IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF LAGUNA; PUEBLO OF JEMEZ, Plaintiffs, v. MICHAEL REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; TAYLOR N. FERRELL, in his official capacity as Acting Assistant Secretary of the Army for Civil Works; UNITED STATES ARMY CORPS OF ENGINEERS, Defendants.	No. COMPLAINT FOR VIOLATIONS of the ADMINISTRATIVE PROCEDURE ACT; the CLEAN WATER ACT; and FEDERAL TRUST RESPONSIBILITIES.

I. INTRODUCTION

1. The Pueblo of Laguna and the Pueblo of Jemez (together "the Pueblos") are both federally recognized tribes that have resided on lands now within the state of New Mexico since time immemorial.

2. For both Pueblos, waters that flow through their lands are necessary for domestic and agricultural uses. Such waters are also essential for cultural and ceremonial practices. The Pueblo of Laguna depends on clean water for irrigation and domestic purposes, and its traditions include ceremonial practices in which members of the Pueblo consume water. The Pueblo of Jemez likewise utilizes clean water for agriculture and domestic purposes, and its water supports

uses including ceremonial and cultural practices, hunting and fishing, as well as domestic, municipal, commercial, and industrial uses.

3. The Pueblos are located in New Mexico, in the arid southwest United States, where water is scarce and therefore of special value. Any water pollution in and around the Pueblos has a disproportionate impact because of the scarcity and preciousness of the resource in the region.

4. Most of the geography surrounding the Pueblos is inscribed by arroyos—gullies carved into the earth by flowing water that for more than a millennium have served as channels for life-giving water in times of rain or snowmelt. Each arroyo, ditch, ephemeral stream, waterway, and acequia with the hydrologic capability to facilitate water flow, regardless of the continuity of that flow, is a vein of life for the Pueblo communities. These conveyances bring water into the lands of the Pueblos and, with it, any pollutants introduced into waterways upstream of or hydrologically connected to the Pueblos' watersheds.

5. Congress enacted the Clean Water Act ("CWA") with the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Among the CWA's main requirements is the prohibition of unpermitted discharge of pollutants into "navigable waters," defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1311(a), 1362(7).

6. The CWA charges the U.S. Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (together, "the Agencies") with implementation of the CWA's pollution protection programs. *See* 33 U.S.C. §§ 1342(a), 1344 (giving the EPA and the Corps authority over the major permitting schemes); *see also* 33 U.S.C. § 1319 (generally giving

the Administrator of the EPA the right to enforce); 33 U.S.C. § 1319(g)(1)(B) (granting limited enforcement power to the Secretary of the Army). Because the CWA does not define "waters of the United States," the Agencies have interpreted the term in order to establish which waters are protected by the CWA. *See Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs,* 893 F.3d 1017, 1020 (7th Cir. 2018); *see also* 33 C.F.R. § 328.3 (the Corps' definition of "waters of the United States") and 40 C.F.R. § 120.2 (the EPA's definition of "waters of the United States").

7. Historically, the Agencies have interpreted "waters of the United States" broadly, in keeping with the text, structure, and purpose of the CWA, although that interpretation has been updated over time in response to scientific advances and judicial decisions. *See United States v. Hubenka*, 438 F. 3d 1026, 1030–31 (10th Cir. 2006) ("As the Supreme Court has recognized, 'Congress chose to define the waters covered by the [CWA] broadly.'" (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)); *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (finding that Congress intended the definition of "waters of the United States" to be broader than the traditional definition of "navigable waters"); Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (June 29, 2015) (issuing a new rule defining "waters of the United States" in response to scientific data) [hereinafter the 2015 Clean Water Rule].

8. The Supreme Court interpreted "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). Justice Scalia's plurality opinion found that CWA jurisdiction did not extend to the wetlands in question, relying on a dictionary definition of "waters" as modified by the word "the" to conclude that the term "the waters of the United States" could "confer[] jurisdiction only over relatively permanent bodies of water." *Id.* at 739.

9. Justice Kennedy's concurrence in judgment supported a "significant nexus" test, finding CWA jurisdiction where the water or wetland "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. As such, the Supreme Court's ruling in *Rapanos* rendered both the "Scalia test" and Justice Kennedy's "significant nexus" test as valid for determining "waters of the United States."

10. Several federal Circuit Courts of Appeals have subsequently followed Justice Kennedy's test. *See, e.g.*, *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 724 (7th Cir. 2006) (per curiam); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

11. In 2015, the Agencies promulgated the Clean Water Rule, which relied on a thorough survey of the best available science to determine which bodies of water were "waters of the United States" under the significant nexus test. 80 Fed. Reg. at 37,060. In keeping with historic practice and based on clear science, the 2015 Clean Water Rule determined that many of the ephemeral and intermittent streams,[1] such as those common on the lands of the Pueblos, were "waters of the United States."

12. In 2017, President Donald J. Trump issued an Executive Order directing the Agencies to repeal the Clean Water Rule and consider replacing it with a regulation employing

[1] Ephemeral streams flow only in response to precipitation whereas intermittent streams flow continuously only at certain times of the year, for example, only flowing in the spring after snowmelt. U.S. Envtl. Prot. Agency, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest 6 (2008).

the narrower approach and reasoning of Justice Scalia's plurality opinion in *Rapanos*. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

13. The Agencies repealed the 2015 Clean Water Rule and then reversed their longstanding policy by promulgating a new, much narrower interpretation of the "waters of the United States." Definition of "Waters of the United States" — Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) [hereinafter the 2019 Repeal Rule]; The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) [hereinafter the 2020 Navigable Waters Rule]. The 2020 Navigable Waters Rule follows the directive of Executive Order 13,778, but without due regard for established law.

14. The 2019 Repeal Rule and 2020 Navigable Waters Rule are inconsistent with both the CWA's objective of "maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" and the *Rapanos* significant nexus test.

15. The 2019 Repeal Rule and the 2020 Navigable Waters Rule harm the Pueblos by removing federal CWA water pollution protections from many of the ephemeral streams and other waterbodies that sustain the Pueblos. These rules remove CWA protections from 79% to 97% of stream miles in the Pueblo of Laguna. These rules remove CWA protections from 94% of stream miles in the Jemez watershed and 87% of stream miles on Jemez Pueblo trust lands.

16. Where a waterbody is not determined to be a "water of the United States," the Pueblos alone are left to establish and administer water pollution control programs at their own expense.

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