own winning argument, the court presented itself as a judiciary attempting to legislate; while the court specifically warned that "a court is not to substitute its judgment for that of the agency" when evaluating the validity of an agency's interpretation of a statute, that appears to be exactly what the court did.[95] This is especially clear given that the court rejected all of

89. *Id.* at 1312 n.11.

90. *Clean Water Rule*, 80 Fed. Reg. 37054, 37104-06; *NWPR*, 85 Fed. Reg. 22250, 22255.

91. *See generally* North Dakota v. Env't Prot. Agency, 127 F. Supp. 3d 1047 (D.N.D. 2015); Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 2018 AMC 29 (2018).

92. *Id.* at 1301-07, 1306 n.6.

93. *Id.*

94. *Id.* (noting that the Tenth Circuit maintains a uniquely charitable set of preservation rules).

95. *Id.* at 1308 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

Colorado's claims of injury prior to accepting this claim it independently developed.[96] Through this apparent abuse of discretion in granting a preliminary injunction based on an argument that was not presented by the plaintiffs, the court in the noted case weakened the persuasive value this decision could have on future challenges to the NWPR or other interpretations of the CWA. Though the court's decision may have ensured that Colorado waters will be protected for the duration of this litigation, the nature of how the court reached this conclusion likely limits the strength of this potentially valid challenge to this narrowing of the term "waters of the United States."

V. CONCLUSION

When analyzing the recent changes to the definition of "waters of the United States," one must ask if the present level of deference afforded to agencies' interpretations of statutes has outlived its usefulness. Though some deference must be provided to an agency's constructions of the statutes it has been charged with administering, agencies have seemingly abused the arbitrary and capricious standard to alter the scope of the CWA at the whim of the sitting president.[97] As the noted case and *California v. Wheeler* exemplify, it now appears that a judge must abuse their discretion to invalidate a potentially harmful change in policy. Nevertheless, the noted case is currently on appeal in the Tenth Circuit and will likely be overturned on the basis of deference.

Author's Note

While this Article was going to print, the Tenth Circuit reversed and remanded the district court's decision, therein letting the NWPR go into effect in Colorado.[98] Though the author predicted that a remand would occur, the Tenth Circuit reached its decision on different grounds than the

96. *Id.* at 1301-07.

97. *See* Memorandum from Env't Prot. Agency and Dep't of Army on Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters (Jan. 2001) (defining the scope of the CWA on the last full day of the Clinton Administration's tenure); *see also* Memorandum from Env't Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (Dec. 2008) (altering the extent of the CWA shortly after President Obama was elected but before his inauguration); *see also Clean Water Rule*, *supra* note 35 (2015) (increasing the number of "categorically jurisdictional waters" near the end of the Obama Administration's tenure); *see also NWPR*, *supra* note 13 (repealing the Clean Water Rule and limiting the scope of the CWA after a three-year process that began at the onset of the Trump Administration's tenure).

98. State v. EPA, 989 F.3d 874 (10th Cir. 2021)

author expected. First, the Tenth Circuit held that the district court did not violate the principles of party presentation when it linked three separate sentences from Colorado's briefing to concoct the diversion-of-resources theory of harm on which it rested its decision.[99] The Tenth Circuit also surprisingly chose not to analyze the impact of *Rapanos* on this case; instead, the Tenth Circuit based its entire decision on holding that Colorado had failed to establish that an irreparable injury would occur absent an injunction.[100] Though the Tenth Circuit's decision produced a loss for Colorado, the Tenth Circuit's holding that the district court did not abuse its discretion when concocting a new theory of harm from unrelated sentences in Colorado's briefing is a victory for all judges who wish to help environmental plaintiffs in their court battles.

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99. *Id.* at 886.

100. *Id.* at 890.

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