No. 20-1238

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF COLORADO
Plaintiff/Appellee,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants/Appellants

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

AMENDED BRIEF OF THE COLORADO WATER CONGRESS AS *AMICUS CURIAE* URGING REVERSAL

Stephen H. Leonhardt
Scott A. Clark
April D. Hendricks
BURNS, FIGA & WILL, P.C.
6400 S. Fiddler's Green Cir., #1000
Greenwood Village, CO 80111
Phone: (303) 796-2626
Fax: (303) 796-2777
sleonhardt@bfwlaw.com
sclark@bfwlaw.com
ahendricks@bfwlaw.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), counsel for *Amicus Curiae* state the following:

The **Colorado Water Congress** is a Colorado nonprofit corporation located in Denver, Colorado, which has no corporate parent and is not publicly traded.

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NOTICE OF CONSENT RECEIVED FROM ALL PARTIES

Pursuant to Fed. R. App. P. 29(a)(2), counsel for Amicus Curiae sought and obtained consent from all parties for the filing of this brief.

INTRODUCTION

The Colorado Water Congress ("CWC") files this *amici curiae* brief, urging reversal of the District Court's preliminary injunction. CWC is primarily concerned with the harm Colorado alleged, that it would bear increased burdens of regulating and permitting dredge and fill activities in State waters, and the District Court's conclusion, from the same premise, that Colorado would suffer harm from the increased enforcement activity that it would "need" to take if federal enforcement were reduced due to the 2020 Navigable Waters Protection Rule ("NWPR" or "Rule").

Both theories of harm are contrary to Colorado law, as CWC explains below. Thus, the District Court abused its discretion in finding harm to Colorado's legal interests. Accordingly, the preliminary injunction should be vacated.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

The Colorado Water Congress ("CWC"), a non-profit organization established in 1958, is the leading voice of Colorado's water community. CWC has about 350 member organizations representing the diverse interests and opinions of water users throughout Colorado's nine major river basins, including those who use water for municipal, agricultural, industrial, recreational, commercial, and other beneficial uses. CWC advocates for state and federal policies that support high-quality sustainable water supplies through protection of water rights, conservation, planning, management, and infrastructure investments.

CWC and its members support the implementation of the Clean Water Act by state and federal agencies in ways that protect water uses and water rights. CWC's participation as *amicus curiae* provides this Court with a statewide perspective on the importance of protecting the quality of state waters, consistent with federal and Colorado laws, in light of the Environmental Protection Agency's and the United States Army Corps of Engineers' (the "Agencies'") adoption of the

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[1] CWC certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certify that no person or entity, other than CWC and its members, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(a)(4)(E).

Navigable Waters Protection Rule ("NWPR"). CWC disagrees with the State of Colorado's position on its present authority to regulate dredging and filling state waters that fall outside federal jurisdiction under the NWPR, and with the District Court's conclusion that Colorado law prohibits such dredge and fill activity. Current state laws neither authorize the regulation of, nor prohibit, the dredging and filling activities in non-federal waters that Colorado seeks to regulate.

SUMMARY OF ARGUMENT

The District Court erred in finding that the NWPR would cause irreparable harm to Colorado by allegedly imposing an increased regulatory and enforcement burden upon the state. The District Court mistakenly interpreted Colorado's Water Quality Control Act ("WQCA") to prohibit any discharge of dredge and fill material into state waters. In fact, the WQCA does not impose such a prohibition, nor does it authorize state regulation of such discharges. Even as federal definitions of "waters of the United States" have changed over the past several years, Colorado never has sought to regulate or prohibit dredge and fill activities in state waters. This indicates that until now, Colorado has not interpreted the WQCA to prohibit such activities. This is consistent with the WQCA's interpretive requirement that protects water rights established under state law, and avoids the

absurd result of the District Court's order, to flatly prohibit that which Colorado always has allowed.

Colorado's claimed irreparable harm, and any disruption of the status quo, result from Colorado's own recent change in executive policy. There have always been state waters beyond even the more expansive earlier interpretations of "waters of the United States." Colorado has never sought to regulate dredge and fill activities in those state waters, or to treat such activities as unlawful. Only now, upon the Agencies' latest modification to the "waters of the United States" definition, has the State suggested that it desires and might attempt to regulate dredge and fill activities. Its choice to alter the long-standing status quo, and any claimed harm that results from its abrupt change in policy, is self-inflicted and does not warrant a preliminary injunction.

For these reasons, this Court should reject assertions of harm based on interpretations of the WQCA to prohibit or regulate dredge and fill activities in waters outside federal jurisdiction, and should vacate the preliminary injunction.

ARGUMENT URGING REVERSAL

I. While the Clean Water Act authorizes a federal regulatory framework for dredge and fill activities, the Colorado Water Quality Control Act neither authorizes such state regulation nor prohibits such activities.

The State of Colorado does not now, and never has, regulated dredge and fill activities in Colorado waters. No provision of the NWPR forces a change in that regime.

The Colorado Water Quality Control Act ("WQCA"), C.R.S. § 25-8-101 *et seq*, can best be understood by examining the statutory framework of both that Act and the federal Clean Water Act, and comparing the regulatory framework established by each. The relationships between those frameworks and consistent practice over the past 45 years demonstrate that the WQCA does not authorize the State to regulate dredge and fill activities within state waters, as Colorado has acknowledged.[2] It also does not flatly prohibit such activities, contrary to the District Court's conclusion.[3]

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[2] *See* Declaration of Nicole Rowan; Aplt. App. 85-86. ("Establishing its own permitting program for fill activities will require amendment of the Colorado Water Quality Control Act, which is outside the control of CDPHE.")

[3] As the Agencies point out (Appellant's Opening Brief at 36-38), Colorado did not argue such a prohibition, nor argue harm based on such a prohibition, in requesting a preliminary injunction.

Nothing in the NWPR compels the regulatory burden alleged by Colorado or the enforcement burden described by the District Court. Therefore, the NWPR will not cause Colorado to suffer any great and irreparable harm that warrants the issuance of a preliminary injunction.

A. The Clean Water Act's regulatory framework establishes two distinct permitting programs under Sections 402 and 404, while the Colorado Water Quality Control Act has no counterpart for Section 404.

In 1972, Congress enacted the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq., to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that objective, the CWA generally prohibits the unpermitted discharge of pollutants, including dredged and fill materials, from a point source into "navigable waters," which are defined under the CWA as "the waters of the United States," *id*. §§ 1311(a), 1342(a), 1344(a), 1362(7).

Under the CWA, the discharge of pollutants into "waters of the United States" is unlawful unless the discharge occurs in compliance with the provisions of either the Section 402 National Pollutant Discharge Elimination System permitting program or the Section 404 permitting program for the discharge of dredged and fill materials. Section 402 authorizes the EPA to issue permits for the discharge of pollutants (other than dredged or fill material) into the "waters of the

United States." *Id*. 33 U.S.C. § 1342. The discharge of dredged or fill material into waters of the United States is separately regulated and permitted by the U.S. Army Corps of Engineers ("Corps") under Section 404. *Id*. § 1344(a), (d), (g). The Supreme Court has explained the reasons for this distinction:

> In contrast to the pollutants normally covered by the permitting requirement of [Section 402], "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an "addition ... to navigable waters" when deposited in upstream isolated wetlands. The Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404].

Rapanos v. United States, 547 U.S. 715, 744-45 (2006) (plurality opinion)(internal citations omitted).

Under the two permitting schemes established by the CWA, the EPA or the Corps of Engineers, as applicable, may delegate its permitting authority to states that satisfy certain minimum requirements. In 1975, the EPA delegated its authority to administer the discharge permitting program under Section 402 to the State of Colorado, which, through the Water Quality Control Division, operates and oversees this program. 40 Fed. Reg. 16713 (April 14, 1975); *see also* Memorandum of Agreement between EPA and Colorado, at 2 (March 27, 1975) at https://www.epa.gov/sites/production/files/2013-09/documents/co-moa-npdes.pdf (authorizing the State of Colorado "to process and issue National Pollutant

Discharge Elimination System waste discharge permits which are consistent and compatible with the [Clean Water] Act and with regulations and guidelines promulgated thereunder."). However, Colorado never has requested delegation of section 404 program authority as required under sections 404 (g) and (h) of the federal Act, and the state legislature has not authorized or implemented a state dredge and fill permitting program. Thus, the Corps continues to administer the Section 404 program in Colorado.

Like the CWA, the Colorado WQCA prohibits discharges of pollutants into state waters, unless those discharges occur in accordance with a state or federal permit. C.R.S. § 25-8-501(1) provides that "[n]o person shall discharge any pollutant into any state water from a point source without having obtained a permit from the [Water Quality Control Division]." However, consistent with the delegation of CWA authority, permits issued by the Division are limited to the Section 402 permitting program. As noted above, the Colorado General Assembly has provided no authorization for state agencies to regulate dredge and fill operations under an independent state program.

C.R.S. § 25-8-202(1) authorizes the Colorado Water Quality Control Commission to "develop and maintain a comprehensive and effective program for the prevention, control, and abatement of water pollution and for water quality

protection throughout the entire state." In connection with that authority, the Commission must "[p]romulgate permit regulations in accordance with sections 25-8-501 to 25-8-504." C.R.S. § 25-8-202(1)(d). Part 5 of the WQCA, which establishes Colorado's permit system, is analogous to the National Pollutant Discharge Elimination System permitting program established under Section 402 of the CWA, and contains no reference to or authorization for the State's regulation of dredge and fill activities.

Due to this limited authority, to date, Colorado has not regulated any discharges of dredge and fill material. Colorado has neither sought nor received a delegation of the Corps' authority to regulate discharges into "waters of the United States" under Section 404, nor has it regulated any dredge or fill activities in other state waters. The WQCA generally requires that discharges of pollutants to state waters be authorized by either a state or federal permit. The WQCA's prohibitions on discharges and the permit requirement exist within the very specific context that the WQCA implements the Section 402 permitting program. The WQCA simply does not address discharges of dredged and fill materials and provides no means by which Colorado can regulate or permit discharges of such materials. Because Colorado has sought delegation of only the EPA's Section 402 permitting authority, Colorado always has fully relied upon the Corps to issue Section 404

permits and, more importantly, to determine when dredge and fill can proceed without a permit.

B. The WQCA neither prohibits, nor authorizes regulation of, the dredging and filling of the so-called "gap waters" left unregulated by the NWPR.

Under the WQCA, "[n]o person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division for such discharge." C.R.S. § 25-8-501(1). "State waters" are defined more broadly than the "waters of the United States" that are subject to federal regulation under the CWA. Under the WQCA, "state waters" include "any and all surface and subsurface waters which are contained in or flow through [the State of Colorado]," except for certain waters in water treatment and distribution systems. C.R.S. § 25-8-103(19).

In the 2020 Navigable Waters Protection Rule ("NWPR" or "Rule"), the EPA and the Corps have adopted a markedly more limited definition of the "waters of the United States" that are subject to federal regulation under the CWA. The NWPR outlines four categories of jurisdictional waters: "(1) The territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands)." 85

Fed. Reg. 22,250-1 at 22,273 (April 21, 2020). Under the NWPR, all ephemeral waters and certain wetlands and intermittent streams that were previously regulated under the CWA are now excluded from the Corps' jurisdiction and, consequently, no longer are subject to the permitting requirements of Section 404. These waters are the so-called "gap waters" that Colorado contends will be impacted by the Agencies' promulgation of the NWPR.

However, the WQCA does not specifically prohibit, or authorize regulation of, dredging or filling waters that fall outside of federal jurisdiction, whether that jurisdiction is articulated by the NWPR or another standard. Indeed, unlike the CWA, the WQCA does not establish any regulatory program under which the state of Colorado may permit or prohibit discharges of dredge and fill materials to state waters. As discussed above, the WQCA is directed at CWA Section 402 regulation of pollutant discharges. *See* C.R.S. § 25-8-501. In fact, the only mention of Section 404 in the WQCA is an express confirmation of the General Assembly's intent that dredge and fill regulation is left to the Corps. C.R.S. § 25-8-302(f) (affirming that when issuing CWA Section 401 certifications, "General or nationwide permits under section 404 of the federal act shall be certified for use in Colorado without the imposition of any additional state conditions.").

As discussed in Section I.A above, the WQCA does not include any mechanism by which the State of Colorado can issue a permit for dredge and fill activities in state waters, and the State has not otherwise sought such authority. The fact that the EPA and the Corps have adopted the NWPR, which restricts the waters that are now subject to their federal permitting jurisdiction, simply means that there are fewer waters for which a dredge or fill permit would be required. Through Colorado's own inaction, the State neither sought to assume the Corps' Section 404 permitting authority nor developed any legal authority for its own program to issue or deny permits to discharge dredged or fill materials in state waters.

C. Even as federal jurisdiction over waters of the United States has changed and diminished over time, Colorado has operated its Clean Water Program without seeking to regulate discharges of dredge and fill materials into state waters, or to assume Section 404 permitting authority from the Corps.

As noted in Section I.A, the CWA prohibits the discharge of dredge and fill material, without a permit, into "navigable waters," defined under the Act as "the waters of the United States." 33 U.S.C. §§ 1311, 1344. The scope of which waters constitute "waters of the United States," for the purpose of regulation under the Act, has been debated, modified, and, ultimately, diminished over several decades through several Supreme Court decisions. In the earliest of these, *United States v.*

Riverside Bayview Homes, Inc., the Court adopted an expansive view of the waters subject to federal jurisdiction under the CWA, deferring to the Corps' assertion of jurisdiction over wetlands that "actually abut" navigable waters. 474 U.S. 121, 131-35 (1985). By recognizing that the Corps could permissibly regulate discharges of dredge and fill materials into adjacent wetlands, the Court extended the jurisdictional reach of the CWA outside the bounds of waters traditionally considered navigable.

However, the Supreme Court's decisions since that time restricted the scope of waters subject to federal regulation under the CWA, first in 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), and then in *Rapanos* in 2006. Clarifying the limits of its previous decision in *Riverside Bayview*, the Supreme Court concluded that Congress did not intend for the Corps of Engineers' permitting authority under Section 404 to cover non-navigable, isolated, intrastate waters. *SWANCC*, 531 U.S. 159, 174 (2001) (holding that the Corps of Engineers' exertion of Section 404 permitting authority over isolated intrastate waters would be "a significant impingement of the States' traditional and primary power over land and water use.").

In *Rapanos*, the Supreme Court further limited the reach of the CWA's jurisdiction. The Court's plurality opinion limited "waters of the United States" to

traditional navigable waters and those "relatively permanent bod[ies] of water connected to traditional interstate navigable waters" and to "wetlands with a continuous surface connection" to such relatively permanent waters. 547 U.S. at 742. Concurring with the plurality, Justice Kennedy suggested that the Corps' regulatory jurisdiction could extend somewhat farther to waters having a "'significant nexus' to waters that are [or were] navigable in fact or that could reasonably be so made." *Id.* at 759. The Agencies responded with their 2008 Guidance,[4] establishing criteria for determining a "significant nexus."

Colorado adopted the WQCA in 1973, prior to the Court's *Riverside Bayview* holding, and the Act has been amended several times thereafter. With the Court's above-noted decisions in *SWANCC* and *Rapanos*, the waters subject to federal discharge permitting under Section 404 have narrowed, carving more state waters out of the Corps' Section 404 permitting jurisdiction. Despite these progressive steps narrowing the Corps' jurisdiction over a period of nearly 20 years, Colorado never pursued legislation or any other action to authorize its own regulation of dredge and fill discharges. Rather, Colorado continued to regulate discharges of pollutants only under the Section 402 discharge permitting program,

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[4] The 2008 Guidance is cited and discussed in Colorado's Complaint at 15-16. Appellant's Appendix at 22.

leaving dredge and fill regulation to the sole jurisdiction of the Corps, including determinations that certain dredge and fill operations require no permit because they do not affect "waters of the United States." Regardless of whether the NWPR actually alters the scope of the waters classified as "waters of the United States" subject to the Corps' jurisdiction under Section 404, the Rule does not change Colorado's regulatory scheme that defers dredge and fill regulation to the Corps' sole authority. Consequently, the Agencies' adoption of the NWPR cannot cause Colorado to suffer regulatory or enforcement harm.

D. The WQCA cannot be read to deny or impair rights to appropriate water for beneficial use.

The WQCA provides its own constraint on interpretation:

> No provision of this article shall be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of sections 5 and 6 of article XVI of the constitution of the state of Colorado, compacts entered into by the state of Colorado, … or Colorado court determinations with respect to the determination and administration of water rights. Nothing in this article shall be construed, enforced, or applied so as to cause or result in material injury to water rights.

C.R.S. § 25-8-104(1). With this declaration, the General Assembly confirmed that the WQCA is designed not only to prevent water pollution but also "to protect the beneficial use of water in a variety of different contexts." *Thornton v. Denver*, 44 P.3d 1019, 1029 (Colo. 2002). The District Court did not take into account this

interpretive requirement, which defeats the conclusion that C.R.S. § 25-8-501 prohibits any discharge of dredge and fill material. Most Colorado water rights involve the diversion of water from state waters (streams or aquifers), or construction of dams or other structures to store water. If the WQCA were read to prohibit dredging and/or filling "state waters" without a federal permit (since no such state permits are authorized), it would effectively deny the use of water rights in any state waters that fall outside federal jurisdiction, either before or after the NWPR.[5]

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[5] CWC does not dispute the settled principle that federal permits issued under the CWA may impose reasonable conditions upon the exercise of water rights allocated under state law. *See PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 720 (1994) (holding that the CWA "preserve[s] the authority of each State to allocate water quantity as between users, [but does] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512-513 (10th Cir. 1985) (holding that the Corps of Engineers, in issuing Section 404 permits, may consider factors affecting water quantity as well as water quality and, thus, properly considered downstream impacts to endangered species resulting from the depletion of water caused by the applicant's placement of fill material during dam construction). Rather, CWC argues that Colorado's statute, by its terms, must not be interpreted in ways that would "supersede, abrogate, or impair" water diversion rights for beneficial use that are protected under Colorado's Constitution. C.R.S. § 25-8-104(1). The District Court's interpretation of the WQCA, to prohibit the discharge of dredge and fill materials into non-jurisdictional state waters, would not merely condition but essentially preclude the exercise of water rights in those waters, in contravention of the WQCA's mandate.

The Colorado Constitution establishes the allocation of water rights by prior appropriation, and requires that the "right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Colo. Const., Art. XVI, § 6. By interpreting the WQCA to prohibit any dredging or filling of state waters, while recognizing it provides no means for obtaining a non-federal permit, the District Court's conclusion effectively would deny the appropriation by diversion for beneficial use of any water outside federal jurisdiction.[6] This interpretation is contrary to C.R.S. § 25-8-104(1) and the Colorado Constitution. To avoid interference with water rights, consistent with these constraints, the better construction is the interpretation Colorado's WQCD has taken until 2019: the State does not regulate or prohibit dredging or filling waters that fall outside federal jurisdiction.

[6] For example, Colorado law authorizes the State Engineer (Division of Water Resources) to approve livestock water tanks under C.R.S. § 35-49-101, et seq., and erosion control dams under C.R.S. § 37-87-122. Both types of water structures involve the construction of dams to capture water in "normally dry" watercourses, which likely fall outside federal jurisdiction under the NWPR. The District Court's interpretation of the WQCA would prohibit such structures even when approved by the State Engineer under other Colorado statutes.

E. The District Court's interpretation of the WQCA, as prohibiting discharges of dredge and fill material into non-federal state waters, leads to absurd results.

The District Court's order construes the WQCA as imposing a "flat prohibition" on dredging and filling state waters. Order Granting As-Construed Motion for Stay of Agency Action at 5, 7; Aplt. App. 98, 100. As discussed in Sections I.A and I.B above, the WQCA creates a detailed regulatory scheme for point source discharges of pollutants into state waters. Under the District Court's interpretation of the WQCA, discharges of dredge and fill materials into the significant state waters that also qualify as "waters of the United States" are permissible with the appropriate federal permit, while the discharge of the same materials into non-federal state waters would be unlawful. Such a prohibition on discharges to non-federal waters, while allowing permits to dredge and fill the more significant waters under federal jurisdiction, would be absurd.

The Supreme Court has held that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). The District Court's interpretation of the WQCA produces an absurd result, in that it would prohibit all dredge and fill activities in non-federal state waters, while allowing such activities with federal permits in

"waters of the United States," in which such activities have more significant consequences.

The Colorado General Assembly enacted the WQCA to "prevent injury to beneficial uses made of state waters, to maximize the beneficial uses of water, and to develop waters to which Colorado and its citizens are entitled," and in doing so, "to achieve the maximum practical degree of water quality in the waters of the state consistent with the welfare of the state." C.R.S. § 25-8-102(1). The District Court's construction of this Act, however, would preclude activities that require dredging or filling state waters not subject to federal regulation, while allowing such activities to proceed with federal permits where the waters are also "waters of the United States." This interpretation contradicts the stated purposes of the WQCA by flatly prohibiting many uses of the state's non-federal waters and, thus, should be avoided. The better interpretation, consistent with the WQCA's legislative purpose, is that which the WQCD held prior to the adoption of the NWPR: the Act does not prohibit dredge and fill activities in non-federal waters. This interpretation furthers the purposes of the Act, including maximization of both beneficial uses of state waters and the quality of state waters, consistent with the welfare of the State.

II. Colorado's claimed irreparable harm and disruption of the status quo result primarily from its own recent executive policy decisions and does not warrant a preliminary injunction.

A preliminary injunction "is an 'extraordinary remedy' that is granted only when 'the movant's right to relief [is] clear and unequivocal.'" *First Western Capital Management Company v. Malamed*, 874 F. 3d 1136, 1145 (10th Cir. 2017). The primary purpose of a preliminary injunction, where warranted, is to preserve the relative positions of the parties until a trial on the merits resolves the petitioner's claims. *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc*., 805 F.2d 351, 355 (10th Cir. 1986). However, no such injunction is warranted in this matter, where Colorado's claimed harm directly results from its recent change in executive policy and its own action and inaction over the course of several decades.

A. Colorado's longstanding interpretation of the WQCA is that non-federal waters are not subject to any state dredge and fill permitting obligations.

Under the WQCA, the State of Colorado authorizes point-source discharges into state waters pursuant to either a state or federal permit. C.R.S. § 25-8-501(1). While the State issues permits for pollutant discharge pursuant to its EPA-delegated authority under Section 402 of the CWA, the State recognizes permits issued by the Corps of Engineers under Section 404 for the discharge of dredged

and/or fill material, and considers those permits satisfactory under Colorado law. In so doing, the State has historically deferred to the Corps' determinations that certain waters are not "waters of the United States," and thus, not subject to regulation with respect to dredge and fill activities.

For non-jurisdictional waters outside the scope of the Corps' permitting authority, the State historically has not required any permits for dredge or fill activity. Prior to the agencies' adoption of the NWPR, the State has allowed projects involving discharges of dredged and fill materials into exclusively state waters to go forward without asserting regulatory authority or taking enforcement action to prevent the occurrence of such discharges.

B. In response to promulgation of the NWPR, Colorado has adopted the contrary position that dredge and fill activities in non-jurisdictional waters must be regulated by the state.

The State alleges that, because Colorado has no permitting system for dredge and fill activities in state waters that fall outside the scope of federal jurisdiction, "project sponsors will be left without any legal mechanism to authorize projects that require discharges of fill in these waters." Order Granting As-Construed Motion For Stay of Agency Action at 7; Aplt. App. 100 (quoting State's Amended Motion for Preliminary Injunction at 7). However, in Colorado, a gap always has existed between the waters considered to be "state waters" under

the WQCA and the waters subject to federal regulation under the CWA, because "state waters" always have been defined more broadly than "waters of the United States." In those waters that fall outside of federal CWA jurisdiction, the state has simply never asserted regulatory authority or required specific permits authorizing the discharge of dredged or fill materials. Rather, it has respected the Corps' determination that a water is non-jurisdictional and has allowed the discharge to occur without further regulation.

Only following the agencies' promulgation of the NWPR has the State re-interpreted the WQCA to prohibit and/or mandate regulation or enforcement actions against discharges of dredge and fill material into state waters that the Corps concludes are outside of its jurisdiction. With this change in executive policy, the State of Colorado now warns that it will require a new permitting framework and bring enforcement actions against the placement of dredged or fill materials in state waters, even though such activity was never previously treated as unlawful.

C. Colorado cannot claim that the Agencies' promulgation of the NWPR will disrupt the status quo and cause irreparable harm sufficient to justify injunctive relief, where the state's perceived harm and disruption result from its own actions and inaction.

Where a party seeks a preliminary injunction that alters the status quo, "the movant must satisfy a heightened burden" by demonstrating "that the exigencies of

the case support" his motion. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004). The State, however, failed to satisfy that heightened standard in its request to enjoin the agencies' enforcement of the NWPR. As noted above, in this instance, the historical status quo has been for the State not to exercise regulatory authority and therefore to allow, without a permit, discharges of dredged or fill materials into state waters that fall outside the scope of federal jurisdiction under the CWA. However, in a departure from that historical position, the State has now determined that it must regulate discharges of dredged or fill materials in exclusively state waters.

The District Court found that the State would be sufficiently harmed by undertaking a few additional enforcement actions for the discharge of dredge and fill materials in state waters (an argument that the State itself did not raise in its briefing to the District Court). However, any such harm that may result from the State's perceived need to commence additional enforcement actions is the direct result of the State's own change in policy. Colorado's decision to bring enforcement actions against discharges of dredge and fill materials in waters that fall outside the scope of federal jurisdiction constitutes a change in Colorado's interpretation and application of the WQCA, not a change of circumstance

resulting from the NWPR. That policy change does not rise to the level of "irreparable harm" necessary to justify the issuance of a preliminary injunction.

To the contrary, any harm that may result from the State's decision to pursue regulation or enforcement authority is mostly self-inflicted, considering that the State never previously considered such discharges to be unlawful. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (holding that the plaintiff failed to allege sufficient harm, where the injury in question was "self-inflicted, resulting from decisions by their respective state legislatures," and that "[n]o State can be heard to complain about damage inflicted by its own hand."). In this instance, Colorado can avoid the harm complained of by foregoing enforcement efforts against discharges to non-jurisdictional waters, consistent with its historical position, at least until it obtains new legislative authority.

Moreover, though the State has been on notice for several years of the EPA's and the Corps' rulemaking to narrow the definition of "waters of the United States," the State never obtained (or even requested, until late in the 2020 legislative session) legislation authorizing the operation of a dredge and fill permitting program. Rather, the State continued to rely upon the Corps' permitting decisions, with full knowledge of the Agencies' reconsideration of the scope of waters subject to federal jurisdiction. However, the agencies' decision to limit the

waters regulated under the CWA does not amount to irreparable harm to Colorado. The State historically has not required dredge and fill permits for discharges into non-jurisdictional waters. The fact that the agencies have reduced the scope of waters that fall within their CWA jurisdiction does not harm the State, since Colorado can simply choose to maintain the status quo by continuing to not require such permits.

CONCLUSION

For the foregoing reasons, this Court should reject the District Court's interpretation of the WQCA to prohibit dredge and fill activities in state waters, and any allegations of harm based on the perceived need to regulate or undertake enforcement against such activities. Because the preliminary injunction was based on such erroneous interpretation and allegations of harm, this Court should vacate the preliminary injunction.

Respectfully submitted on July 16, 2020 and amended on the 3rd day of August, 2020.

/s/ April D. Hendricks
Stephen H. Leonhardt
Scott A. Clark
April D. Hendricks
BURNS, FIGA & WILL, P.C.
6400 S. Fiddler's Green Circle, #1000
Greenwood Village, CO 80111
Phone: (303) 796-2626
Fax: (303) 796-2777
sleonhardt@bfwlaw.com
sclark@bfwlaw.com
ahendricks@bfwlaw.com

Attorneys for Amicus Curiae
Colorado Water Congress

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this amended brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5404 words, which was determined by Word Version 2016. This amended brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5), (6) and 10th Cir. R. 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and 14-point Times New Roman.

Dated: August 3, 2020.

S/ April D. Hendricks
April D. Hendricks

Attorneys for Amicus Curiae
Colorado Water Congress

CERTIFICATE OF DIGITAL SUBMISSION

Under section II.I of this Court's CM/ECF User Manual, I hereby certify that:

1. All required privacy redactions have been made under 10th Cir. R. 25.5.

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Dated: August 3, 2020.

S/ April D. Hendricks
April D. Hendricks

Attorneys for Amicus Curiae
Colorado Water Congress

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, I electronically filed the foregoing AMENDED BRIEF OF COLORADO WATER CONGRESS AS *AMICUS CURIAE* URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Additionally, I certify that seven paper copies of the AMENDED BRIEF OF COLORADO WATER CONGRESS AS *AMICUS CURIAE* URGING REVERSAL will be delivered within five business days to the Clerk, United States Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257-1823.

S/ April D. Hendricks
April D. Hendricks

Attorneys for Amicus Curiae
Colorado Water Congress