

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

NEW MEXICO CATTLE GROWERS’  
ASSOCIATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY; ANDREW  
WHEELER, in his official capacity as  
Administrator of the Environmental  
Protection Agency; UNITED STATES  
ARMY CORPS OF ENGINEERS; and R.D.  
JAMES, in his official capacity as Assistant  
Secretary for Civil Works, Department of the  
Army,

Defendants.

) Case No. \_\_\_\_\_

**COMPLAINT**

**INTRODUCTION**

1. This lawsuit is about the proper interpretation of the term “navigable waters” in the Clean Water Act, 33 U.S.C. §§ 1362(12) and 1362(7). The Clean Water Act imposes severe criminal penalties for unpermitted discharges to “navigable waters.” Permitting is onerous and expensive, costing years of time and hundreds of thousands of dollars on average. What “waters” are “navigable” is thus a major question. In 1986, the Environmental Protection Agency (EPA) and Army Corps of Engineers (Army) adopted regulations (the 1986 Regulations) that interpreted the term “navigable waters” broadly to include extensive non-navigable waterbodies and features upstream of and even isolated from navigable-in-fact rivers and lakes. In 2015, the EPA and the Army replaced the 1986 Regulations with a new regulation (the 2015 Navigable Waters Definition) that reinterpreted “navigable waters” to include some but not all of the non-navigable

water features included in the 1986 Regulations. On October 22, 2019, the EPA and the Army published a final rule (the Repeal and Recodify Rule) repealing the 2015 Navigable Waters Definition and purporting to readopt the 1986 Regulations, along with related guidance memoranda.

2. Plaintiff's members own or operate real property with aquatic features in New Mexico, and are subject to EPA and Army permitting and enforcement under the 1986 Regulations and related guidance. Plaintiff challenges several provisions of the 1986 Regulations and related guidance, as either exceeding the agencies' statutory authority under the Clean Water Act and the Congressional Review Act, or Congress' authority under the Commerce Clause, the Due Process Clause, the Non-Delegation Doctrine, and the Tenth Amendment. Plaintiff asks this Court to declare that several provisions of the Clean Water Act, the 1986 Regulations, and related guidance are statutorily and constitutionally invalid, and to enjoin their enforcement.

### **JURISDICTION AND VENUE**

3. Jurisdiction is founded upon 28 U.S.C. § 1331 (federal question); § 1346(a)(2) (civil action against the United States); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief and any other "necessary and proper" relief); and 5 U.S.C. § 702 (judicial review of agency action under the Administrative Procedure Act).

4. Plaintiff has exhausted all administrative remedies.

5. This action is timely. 28 U.S.C. § 2401(a).

6. The challenged rule is final agency action, ripe for judicial review. 5 U.S.C. § 704.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(2), because Plaintiff's members reside in this District. *See also* 5 U.S.C. § 703 (venue for actions under the Administrative Procedure Act generally proper in “a court of competent jurisdiction”).

## **PARTIES**

### **PLAINTIFF**

8. The New Mexico Cattle Growers' Association (Cattle Growers') is a non-profit organization dedicated to advocating on behalf of its members on numerous issues relating to regulation under the Clean Water Act. Cattle Growers' devotes substantial resources to activities that seek to ensure that Clean Water Act regulation does not unreasonably impair the cattle industry. Cattle Growers' lobbies on Clean Water Act issues, publishes information on related issues for its members, performs research pertaining to Clean Water Act regulation, and submits comments to government agencies addressing concerns about how regulations under the Act affect its members. Cattle Growers' represents roughly 1,400 cattlemen and landowners throughout the State of New Mexico and many other states, many of whom are subject to the Clean Water Act under the 1986 Regulations and related guidance based on the presence of intermittent and ephemeral tributaries on their properties, as well as wetlands and other stationary water features regulated by the 1986 Regulations and related guidance. On behalf of its members, Cattle Growers' submitted comments objecting to the readoption of the 1986 Regulations and related guidance in the then-proposed Repeal and Recodify Rule.

## DEFENDANTS

9. The United States Environmental Protection Agency (EPA) is a cabinet agency and has enforcement responsibility for the Clean Water Act under the 1986 Regulations. The EPA jointly issued the regulations challenged in this action.

10. Andrew Wheeler is the Administrator of the EPA. He signed the Repeal and Recodify Rule on behalf of EPA on September 12, 2019.

11. The United States Army Corps of Engineers (Army) is a branch of the Department of the Army and has enforcement responsibility for the Clean Water Act under the 1986 Regulations. The Army jointly issued the regulations challenged in this action.

12. R.D. James is the Assistant Secretary of the Army for Civil Works. He signed the Repeal and Recodify Rule on behalf of the Army on September 5, 2019.

## LEGAL BACKGROUND

13. For over a hundred years, the United States Congress regulated the obstruction of navigation on rivers and lakes through a series of statutes that applied to “navigable waters of the United States.” *Rapanos v. United States*, 547 U.S. 715, 723 (2006). In a line of cases originating with *The Daniel Ball*, the Supreme Court of the United States interpreted this term to refer to

[t]hose rivers . . . are navigable in fact[, *i.e.*] . . . when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. 557, 563 (1870); *see also Rapanos*, 547 U.S. at 723.

14. The phrase “navigable waters of the United States” was used in Section 10 of the Rivers and Harbors Act when that act was first adopted in 1899, Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151, and remains in use today, 33 U.S.C. § 403. Section 10 also prohibits obstructions to “the navigable capacity of the waters of the United States” unless authorized by Congress. 33 U.S.C. § 403.

### THE CLEAN WATER ACT

15. In 1972, Congress adopted significant amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, which has since been called the Clean Water Act (the Act). The Act prohibits unpermitted discharges, defined as additions of pollutants from point sources, to navigable waters. 33 U.S.C. §§ 1311(a), 1362(12). The Act assigns general permitting authority to the EPA, with limited authority assigned to the Army to permit discharges of dredged or fill material. 33 U.S.C. §§ 1342(a)(1), 1344(a). The meaning of the term “navigable waters” is what determines whether any particular action is prohibited unless permitted under the Act. The Act states that “navigable waters means the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

16. Nothing in the Act’s definition of “navigable waters” extends the term to non-navigable waters of any sort (*e.g.*, non-navigable tributaries and “adjacent waters”) that are upstream or isolated from navigable-in-fact waters. Nothing in the legislative history of the Act shows that Congress “intended to exert anything more than its commerce power over navigation.” *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng’rs*, 531 U.S. 159, 168 n.3 (2001) (*SWANCC*). In contrast, when Congress has intended to extend its reach to waters that are not navigable, it has said so expressly. For instance, with the Flood Control Act of 1936, Congress

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