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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Pasqua Yaqui Tribe, et al.,

10 Plaintiffs,

11 v.

12 United States Environmental Protection
13 Agency, et al.,

14 Defendants.

No. CV-20-00266-TUC-RM

ORDER

15 Plaintiffs Pascua Yaqui Tribe, Quinault Indian Nation, Fond du Lac Band of Lake
16 Superior Chippewa, Menominee Indian Tribe of Wisconsin, Tohono O’Odham Nation,
17 and Bad River Band of Lake Superior Chippewa (“Plaintiffs”) challenge two final rules
18 promulgated by the United States Environmental Protection Agency (“EPA”) and the
19 United States Army Corps of Engineers (“Corps of Engineers”) (collectively,
20 “Agencies”). (Doc. 1.) The first, entitled “Definition of ‘Waters of the United States’—
21 Recodification of Pre-Existing Rules,” 84 Fed. Reg. 56,626 (Oct. 22, 2019) (“2019
22 Repeal Rule”), repealed the 2015 “Clean Water Rule.” The second, entitled “The
23 Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed.
24 Reg. 22,250 (Apr. 21, 2020) (“NWPR”), established a new definition of the phrase
25 “waters of the United States” in the Clean Water Act (“CWA”).

26 Plaintiffs moved for summary judgment on May 11, 2021. (Doc. 47.) On July 13,
27 2021, Defendant-Intervenors Chantell and Michael Sackett (“Sacketts”) filed a Cross-
28 Motion for Summary Judgment (Doc. 77), as did Defendant-Intervenors Arizona Rock

1 Products Association; National Stone, Sand, and Gravel Association; Arizona Cattle
2 Feeders Association; Home Builders Association of Central Arizona; Arizona Farm and
3 Ranch Group; Arizona Farm Bureau; and Arizona Chapter Associated General
4 Contractors (collectively, “Business Intervenors”) (Doc. 79).

5 In lieu of filing a response to Plaintiffs’ Motion for Summary Judgment,
6 Defendants EPA, EPA Administrator Michael Regan, Corps of Engineers, and Acting
7 Assistant Secretary of the Army Jaime Pinkham (collectively, “Agency Defendants”)
8 filed a Motion for Voluntary Remand of the NWPR Without Vacatur and Motion for
9 Abeyance of Briefing on the 2019 Rule Claims. (Doc. 72.) Plaintiffs do not oppose
10 remand of the NWPR but argue that remand should include vacatur. (Doc. 74 at 1-12.)¹
11 The Sacketts oppose remand. (Doc. 84.) The Business Intervenors do not oppose
12 remand but oppose Plaintiffs’ position that remand should include vacatur. (Doc. 85.)
13 The Court held a hearing on the Motion for Voluntary Remand on August 4, 2021 and
14 took the matter under advisement. (Doc. 92.)

15 For the following reasons, the Court will grant the Agency Defendants’ Motion for
16 Voluntary Remand, as well as Plaintiffs’ request that remand include vacatur.

17 **I. Background**

18 The CWA was enacted in 1972 “to restore and maintain the chemical, physical,
19 and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Act regulates
20 discharges of pollutants from point sources to “navigable waters,” with “navigable
21 waters” defined as “waters of the United States, including the territorial seas.” 33 U.S.C.
22 §§ 1311(a), 1362(7), 1362(12). The statute does not further define the phrase “waters of
23 the United States.” For decades, that phrase was defined by regulation to include
24 tributaries and impoundments of interstate waters and other waters used in or affecting
25 interstate or foreign commerce, as well as wetlands adjacent to such waters, including
26 wetlands separated by man-made dikes or barriers, natural river berms, and beach dunes.
27 *See* 33 C.F.R. § 328.3(a), (c) (1986); *see also* 51 Fed. Reg. 41,206, 41,250 (Nov. 13,

28 ¹ All record citations refer to the page numbers generated by the Court’s electronic filing system.

1 1986); 53 Fed. Reg. 20,764, 20,774 (June 6, 1988).

2 In *Rapanos v. United States*, a deeply divided Supreme Court considered whether
3 wetlands connected to distant navigable waters via ditches or artificial drains constitute
4 “waters of the United States” within the meaning of the CWA. 547 U.S. 715, 729 (2006)
5 (Scalia, J., plurality). Justice Scalia authored a four-justice plurality opinion concluding
6 (1) that “the phrase ‘waters of the United States’ includes only those relatively
7 permanent, standing or continuously flowing bodies of water forming geographic features
8 that are described in ordinary parlance as streams, oceans, rivers, and lakes”; and (2)
9 “only those wetlands with a continuous surface connection to bodies that are ‘waters of
10 the United States’ in their own right, so that there is no clear demarcation between waters
11 and wetlands, are adjacent to such waters and covered by the [CWA].” *Id.* at 739, 742
12 (Scalia, J., plurality) (internal quotation, emphasis, and alteration marks omitted). Justice
13 Kennedy concurred in the judgment of the plurality but wrote separately and found that
14 wetlands constitute “navigable waters” within the meaning of the CWA if there is “a
15 significant nexus between the wetlands” and traditionally navigable waters, such that “the
16 wetlands, either alone or in combination with similarly situated lands in the region,
17 significantly affect the chemical, physical, and biological integrity” of traditionally
18 navigable waters. *Id.* at 779-80 (Kennedy, J, concurring). Justice Kennedy and the four
19 dissenting justices all rejected Justice Scalia’s plurality opinion as “inconsistent with the
20 [CWA]’s text, structure, and purpose.” 547 U.S. at 776 (Kennedy, J., concurring); *see id.*
21 at 800 (Stevens, J., dissenting) (agreeing with Justice Kennedy that the limitations set
22 forth in the plurality opinion “are without support in the language and purposes of the
23 [CWA] or in [the Supreme Court’s] cases interpreting it”).

24 The Ninth Circuit subsequently held that Justice Kennedy’s *Rapanos* concurrence
25 is controlling under Supreme Court precedent for interpreting fractured decisions. *N.*
26 *Cal. River Watch v. Cty. of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *see also*
27 *United States v. Robertson*, 875 F.3d 1281, 1290-1292 (9th Cir. 2017) (re-affirming
28 *Healdsburg*), *vacated as moot*, 139 S. Ct. 1543 (2019). Other circuit courts likewise

1 either adopted Justice Kennedy’s significant nexus test or found that CWA protections
2 applied upon satisfaction of either Justice Kennedy’s or Justice Scalia’s tests. *See, e.g.,*
3 *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011); *Precon Dev. Corp. v. U.S.*
4 *Army Corps of Eng’rs*, 633 F.3d 278, 288-89 (4th Cir. 2011); *United States v. Bailey*, 571
5 F.3d 791, 799 (8th Cir. 2009); *United States v. Robison*, 505 F.3d 1208, 1221-22 (11th
6 Cir. 2007); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States v.*
7 *Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006).

8 In 2015, the Agencies adopted the “Clean Water Rule,” re-defining the term
9 “navigable waters.” 33 C.F.R. § 328.3 (2016); *see also* 80 Fed. Reg. 37,054 (June 29,
10 2015). As part of the rulemaking process, the Agencies produced a review of scientific
11 literature on the connections between tributaries, wetlands, and downstream waters, titled
12 “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis
13 of the Scientific Evidence” (“Connectivity Report”). (Doc. 64; Doc. 64-1; Doc. 64-2.)

14 On February 28, 2017, President Donald Trump issued Executive Order 13,778,
15 directing the Agencies to consider repealing the Clean Water Rule and replacing it with a
16 regulation adopting the reasoning of Justice Scalia’s plurality opinion in *Rapanos*. 82
17 Fed. Reg. 12,497 (Feb. 28, 2017). The Agencies repealed the Clean Water Rule in 2019
18 and re-instated the pre-2015 regulations. 84 Fed. Reg. 56,626 (Oct. 22, 2019). Then, in
19 the 2020 NWPR, the Agencies re-defined the term “navigable waters” to mean: (1) “[t]he
20 territorial seas” and waters used “in interstate or foreign commerce,” (2) “[t]ributaries,”
21 (3) “[l]akes and ponds, and impoundments of jurisdictional waters,” and (4) “[a]djacent
22 wetlands.” 33 C.F.R. § 328.3(a) (2020); *see also* 85 Fed. Reg. 22,250 (Apr. 1, 2020).
23 The NWPR strictly defines “tributaries” and “adjacent wetlands,” and it categorically
24 excludes certain features from the definition of “navigable waters,” including “ephemeral
25 streams.” 33 C.F.R. § 328.3(b), (c)(1), (c)(12). Consistent with Executive Order 13,778,
26 the NWPR is based in significant part on the *Rapanos* plurality opinion. *See, e.g.,* 85
27 Fed. Reg. at 22,2259, 22,273, 22,279-80, 22,288-89, 22,291, 22,303-04, 22,308-10,
28 22,314, 22,319, 22,326. The Agencies published the NWPR notwithstanding feedback

1 from the EPA Science Advisory Board that the NWPR conflicts with established science,
2 disregards key aspects of the 2015 Connectivity Report, and weakens protection of the
3 nation's waters in contravention of the CWA's objectives. (Doc. 63-8 at 2-5.)

4 On January 20, 2021, President Joe Biden issued Executive Order 13,990,
5 expressing the policy of the new administration:

6 to listen to the science; to improve public health and protect our environment; to
7 ensure access to clean air and water; to limit exposure to dangerous chemicals and
8 pesticides; to hold polluters accountable, including those who disproportionately
9 harm communities of color and low-income communities; to reduce greenhouse
10 gas emissions; to bolster resilience to the impacts of climate change; to restore and
expand our national treasures and monuments; and to prioritize both
environmental justice and the creation of the well-paying union jobs necessary to
deliver on these goals.

11 86 Fed. Reg. 7,037 (Jan. 20, 2021). Executive Order 13,990 directed federal agencies "to
12 immediately review and, as appropriate and consistent with applicable law, take action to
13 address the promulgation of Federal regulations and other actions during the last 4 years
14 that conflict with these important national objectives." *Id.*

15 Consistent with Executive Order 13,990, the EPA and Corps of Engineers have
16 provided notice of their intent to restore the pre-2015 regulatory definition of "waters of
17 the United States" while working to develop a new regulatory definition. (Doc. 89.) The
18 Agencies have not provided an estimate of when a new regulatory definition will be
19 published.

20 **II. Motion to Remand**

21 The Agency Defendants seek voluntary remand of the NWPR while they work to
22 revise or replace the rule and re-define "waters of the United States." (Doc. 72; *see also*
23 Doc. 83 at 4.) Neither Plaintiffs nor the Business Intervenors oppose the Agency
24 Defendants' request for voluntary remand. (Doc. 74 at 1-12; Doc. 85 at 1-7.) The
25 Sacketts oppose the request to the extent it seeks remand of the "adjacent wetlands"
26 provision of the NWPR. (Doc. 84.)

27 "A federal agency may request remand in order to reconsider its initial action."
28 *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam).

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