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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO,
Plaintiff-Appellee,

v.

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

CHANTELL AND MICHAEL SACKETT,
Intervenor-Defendant-Appellants, and

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

On Appeal from the United States District Court for the District of Colorado
No. 1:20-cv-01461-WJM-NRN (Honorable William J. Martinez)

BRIEF OF AMICUS CURIAE NAVAJO NATION FOR AFFIRMANCE IN SUPPORT OF APPELLEE COLORADO

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GLOSSARY

Agencies	United States Environmental Protection Agency and United States Army Corps of Engineers
APA	Administrative Procedure Act
Clean Water Rule	Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)
Corps	United States Army Corps of Engineers
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
NEPA	National Environmental Policy Act
NPDES	National Pollutant Discharge Elimination System
Replacement Rule or Rule	The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (April 21, 2020)
SWANCC	*Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001)
WOTUS	Waters of the United States

INTEREST OF AMICUS CURIAE[1]

The Navajo Nation is a federally recognized Indian tribe with a formal Reservation that encompasses approximately 17,627,262 acres of sovereign territory in northwestern New Mexico, northeastern Arizona, and southeastern Utah, and that shares a border with southwestern Colorado. The Navajo Nation also owns almost 30,000 acres of land in Colorado near Blanca Peak, one of the four Navajo sacred mountains. Three major river basins drain the Navajo Nation—the Lower Colorado River, the Upper Colorado River, and the Rio Grande—and Colorado waters flow into all three. As in Colorado, streams that are either ephemeral (flowing only in response to precipitation) and intermittent (flowing during certain times of the year, e.g., seasonally) make up the majority of Navajo Nation waters.

The Navajo Nation is a sovereign government with proprietary interests in its land and water and governmental interests in the management of its natural resources, including providing clean and adequate water to meet the needs of its residents and its economy; protecting the use of its water for Navajo traditional and cultural practices and its environment as a whole in the Navajo way; and ensuring that its land may serve as a permanent homeland for Navajo people. In addition, the

[1] All parties have consented to the filing of this amicus brief, pursuant to Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, contributed money intended to fund preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Navajo Nation's treaty rights include the right to hunt, Treaty of June 1, 1868, 15 Stat. 667, an activity that depends on clean water to support the animals and their environment.

Like Colorado, the Navajo Nation has its own clean water act that defines "waters of the Navajo Nation" more broadly than the U.S. Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (jointly, "Agencies") defined the corresponding term "waters of the United States" ("WOTUS") in the regulation challenged here, *see* 85 Fed. Reg. 22,250 (April 21, 2020) ("Replacement Rule" or "Rule"). *Compare* 4 N.N.C. § 1302(43), *with, e.g.*, 40 C.F.R. § 120.2. The Navajo Nation determined that its broader definition—which is largely consistent with the 2015 "Clean Water Rule"[2]—was necessary to fulfill its governmental obligations. *See* 4 N.N.C. § 1303(A). The Navajo Nation requires a permit for all discharges from a point source into those waters, again like Colorado. *Id.* § 1321. And the Navajo Nation has neither a Clean Water Act ("CWA") § 402 NPDES permit program nor a § 404 dredge and fill permit program, 33 U.S.C. §§ 1342, 1344, but instead relies on the Agencies to administer those programs and issue those permits. The Agencies are required to do so not only under CWA §§ 402(a) and 404(a) but also pursuant to the United States' trust responsibility to Indian tribes,

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[2] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

which includes protection of tribal treaty rights and resources and involves "moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (upholding treaty obligations to the Creek Nation).

Under the Clean Water Rule, the Agencies issued permits for virtually all Navajo Nation waters. The Replacement Rule, however, does not include the majority of Navajo Nation waters, just as it does not include many waters in Colorado. As a result, the Agencies will no longer issue permits to protect those waters from discharges. The Navajo Nation does not have the resources to fill this permitting gap nor to enforce its permit requirement. Indeed, currently only two states—not including Colorado—and no tribes have CWA § 404 permit programs, due to the extensive resources and expertise they require; the Corps has issued those permits for decades.[3] Moreover, the diminished protection of Colorado waters stemming from the reduction in CWA § 404 permits will further harm the Navajo Nation, since many Colorado waters are upstream from and hydrologically connected to Navajo Nation waters.

In place of having its own CWA §§ 402 and 404 permit programs, the Navajo Nation relies on CWA § 401 to review proposed projects on the Navajo Reservation

[3] No tribes have CWA § 402 permit programs.

that require federal permits and to ensure that those projects will protect Navajo water quality standards and other applicable laws. 33 U.S.C. § 1341(a)(1), (d). Colorado similarly relies on this provision to review projects requiring CWA § 404 and other federal permits, including licenses issued by the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission. The Rule, by greatly reducing the number of federal permits issued, will allow discharges into Navajo Nation (and Colorado) waters without this review and certification. In a similar fashion, the Rule reduces tribal and state opportunities under CWA § 401(a)(2) to object to federal permits for discharges into hydrologically connected waters in neighboring jurisdictions, such as discharges into Colorado waters, that may cause violations of Navajo Nation water quality standards. *Id.* § 1341(a)(2). Moreover, while the Agencies claim a primary purpose of the Replacement Rule is to preserve states' and tribes' authority, *e.g.*, 85 Fed. Reg. at 22,252, 22,269, EPA recently published a rule limiting the authority of states and tribes to protect their waters under CWA § 401, 85 Fed. Reg. 42,210, 42,285 (July 13, 2020). This rule will further magnify the harms caused by the Replacement Rule.

Other harms also arise from the Rule's restrictive definition of WOTUS, in addition to permitting and certification issues. For example, the new definition of WOTUS limits the applicability of CWA § 311, which protects Navajo Nation and Colorado waters from oil spills. 33 U.S.C. § 1321(b), (j)(5), (s).

The Agencies admit to these harms in their rulemaking.[4] Regarding tribal resources in the Rio Grande Basin, for example, the Agencies acknowledge that "[c]hanges in the scope of CWA programs on facilities and activities within and upstream of tribal lands could potentially expose tribal resources to incremental pollution from oil spills or point source discharges, and adverse effects from dredging activities or forgone wetland mitigation." Economic Analysis at 163–64. More specifically, the Agencies acknowledge that between 2010 and 2015, there were 376 CWA § 404 permits in the Basin affecting dredge and fill activities in both tribal waters and waters upstream of tribal lands that may no longer be required under the Replacement Rule, forgoing "35 acres and 600 linear feet of permanent impact mitigation." *Id*.

Now, however, they argue to the contrary and downplay the impact the Rule has on Colorado and many other states as well as many tribes, including the Navajo Nation. The Navajo Nation will experience these harms if the Rule is implemented both within the Navajo Nation and within Colorado. Because of the severity of these harms, the Navajo Nation has challenged the Rule in the U.S. District Court for the

[4] U.S. EPA & Dep't of the Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" (Jan. 22, 2020), at 105–06, Docket ID No. EPA-HQ-OW-2018-0149-11572, https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11572 ("Economic Analysis").

District of New Mexico, No. 2:20-cv-00602, which will be bound by the Court's ruling here. The Navajo Nation therefore files this brief in support of the preliminary injunction entered by the district court.

SUMMARY OF ARGUMENT

The Replacement Rule marks an abrupt change to decades of prior CWA rules and policy and was promulgated in disregard of the extensive scientific record on which those rules and policy were based. The Agencies violated basic tenets of administrative law in promulgating the Rule, as discussed in Appellee Colorado's brief. This Court may affirm the district court's decision below that Colorado is likely to succeed on the merits based on any one of the violations of the Administrative Procedure Act ("APA") or National Environmental Policy Act ("NEPA") that the state has raised, and therefore need not reach the issues discussed in this brief.

If, however, the Court chooses to consider whether the Replacement Rule is consistent with the CWA, the Court should follow Tenth Circuit law and a majority dictate of the Supreme Court to conclude that it is not.

BACKGROUND

I. THE CLEAN WATER ACT AND "WATERS OF THE UNITED STATES"

By 1970, after decades of federal deference to state efforts, the nation's waters were "in serious trouble, thanks to years of neglect, ignorance, and public indifference." H.R. Rep. No. 92-911, at 66 (1972). In 1972, Congress responded,

passing the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act "incorporated a broad, systemic view of the goal of maintaining and improving water quality," one that "demanded broad federal authority to control pollution." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132, 133 (1985).

The Act's suite of water pollution controls, including its prohibition against the discharge of pollutants without a permit, applies to "navigable waters," 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12), which "Congress chose to define . . . broadly" as "'the waters of the United States,'" *Riverside Bayview*, 474 U.S. at 133. By defining "navigable waters" as WOTUS, the Act "makes it clear that the term 'navigable' . . . is of limited import." *Id.*; *see also, e.g.*, H.R. Rep. No. 92-911, at 131 (1972) ("The Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation").

II. THE CASE LAW AND THE SIGNIFICANT NEXUS TEST

Consistent with Congress's intent, the Supreme Court and the Tenth Circuit have repeatedly affirmed that the phrase "waters of the United States" encompasses not only traditional navigable waters but also non-navigable streams and wetlands that significantly affect the quality of the nation's navigable waters. In *Riverside Bayview*, the Supreme Court found reasonable, "[i]n view of the breadth of federal regulatory authority contemplated by the Act itself," the Corps' determination that

the CWA extends to adjacent wetlands (those which "'border . . . or are in reasonable proximity to other waters of the United States'") because they are "inseparably bound up with the 'waters' of the United States" and "may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands." 474 U.S. at 134 (quoting 42 Fed. Reg. 37,122, 37,128 (July 19, 1977)).

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC*"), although the Court rejected the Corps' regulation of the isolated ponds at issue based on their use as habitat for migratory birds, it distinguished *Riverside Bayview* and explained that "it was the 'significant nexus' between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. 531 U.S. 159, 167 (2001).

In *United States v. Hubenka*, this Court applied the significant nexus test of *Riverside Bayview* and *SWANCC*, holding that the Corps' decision to regulate all tributaries of navigable and interstate waters was reasonable because "the potential for pollutants to migrate from a tributary to navigable waters downstream constitutes a 'significant nexus' between those waters." 438 F.3d 1026, 1033–34 (10th Cir. 2006).

Finally, four months after this Court's decision in *Hubenka*, the Supreme Court decided *Rapanos v. United States* and split 4-1-4 over the appropriate

interpretation of WOTUS. A majority of five Justices voted to vacate and remand so that the district court could consider CWA jurisdiction based on the proper standard. 547 U.S. 715, 757 (2006) (Scalia, J., plurality opinion); *id.* at 759 (Kennedy, J., concurring in the judgment). A different majority of five Justices reached two important conclusions. First, they held that the CWA protects non-navigable waters and wetlands with a "significant nexus" to navigable waters. *Id.* at 780, 787 (Kennedy, J., concurring in judgment); *id.* at 788, 810 (Stevens, J., joined by three other Justices, dissenting). Second, the same five Justices rejected the plurality's proposed standard that would have restricted the CWA to waters with "a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water," *id.* at 739, 742 (Scalia, J., plurality opinion). The five Justices found this proposed standard was contrary to the CWA and the Supreme Court's cases interpreting the Act. *Id.* at 776 (Kennedy, J., concurring in judgment); *id.* at 800 (Stevens, J., dissenting). Therefore, as each of the *six* Circuit courts to pass on the issue has held (*see infra* n.11), waters that satisfy the significant nexus test "come within the statutory phrase 'navigable waters,'" *id.* at 780 (Kennedy, J., concurring in judgment).

III. THE SCIENTIFIC RECORD

In 2015, the Agencies concluded, based on a "Connectivity Report" reviewing more than 1,200 peer-reviewed publications, that "intermittent" and "ephemeral"

tributaries, floodplain wetlands, and many non-floodplain wetlands significantly impact the quality of downstream waterways.[5] Based on the Connectivity Report and other evidence, the Agencies explained that "'there is strong scientific evidence to support . . . includ[ing] *all* tributaries [with an ordinary high water mark and a bed and a bank] within the jurisdiction of the Clean Water Act.'" 80 Fed. Reg. at 37,064 (citation omitted)). The Agencies also explained that the scientific literature "consistently supports the conclusion that covered adjacent waters," including wetlands outside the annual floodplain of navigable waters, "provide similar functions and work together to maintain the chemical, physical, and biological integrity of downstream traditional navigable waters." *Id.* at 37,068–70. The Agencies have never disputed these extensively documented scientific conclusions.

IV. THE REPLACEMENT RULE

On April 21, 2020, the Agencies reversed course and imposed unprecedented restrictions on federal CWA jurisdiction over streams and wetlands. For the first time in the Act's history, the Replacement Rule categorically excludes ephemeral tributaries, 85 Fed. Reg. at 22,339, which comprise millions of the nation's stream

[5] EPA Office of Research and Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Docket ID No. EPA-HQ-OW-2018-0149-11691, at ES-2 to ES-4, 2-22 to 2-30, 3-1 to 3-45, 4-20 to 4-39 (Jan. 2015), Aplee. Supp. App. Vol. 1 at 48–50, 102–10, 132–76, 198–217. The Navajo Nation cites to the original pagination in the Appellants' and Appellee's Appendices and Briefs rather than that stamped by CM/ECF.

miles.[6] The Rule also excludes some untold number of intermittent tributaries, perennial streams, lakes, ponds, and other waters across the country. Economic Analysis at 10–11, 22–23. And it severely restricts jurisdiction over wetlands, covering only those which abut or have a "surface connection" to navigable waters in a "typical year." 85 Fed. Reg. at 22,279.

The agencies concede that lost protections for these waters will potentially cause multiple harms, including increased water pollution, flooding, contamination from oil spills, loss of aquatic habitat, reduced ecosystem services, and degraded drinking water. *E.g.*, Economic Analysis at 105; *see also supra* at 5. Internally, the Agencies estimated that up to 70 percent of the nation's streams and over half of the nation's wetlands may lose protection under limits similar to those in the final Rule.[7] But the agencies did not refine, finalize, or publish these estimates, and in the end they failed to present any quantified estimate of the streams, wetlands, lakes, and other waters that will lose federal protections under the Rule.[8]

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[6] *E.g.*, Ltr. from Steve Moyer, Trout Unlimited, to A. Wheeler, EPA, & R.D. James, Dep't of Army, at 5, 13 (Apr. 15, 2019), Docket ID No. EPA-HQ-OW-2018-0149-4912, https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4912.

[7] *See* Email from Stacey M. Jenson to John Goodin, RE: Two actions, at 2–5, 9 (Sept. 5, 2017), Docket ID No. EPA-HQ-OW-2018-0149-11767, https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11767.

[8] *E.g.*, Economic Analysis at xi ("unable to quantify" total losses), 9 ("unable to quantify" interstate water losses), 11 ("unable to quantify" stream losses), 15–17

To arrive at the Replacement Rule, the Agencies ignored or mischaracterized the Connectivity Report. *See, e.g.*, 85 Fed. Reg. at 22,261, 22,288. Tellingly, even EPA's own Science Advisory Board concluded that the Proposed Rule "lacks a scientific justification" and may "introduc[e] new risks to human and environmental health."[9] Colorado documents these and other APA and NEPA violations that warrant affirmance of the district court's order. In addition to these reasons for affirmance, the Agencies violated the CWA and abandoned the Supreme Court's significant nexus test in favor of Justice Scalia's repudiated opinion in *Rapanos*, *e.g.*, 85 Fed. Reg. at 22,273, 22,325, as discussed below.

("unable to quantify" wetland losses), 18 ("unable to quantify" losses from exclusions), 19 ("unable to quantify" ditch losses), 21 ("unable to quantify" lake and pond losses); EPA and Dep't of Army, Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the U.S.," at 10, 20, 22–23, 27–28, 30, 31 (Jan. 23, 2020), Docket ID No. EPA-HQ-OW-2018-0149-11573, https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11573 (similar).

[9] EPA Office of the Adm'r Sci. Advisory Bd., Final Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated under the Clean Water Act, at 4 (Feb. 27, 2020), Aplee. Supp. App. Vol. 4 at 5; EPA Office of the Adm'r Sci. Advisory Bd., Draft Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, at 4 (Oct. 16, 2019), https://perma.cc/RBC7-V58V (permanent link).

ARGUMENT

I. THE REPLACEMENT RULE VIOLATES THE CWA AND CONTROLLING CASE LAW

A. Tenth Circuit Law Supports Affirmance of the District Court's Decision

In *Hubenka*, when considering the reasonableness of the Corps' decision to regulate all tributaries of navigable and interstate waters, this Court followed the significant nexus test established in *Riverside Bayview* and *SWANCC*. *Hubenka*, 438 F.3d at 1033–34. In reasoning how to interpret the significant nexus test, this Court explained, "[g]iven the 'breadth of congressional concern for protection of water quality' evidenced in the text of the Clean Water Act and in its legislative history, this court concludes the potential for pollutants to migrate from a tributary to navigable waters downstream constitutes a 'significant nexus' between those waters." *Id.* at 1034 (quoting *Riverside Bayview*, 474 U.S. at 133). The Court explained, "'[i]t is the intent of the Clean Water Act to cover, as much as possible, all [WOTUS] instead of just some.'" *Id.* at 1033 (quoting *Quivira Mining Co. v. U.S. Envtl. Prot. Agency*, 765 F.2d 126, 129 (10th Cir. 1985)).[10]

One panel of this Circuit generally cannot overrule the judgment of another panel, absent *en banc* reconsideration or a superseding decision by the Supreme

[10] In *Quivira Mining Co.*, this Court found substantial evidence supported the EPA's jurisdiction over uranium mining and milling discharges into an ephemeral arroyo and creek, due to their connection to navigable-in-fact waters through surface flow at times of heavy rainfall. *Quivira Min. Co.*, 765 F.2d at 129.

Court that contradicts or invalidates the prior panel's analysis. *United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014); *Kennedy v. Lubar*, 273 F.3d 1293, 1300 n.9 (10th Cir. 2001). There has been no *en banc* reconsideration of *Hubenka*, nor does *Rapanos* overturn the significant nexus test on which the *Hubenka* Court relied. To the contrary, in *Rapanos*, a majority of the Justices reaffirmed that the CWA protects waters satisfying the significant nexus test. 547 U.S. at 780, 787 (Kennedy, J., concurring in judgment), 788, 810 (Stevens, J., dissenting).

Because *Rapanos* does not contradict or invalidate *Hubenka*, *Hubenka* controls as the law of the Circuit. The Replacement Rule contravenes *Hubenka* by categorically excluding from WOTUS many waters that undisputedly carry the "potential for pollutants to migrate . . . to navigable waters downstream," 438 F.3d at 1034. *E.g.*, 85 Fed. Reg. at 22,338 (excluding non-floodplain wetlands and ephemeral streams). Therefore, the Rule contravenes the law of this Circuit, and this Court should affirm the district court's preliminary injunction of the Rule.

B. *Rapanos* Compels the Same Result as *Hubenka*: Affirmance of the District Court's Decision

1. The Agencies Cannot Adopt an Interpretation that was Rejected by a Majority of the Justices in *Rapanos*

In *Rapanos*, five Justices held that the plurality opinion authored by Justice Scalia—which would have restricted CWA jurisdiction to waters with "a continuous surface connection" to "relatively permanent, standing or continuously flowing

bodies of water," 547 U.S. at 739, 742—was an unreasonable interpretation of the term WOTUS. Both Justice Kennedy, writing for himself, and Justice Stevens, writing for himself and three other Justices, explained that the plurality's limitations are "inconsistent with the Act's text, structure, and purpose," *id.* at 776 (Kennedy, J., concurring in judgment), and, similarly, "are without support in the language and purposes of the Act or in our cases interpreting it," *id.* at 768 (Kennedy, J., concurring in judgment); *id.* at 800 (Stevens, J., dissenting).

Justice Kennedy explained that the plurality's requirement of permanent, standing, or continuous flow "makes little practical sense in a statute concerned with downstream water quality," and "nothing in the statute suggests" that Congress has drawn a line to exclude irregular waterways. *Id.* at 769 (Kennedy, J., concurring in judgment). Justice Kennedy further explained that "a full reading of the dictionary definition precludes the plurality's emphasis on permanence." *Id.* Justice Stevens explained that the plurality's relatively permanent requirement was arbitrary and defies common sense and common usage. *Id.* at 801 (Stevens, J., dissenting) Multiple circuit courts agree that Justice Scalia's plurality opinion does not define the full scope of WOTUS.[11]

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[11] *United States v. Donovan*, 661 F.3d 174, 183–84 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 798–800 (8th Cir. 2009); *United States v. Robison*, 505 F.3d 1208, 1221–23 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Johnson*,

Despite the overwhelming weight of this authority, in the Replacement Rule the Agencies "self-consciously intended to take the plurality opinion," "flesh out the details, and make it the new law of the land." Order Granting As Construed Motion for Stay of Agency Action ("Order"), Aplt. App. 116–17 (citing 85 Fed. Reg. at 22,259–325). Indeed, that was President Trump's directive, Exec. Order No. 13,778, § 3, 82 Fed. Reg. 12,497 (Mar. 3, 2017), which the Agencies dutifully followed, *e.g.*, 85 Fed. Reg. at 22,288–89 ("The final rule's definition of 'tributary' is [] consistent with the *Rapanos* plurality's position that 'the waters of the United States' include only relatively permanent, standing, or flowing bodies of waters"); *id.* at 22,279 ("The final rule defines 'adjacent wetlands' to include all wetlands that abut [jurisdictional waters and] . . . . other wetlands [with] certain regular hydrologic surface connections to [such waters]").

As the district court concluded, the Agencies lacked the authority to codify a statutory interpretation that was rejected as unreasonable by a majority of the Supreme Court Justices. Order, Aplt. App. 117–18.[12] If a court holds an agency's

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467 F.3d 56, 64–66 (1st Cir. 2006); *see also Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011) (parties agree Justice Kennedy's significant nexus test "undisputedly controls").

[12] When five or more Justices in a fractured case agree on a point of law, the position becomes binding even if given in concurring or dissenting opinions. *E.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) ("On remand, the Court of Appeals correctly recognized that the four dissenting Justices and Justice BLACKMUN formed a majority to require application of the *Colorado*

interpretation or an ambiguous provision of a statute unreasonable, the agency cannot ignore that holding. *E.g.*, *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1152–53 (10th Cir. 2011).

2. *Brand X* Does Not Allow the Adoption of an Unreasonable and Unlawful Interpretation of the CWA

The Agencies and Business Intervenors misinterpret this black-letter law. Citing *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), they contend that the Supreme Court's statutory constructions do "not bind agencies *unless and until* the Court concludes that the statutory language is unambiguous." Agencies' Brief, Doc. 010110374057 at 38–39 (emphasis in original); Business Intervenors' Brief, Doc. 010110378828, at 28. Their argument completely neglects the fact that the interpretation of WOTUS in the

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River test."); *see also Alexander v Sandoval*, 532 U.S. 275, 281–83 (2001) (applying concurring and dissenting opinions to ascertain rule of law); *Alexander v. Choate*, 469 U.S. 287, 293 & nn.8–9 (1985) (same); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (suggesting concurrence in fractured case was not law when "'three of the four Justices in the plurality *and* the four dissenters decisively rejected'" that holding) (citations omitted); *United States v. Duvall*, 740 F.3d 604, 616 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[I]n those rare no-narrowest opinion cases, the lower court still must strive to reach the result that a majority of the Supreme Court would have reached in the current case" and the simplest way to do so is to "run the facts and circumstances of the current case through the various tests articulated by the Supreme Court in the binding case."); *Donovan*, 661 F.3d at 182 ("we have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue").

Replacement Rule was found to violate the CWA. Under *Brand X*, when the Supreme Court affirms one reasonable reading of an ambiguous statute, the Agencies are not precluded from adopting a "'different *reasonable* interpretation.'" Agencies' Brief, Doc. 010110374057, at 40 (emphasis added) (quoting *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009)). But when the Court concludes that a statutory interpretation is inconsistent with the Act's text, structure, and purpose, as a majority of the *Rapanos* Justices did with regard to Justice Scalia's plurality opinion, that interpretation is patently unreasonable. The Agencies may not turn around and adopt that rejected interpretation. *E.g.*, *Padilla-Caldera*, 637 F.3d at 1152–53. This result does not place the Agencies in a "straitjacket," Agencies' Brief, Doc. 010110374057 at 40; it simply precludes them from adopting a rule that is contrary to the Act they are charged with implementing.

The Agencies attempt to escape this predicament by claiming that the Replacement Rule "does not adopt wholesale the *Rapanos* plurality's opinion," Agencies' Brief, Doc. 010110374057 at 43–44. As would be expected of a federal regulation, the Replacement Rule is more detailed than the plurality's rejected judicial interpretation of the Act. *See, e.g.*, Order, Aplt. App. 117 (noting that the Rule "flesh[es] out the details" of the plurality opinion). But the Rule's details do not undermine the fact that it embraces and implements the two central tenets of Justice Scalia's opinion that were rejected as contrary to the CWA by five of the

Justices: (1) the relative permanence requirement, and (2) the regular surface connection requirement. *Compare, e.g.*, 85 Fed. Reg. at 22,279, 22,288–89, 22,338–39, *with Rapanos*, 547 U.S. at 768–76 (Kennedy, J., concurring in judgment), *and id.* at 800–07 (Stevens, J., dissenting). As the district court found, the Replacement Rule is not in accordance with the law because it is "modeled" on the rejected plurality opinion. Order, Aplt. App. 118.

In their brief, the Agencies point to one lonely provision of the Replacement Rule that purportedly diverges from Justice Scalia's opinion. *See* Agencies' Brief, Doc. 010110374057 at 44 n.6 (noting that the Rule "include[s] wetlands separated from jurisdictional waters only by natural dunes or berms," whereas the plurality would require a "continuous surface connection"). That provision does not in fact diverge from Justice Scalia's opinion, but instead simply fleshes out the surface connection requirement. *See* 85 Fed. Reg. at 22,311 ("[N]atural berms and similar natural features are indicators of a direct hydrologic surface connection as they are formed through repeated hydrologic events," and so such features do "not sever adjacency"). Even assuming to the contrary, moreover, one five-line provision cannot save a 93-page regulation that was otherwise rejected by a majority of the Justices on the Supreme Court.[13]

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[13] The Agencies also mention the Rule's inclusion of intermittent tributaries "that flow[] continuously during certain times of the year and more than in direct response to precipitation" and adjacent wetlands that are inundated by flooding

Relatedly, the Agencies argue that the Rule "draws from" purported "commonalities" between Justice Kennedy's and Justice Scalia's opinions. Agencies' Brief, Doc. 010110374057 at 44; *see also* Business Intervenors' Brief, Doc. 010110378828, at 17–18, 26–17. But those opinions disagree on virtually everything, save for the uncontroversial point that the Act covers "something more than traditional navigable waters." *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality opinion). As Justice Kennedy explains, "[f]rom this reasonable beginning the plurality proceeds to impose two limitations [that] are without support in the language and purposes of the Act or in our cases interpreting it." *Id.* at 767–68 (Kennedy, J., concurring in judgment); *see United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009) ("there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's views").

The Agencies stake much of their argument on a claim that *Rapanos* concerns "how broadly the Agencies *may* regulate, not how broadly they *must* regulate." Agencies' Brief, Doc. 010110374057 at 41–42. That claim may be correct as far as it goes, but it ignores the fact that five Justices "unambiguously" held that they *must*

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during a typical year, Agencies' Brief, Doc. 010110374057 at 12-13. It is unclear whether the Agencies are arguing that these two provisions diverge from Justice Scalia's opinion, but, if so, these again are merely examples that flesh out the plurality opinion's requirement of a surface connection to jurisdictional waters.

not interpret WOTUS in the manner of the plurality opinion. Order, Aplt. App. 116 (citing *Rapanos*, 547 U.S. at 768–70 (Kennedy, J., concurring in judgment) and *id.* at 800–04 (Stevens, J., dissenting)).[14]

The Agencies also contend that the Rule is lawful because "Justices representing the entire spectrum of opinions in *Rapanos* encouraged the Agencies to promulgate" "'more specific regulations.'" Agencies' Brief, Doc. 010110374057 at 42–44 (quoting 547 U.S. at 782 (Kennedy, J., concurring in judgment)). This directive does not, however, give the Agencies free reign to adopt an interpretation that was rejected by the Court as violating the CWA.

Five Justices in *Rapanos* rejected as contrary to the CWA the interpretation of WOTUS that the Agencies promulgated in the Replacement Rule; that fact alone resolves the interpretive issues in this case. Moreover, even if this Court does not agree that a combination of concurring and dissenting opinions in the fractured *Rapanos* case constitutes binding rules of law, it should still reject the Replacement Rule's interpretation of WOTUS as contrary to the CWA, for the reasons explained by Justice Kennedy and the four dissenters. *See Rapanos*, 547 U.S. at 768–78

[14] In denying a motion for preliminary injunction against the Replacement Rule, the United States District Court for the Northern District of California was apparently "unaware" of the precedent establishing that views held by *any* five Justices of the Supreme Court constitute binding law. Order, Aplt. App. 117 n.9 (citing *California v. Wheeler*, No. 20-cv-03005-RS, 2020 WL 3403072, at *6 (N.D. Cal. June 19, 2020)); *see also supra* note 12.

(Kennedy, J., concurring in judgment); *id.* at 794–807 (Stevens, J., dissenting); *see supra* at 14-15.

3. The District Court's Footnoted Dicta is not Grounds for Reversal

After holding that the Replacement Rule illegally codifies a statutory interpretation rejected by a majority of the Supreme Court Justices, the district court noted that "*Rapanos* arguably forecloses *every* formulation of 'waters of the United States' proposed in" the case, and "eight justices rejected Justice Kennedy's case-by-case 'significant nexus' approach." Order, Aplt. App. 118 n.11. These statements are *dicta* because they are "not necessarily involved nor essential to" the court's holding (as is made all the more obvious by their placement in a footnote). *See United States v. Barela*, 797 F.3d 1186, 1190 (10th Cir. 2015). Under the harmless error rule, *dicta* is—by definition—not grounds for reversal.

Moreover, the district court said merely that it was "arguable" that the various *Rapanos* formulations of WOTUS were foreclosed; it did not say that it agreed, but rather that additional litigation on a WOTUS rule was likely. In that regard, while the four *Rapanos* dissenters unequivocally rejected the plurality opinion, *Rapanos*, 547 U.S. at 800 (Stevens, J., dissenting), they did not find that the significant nexus test was an unreasonable interpretation of WOTUS, *id.* at 788 (Stevens, J., dissenting) ("Justice Kennedy['s] . . . approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality's."). Instead, they

found that Justice Kennedy "fail[ed] to defer sufficiently to the Corps," *id.*, and his case-by-case approach "creat[ed] additional work for all concerned parties," *id.* at 809.

Furthermore, the dissenting Justices voted to affirm federal jurisdiction in all cases in which the significant test is satisfied, *id.* at 810. Indeed, *SWANCC* and *Riverside Bayview* held the same. *SWANCC*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*"); *Riverside Bayview*, 474 U.S. at 134. As a result, and as every circuit court to consider the question has held, *see supra* note 11, waters that meet the significant nexus test are WOTUS.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's order.

Respectfully submitted this 10th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Times New Roman font.

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I hereby certify that on August 10th, 2020, I electronically filed the foregoing **Brief of Amicus Curiae Navajo Nation for Affirmance in Support of Appellee Colorado** with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all counsel of record.

This the 10th day of August, 2020.

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