

Attachment A: Data Analysis

The U.S. Environmental Protection Agency and the U.S. Department of the Army conducted four assessments on the effects of the Navigable Waters Protection Rule (NWPR) on jurisdictional determinations and related individual aquatic resources using data sourced from the U.S. Army Corps of Engineers' (Corps) ORM2 database. Due to the sensitive information found in the ORM2 database, the raw data associated with these analyses are not being provided here. The ORM2 database was deployed to all of the Corps' 38 districts in 2008 and has been continuously improving since that time. Because of changes to regulation and tracking priorities, the data are most reliable from the year 2016 to present. The following assessments are based on data within specific time frames: June 22 to April 15 in the years of 2018-2019, 2019-2020, and 2020-2021.

These assessments use the following metrics:

- Total number of approved jurisdictional determinations (AJDs) and preliminary jurisdictional determinations (PJDs) by given time period.
 - o The above metric was further broken down by total number of AJDs that included jurisdictional and non-jurisdictional determinations.¹
- Total number of individual aquatic resources found to be jurisdictional and non-jurisdictional within AJDs under the NWPR.²
 - o The above metric was further broken down by the categories of jurisdictional waters and exclusions in the NWPR (i.e., (a)(2), (a)(4), (b)(1), and (b)(3) categories).
- Total number of AJDs in New Mexico and Arizona that included stream resources that were found to be jurisdictional and non-jurisdictional.
- Total number of projects that resulted in 'No Permit Required' closure methods.

Background:

The Operation and Maintenance Business Information Link, Regulatory Module (ORM2) is the Corps' internal database that documents Clean Water Act (CWA) section 404 application and permit data, including information on jurisdictional determinations (JDs).³ A JD is a written Corps determination that a water is subject to regulatory jurisdiction under section 404 of the CWA (33 U.S.C. 1344) or a written determination that a water is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).⁴ JDs are identified as either preliminary or approved, and

¹ The NWPR AJD data entry in ORM2 allows for and is often used to compile determinations about both jurisdictional and non-jurisdictional aquatic resources together for a single project site; under prior regulatory regimes, data entry in ORM2 restricted project managers to entering AJDs in separate entries for jurisdictional and non-jurisdictional resources on the same project site.

² Individual aquatic resources were only assessed under the NWPR because jurisdictional determinations carried out under prior regimes had less clear differentiation between types of aquatic resources. For example, a lake under prior regimes could have been classified as a tributary, an impoundment, a traditional navigable water, an interstate water, and sometimes even an adjacent water or adjacent wetland.

³ The public interface for the Corps' ORM2 Database is available at: <https://permits.ops.usace.army.mil/orm-public>.

⁴ 33 CFR 331.2.

both types are recorded in ORM2. An approved jurisdictional determination (AJD) is an official Corps document stating the presence or absence of “waters of the United States” on a parcel or a written statement and map identifying the limits of “waters of the United States” on a parcel. A preliminary jurisdictional determination (PJD) is a non-binding written indication that there may be “waters of the United States” on a parcel; an applicant can elect to use a PJD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination.⁵

Methods:

In the ORM2 database, an AJD can contain one or multiple aquatic resources. For this reason, the agencies assessed data on the AJD-level and at the aquatic resource level.

Data Quality Assurance and Control:

NWPR AJD Data from ORM2 was refined to account for foundational differences in how AJD information is reported under the various regulatory regimes. Because a single AJD in ORM under the NWPR can contain both jurisdictional and non-jurisdictional determinations, the instances of these “mixed” AJD forms had to be separated into two buckets.⁶ To explain, when totaling whether an AJD was for a jurisdictional or non-jurisdictional resource, if an AJD under the NWPR contained both, it was counted in both categories (i.e., a tally would be added under the jurisdictional category and the non-jurisdictional category). This refinement was made on 1,318 AJDs and thus normalized the NWPR AJDs so that it could be compared to AJDs conducted under the previous regulatory regimes. Additionally, any AJDs that were conducted on drylands or Rivers and Harbors Act section 10 waters only were excluded from this analysis, as they are either excluded from the definition of “waters of the United States” or do not fall under the joint jurisdiction of the EPA and Corps under the CWA. This led to 1,099 AJDs from ORM2 being excluded from this analysis. Additionally, AJDs from Colorado were excluded from this analysis.⁷

The agencies also assessed actions from 2020-2021 associated with the Corps’ “No Permit Required” closure method within ORM2, looking specifically at closure methods for “Activities that occur in waters that are no longer WOTUS under the NWPR” and “Activities that do not occur in WOTUS.” “Activities that occur in waters that are no longer WOTUS under the NWPR” is a new closure method created by the Corps for the ORM2 database that helps track actions that would have required a permit prior to the NWPR but that no longer do due to the NWPR’s revised definition of “waters of the United States.” However, this closure method is not being uniformly used across the Districts and by Corps project

⁵ When the Corps provides a PJD, or authorizes an activity through a general or individual permit relying on a PJD, the Corps is not making a legally binding determination of any type regarding whether jurisdiction exists over the particular aquatic resource in question even though the applicant or project proponent proceeds as though the resource were jurisdictional. A PJD is “preliminary” in the sense that a recipient of a PJD can later request and obtain an AJD if that becomes necessary or appropriate during the permit process or during the administrative appeal process. See 33 CFR 331.2.

⁶ Under the pre-2015 regulatory regime and the 2015 Clean Water Rule, AJDs in ORM could contain only jurisdictional features or only non-jurisdictional features.

⁷ Because the NWPR was enjoined in the state of Colorado during the 2020-2021 period of record, all data for sites in the state of Colorado were removed from the 2020-2021 dataset. In order to make the data more suitable for comparative purposes between years, all Colorado data were also removed from the 2018-2019 and the from the 2019-2020 datasets for AJDs made under the previous regulatory regimes.

managers and thus likely undercounts the number of projects that would have required a permit prior to the NWPR but that no longer do.

Statistics:

Because data within ORM2 are imperfect in nature -- due to varying regulatory regimes, economic and development trends, and general human error related to data entry -- the assessment carried out is summary in nature. In short, statistics on significance cannot be run and rather than comparing whole numbers between different time periods, it is more telling to compare percentages. While exact numbers are not obtainable from the data there is more than sufficient volume and accuracy of the data to demonstrate clear trends.

Results and discussion:

AJDs and PJDs over time

Of 6,570 NWPR AJDs that were finalized from June 22, 2020 to April 15, 2021, 71% were found to include non-jurisdictional aquatic resources (Table 1, Figures 1 and 2). The trend to pull from this percentage is that at a national level, when a project proponent wants an official determination of the jurisdictional status of aquatic resources on a parcel and requests an AJD, 71% of the time the AJDs identified non-jurisdictional aquatic resources, while under prior regimes, that same outcome occurred 46% of the time. Similarly telling, since the NWPR has been in effect, the percent of jurisdictional determinations being carried out as AJDs versus PJDs has gone up by 95% and 116% depending on prior time periods considered (Table 1). Fewer PJDs indicates that fewer project proponents are assuming aquatic resources on their project sites are jurisdictional. This has two implications: project proponents are requesting AJDs rather than PJDs and/or they are simply not notifying the Corps of their activities that might result in the discharge of dredged or fill material into aquatic resources because they believe those resources are no longer jurisdictional under the NWPR. The lower rates of PJD requests under the NWPR may be the most striking metric for how trends in jurisdiction have changed.

Table 1: Jurisdictional vs Non-jurisdictional determinations over time

JDs: PJDs vs AJDs					
Time period	PJD	AJD	Total	% AJD	% Change in % AJD
2018-2019	8,465	3,731	12,196	31%	116%
2019-2020	7,351	3,761	11,112	34%	95%
2020-2021	3,961	7,669	11,630	66%	

AJDs: Jurisdictional vs Non-jurisdictional					
Time period	Jurisdictional	Non-jurisdictional	Total	% Non-jurisdictional	% Change in % Non-jurisdictional
2018-2019	1,231	1,039	2,270	46%	
2019-2020	1,159	972	2,131	46%	
2020-2021	1,889	4,681	6,570	71%	56%

The data used are the normalized data, excluding dry lands and RHA section 10 waters only and data from Colorado.

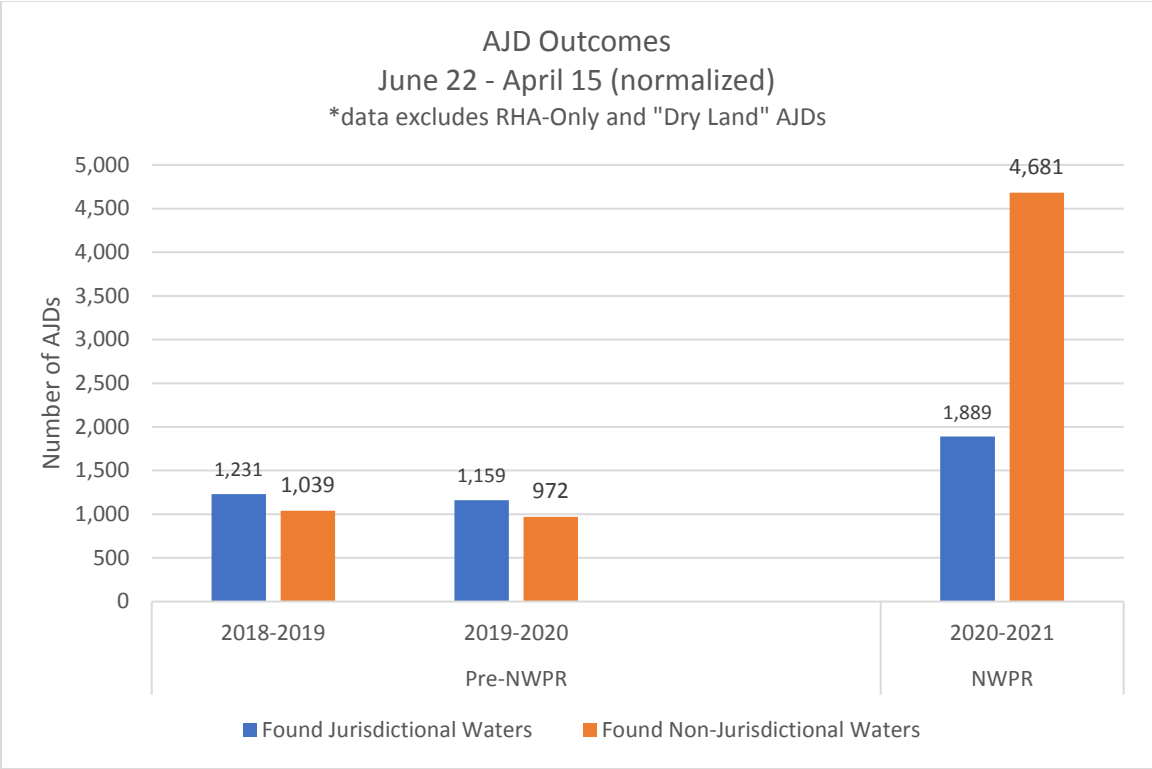


Figure 1. Breakdown of AJDs that found jurisdictional and non-jurisdictional waters (June 22 – April 15), for each of the three periods evaluated. These data exclude both “RHA-only” AJDs and “Dry Land” AJDs as well as AJD data from Colorado. Data have been normalized.

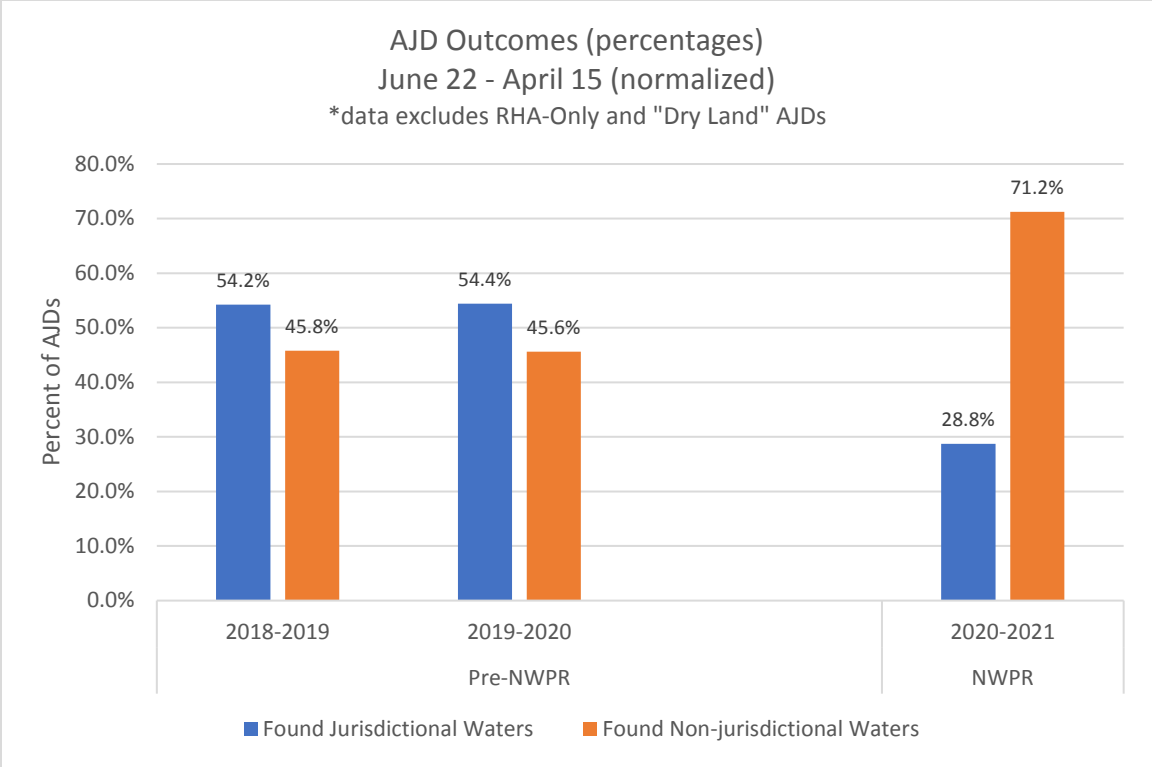


Figure 2. Breakdown of AJDs (by percentages) that found jurisdictional and non-jurisdictional waters (June 22 – April 15), for each of the three periods of record. This data excludes both “RHA-only” AJDs and “Dry Land” AJDs as well as data from Colorado. Data have been normalized.

Individual Aquatic Resources associated with NWPR AJDs

Because data on individual aquatic resources are not directly comparable between regulatory regimes, the focus in this part of the analysis is on what resources are being found to be non-jurisdictional under the NWPR (Figures 3, 4, 5, and 6).⁸ Under the NWPR, 76% of the individual aquatic resources evaluated to date have been found to be non-jurisdictional (Figure 4). Wetlands that do not meet the NWPR's adjacency criteria and ephemeral channelized features make up the majority (73%) of these non-jurisdictional resources (Figures 5 and 6). Additionally, excluded ditches also make up a large portion (12.6%) of the total resources found to be non-jurisdictional (Figure 5).

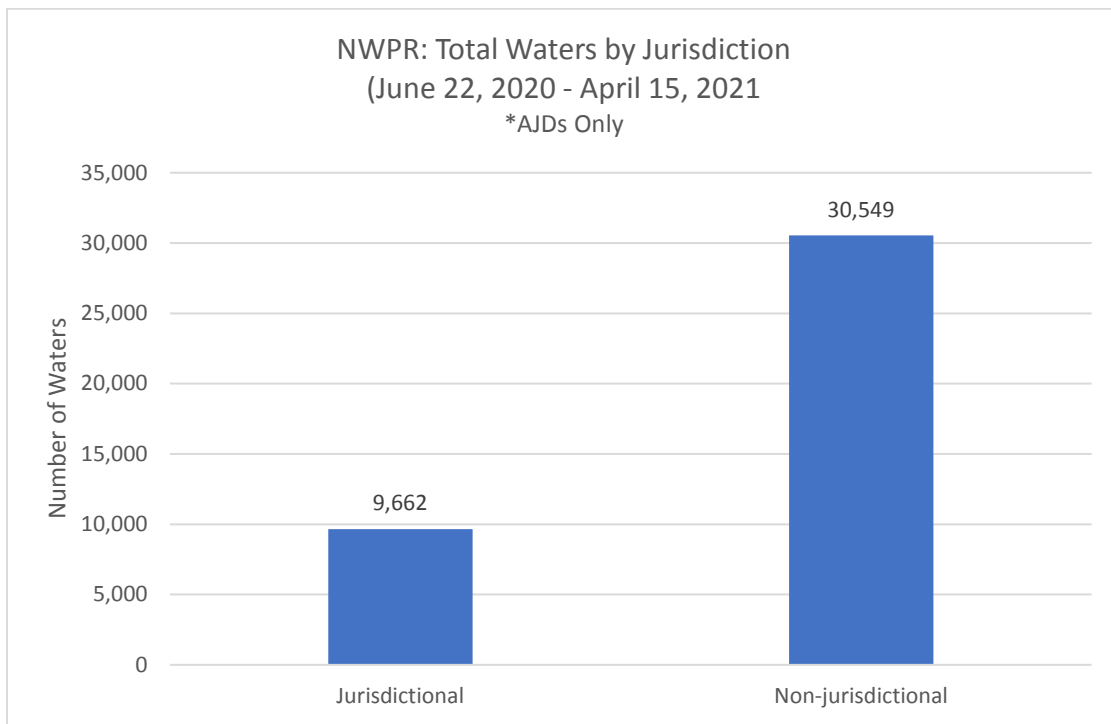


Figure 3. Total number of waters and water features found jurisdictional vs. non-jurisdictional under the NWPR (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.

⁸ This analysis includes only those aquatic resources associated with AJDs.

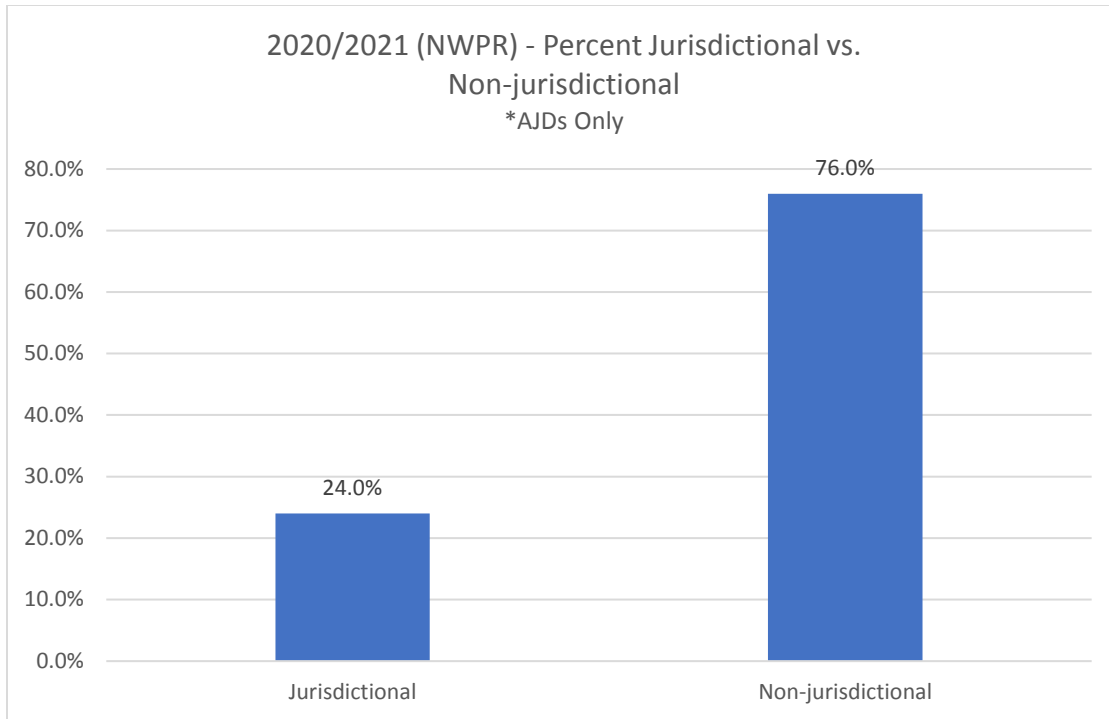


Figure 4. Percentage breakdown of waters and water features found jurisdictional vs. non-jurisdictional under the NWPR (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.

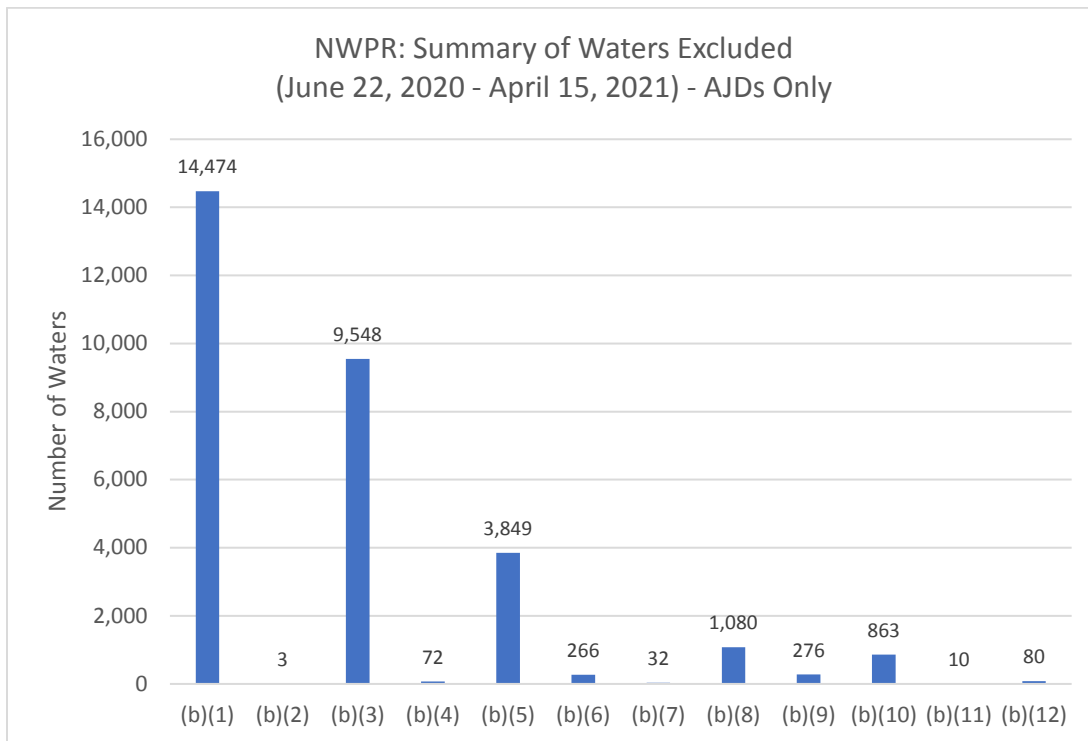


Figure 5. Breakdown of waters found non-jurisdictional under NWPR by exclusion type (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.

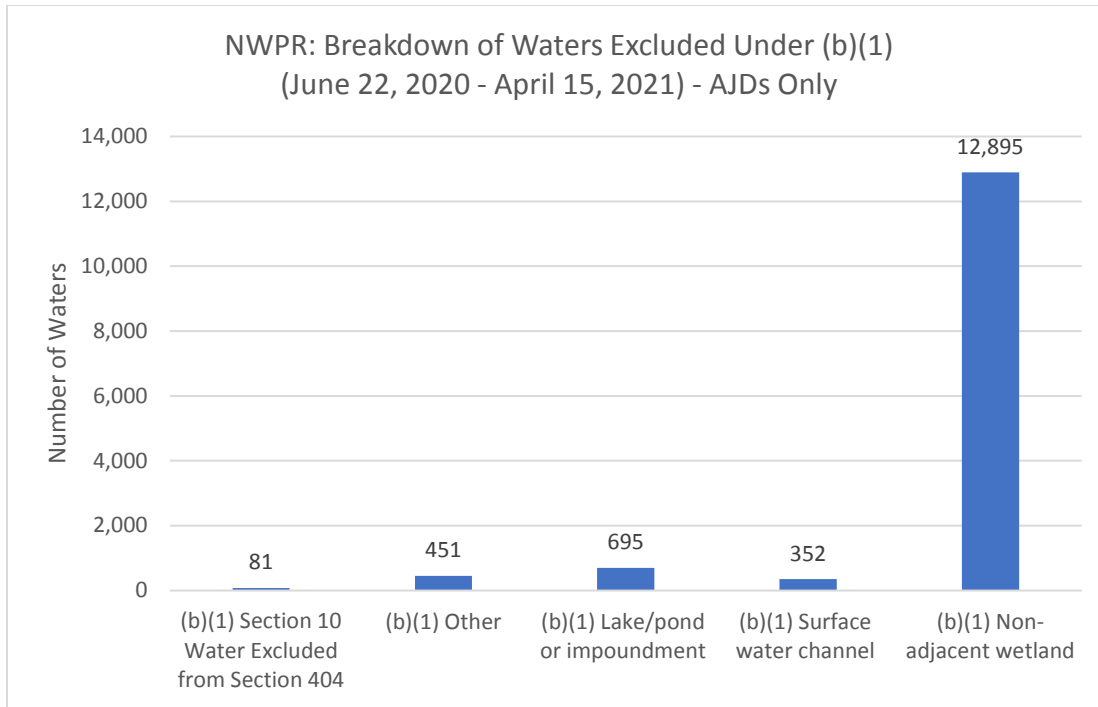


Figure 6. Breakdown of waters found non-jurisdictional under paragraph (b)(1) of the NWPR, broken down by the tracked (b)(1) exclusion subcategories in ORM2 (June 22, 2020 – April 15, 2021). Data reported here are from AJDs only.

Arid West AJDs

NWPR AJDs in Arizona and New Mexico were found to be dominated by non-jurisdictional ephemeral channelized features (Table 2). Interpreting what these percentages mean for on the ground implementation, based on the available data under the NWPR, if someone submits an AJD request for a stream in the state of New Mexico or Arizona, there is nearly a 100% likelihood that the AJD will be for a non-jurisdictional ephemeral stream. Under the NWPR, this means that any nearby wetlands would also generally be non-jurisdictional.

Table 2: Arid West jurisdictional findings under the NWPR

State	Jurisdictional streams	Non-jurisdictional streams	Total Streams	Percent Non-jurisdictional streams
Arizona	4	1,280	1,284	99.7%
New Mexico	0	258	258	100.0%

Note that only (b)(3) resources were looked at for non-jurisdictional data.

No Permit Required based on AJDs only

Based on an assessment of the two specific “No Permit Required” closure methods in ORM2 associated with projects with AJDs, under the NWPR there has been a reported threefold (338% for 2019-2020) to fourfold (412% for 2018-2019) increase in projects that do not require CWA 404 permits as compared to what was reported under the previous regulatory regimes (Figure 7). Given that one of the closure methods included here, “Activities that occur in waters that are no longer WOTUS under the NWPR,” has not been used uniformly by all Corps project managers across the U.S., it is likely that the overall number of projects that fit into this category are likely under-represented.

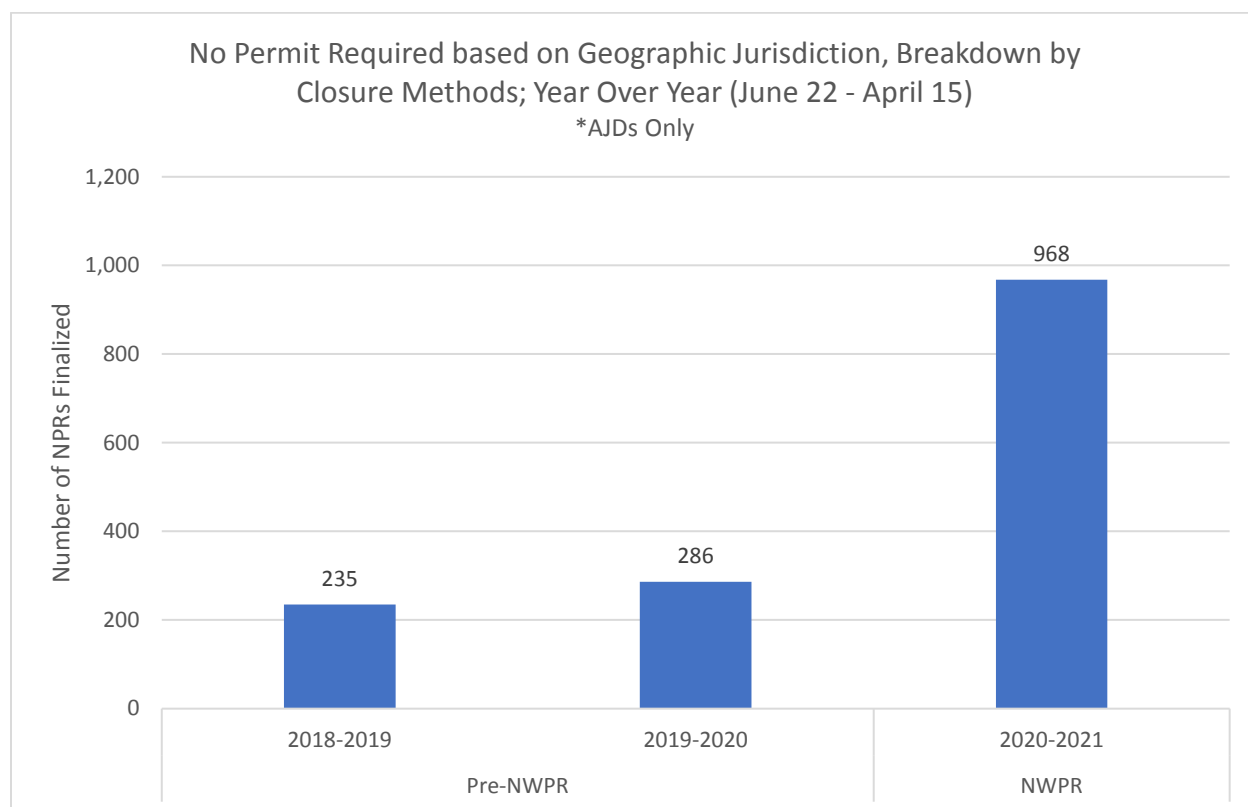


Figure 7. Projects with ‘No permit required’ closure methods of “Activities that do not occur in WOTUS” and “Activities that occur in waters that are no longer WOTUS under the NWPR”.

Data Limitations

While ORM2 contains data on individual aquatic resources that the Corps has determined are or are not jurisdictional on a site-specific basis, JDs are typically conducted at the request of the landowner. In other words, they usually represent where landowners or project proponents want to know if jurisdictional waters are located within their properties or project sites, including but not limited to for purposes of conducting dredged or fill activities. Thus, some aquatic resource types may be over- or underrepresented in the population of PJDs and AJDs.

The agencies recognize that these PJDs and AJDs may not be uniformly distributed across the country. There may be selection bias in terms of where the Corps has available information on JDs. A landowner or applicant can decide whether they would like an AJD – meaning the Corps makes an official determination of whether an aquatic resource is jurisdictional – or whether they would prefer to voluntarily waive or set aside questions regarding jurisdiction with the use of a PJD). In addition, Corps Districts across the country vary in their receipt of requests for AJDs versus PJDs, with some Districts primarily being requested to complete PJDs, particularly prior to the NWPR. Because PJDs cannot determine that something is not a “water of the United States” and/or whether there are no “waters of the United States” on the site and in light of the reduction in jurisdiction under the NWPR, the use of PJDs has appeared to decrease.

The States of New Jersey and Michigan have assumed administration of the CWA section 404 permit program for certain waters within their state boundaries. On December 17, 2020, Florida became the third state to receive approval to assume administration of the program. The Corps, however, retains administration of the section 404 permitting program for specific waters as listed under the parenthetical of CWA section 404(g)(1). Thus, the Corps conducts JDs for only a subset of waters within New Jersey, Michigan, and Florida, which have been included in the analysis of ORM2 data where available. In Florida, the number of NWPR JDs conducted by the Corps will be limited compared to the number of JDs in that state conducted under the prior regulatory regimes, as EPA’s approval for the state to assume administration of the section 404 program occurred a few months after the effective date of the NWPR.

The new closure method “Activities that occur in waters that are no longer WOTUS under the NWPR” is not being uniformly used across the Districts and by Corps project managers and thus likely undercounts the number of projects that would have required a CWA section 404 permit prior to the NWPR but that no longer do. However, it serves as the best available indicator of projects that are tracked and no longer require a section 404 permit in light of the NWPR’s reduction in CWA jurisdiction.

On a national level, ORM2 data are analyzed for reasonableness; when a correction is warranted, it is accomplished by Corps field project managers. Not all individual records, however, are verified and data entry errors may exist.

Despite these limitations, the agencies have concluded that assessing the ORM2 data associated with the NWPR is a reasonable way to evaluate the effects of the rule. The data represent the best national-level information on the resources that are being called non-jurisdictional under the NWPR, and the agencies have concluded that it is reasonable to compare the NWPR data from 2020-2021 with data from the same time period in prior years that are associated with determinations made under the 2015 Clean Water Rule and the pre-2015 regulatory regime, which was reestablished with the 2019 Rule.

Addendum

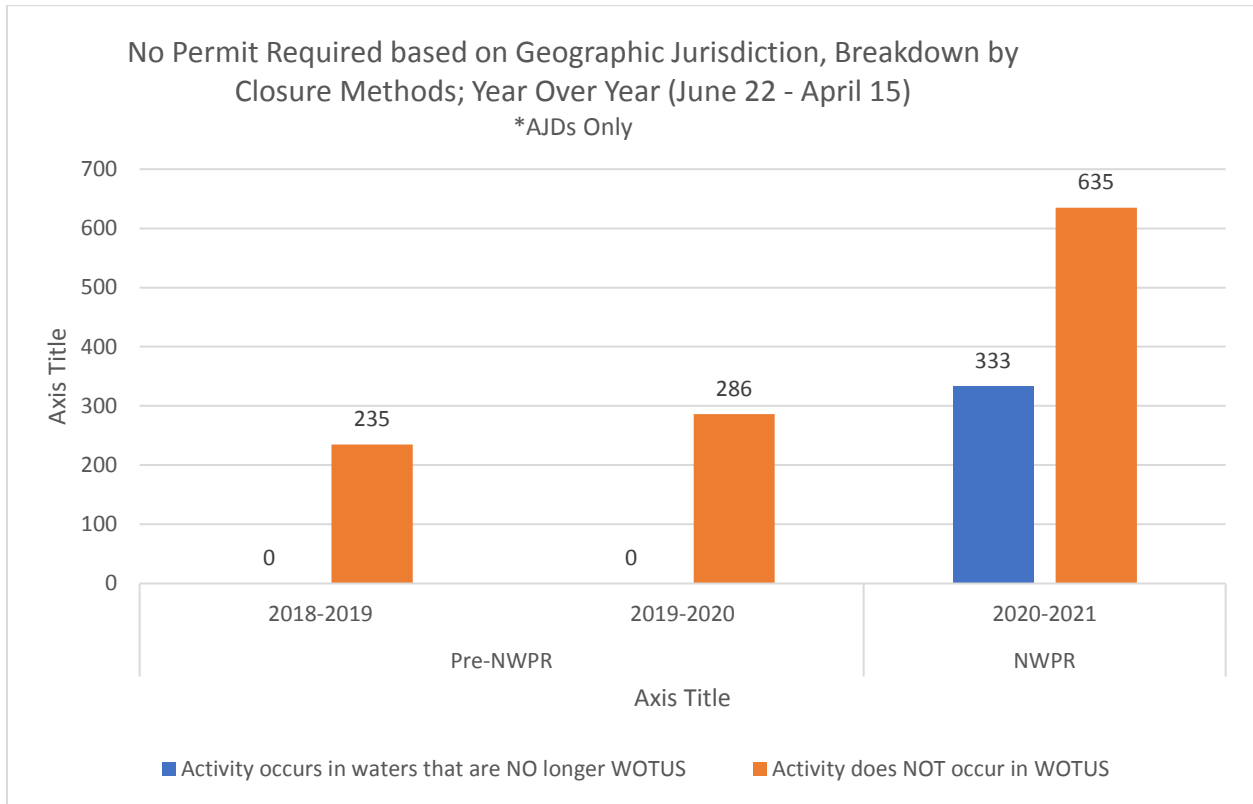


Figure 8. Projects with 'No permit required' closure methods of "Activities that do not occur in WOTUS" and "Activities that occur in waters that are no longer WOTUS under the NWPR".

DA Number	Action Type	Project Name	Closure Method	County	State	Proposed Project Description
SAJ-2018-03203	NPR	Midwest Transit Inc / Tomoka Farms RV Storage Facility	Activity occurs in waters that are NO longer WOTUS under the NWPR	Volusia County	FL	Applicant proposes to JD s21t15r32
SWT-2016-00344	NPR	Martin Marietta Materials Pre JD Expansion of Mill Creek Quarry Johnston County OK	Activity occurs in waters that are NO longer WOTUS under the NWPR	Johnston County	OK	NPR with no AJD due to water on site but not impacted by expansion. Expansion of existing Martin Marietta Materials mine / quarry as the current 'Granite Quarry' extends westward. An unnamed tributary to Mill Creek was observed but per application will not be impacted by the planned expansion. Future expansion of an adjacent (across the highway between the two) mine known as the 'Mill Creek Stone Quarry' may impact WOUS. Approximate center of Granite Quarry expansion area is 34.359340 x -96.812253.
SAJ-2007-06262	NPR	Cocoa Landing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Brevard County	FL	construct a 484 unit residential development
NWK-2020-00417	NPR	Evergy Services, Inc. - Jayhawk Switch Station	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bourbon County	KS	Proposed construction of a new switch station
NWK-2014-00061	NPR	Marmaton Watershed Joint District No. 102 - Ericson Site (I-5 Site withdrawn)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bourbon County	KS	Proposed construction of an impoundment. The "Ericson Site", as proposed, would involve the construction of a 16 feet high, 1000 feet long earthen dam which would result in a reservoir sediment pool surface area of 4 acres and a detention pool area of 10 acres. The "I-5 Site", was originally proposed to involve the construction of a 32.6 feet high, 941 feet long earthen dam and a sediment pool surface area of 7.6 acres and a detention pool area of 30.1 acres was subsequently withdrawn. The "Ericson Site" is located in an unnamed tributary to Pawnee Creek primarily within the SW 1/4 of the NW 1/4 of Section 15, Township 27 South, Range 23 East, in Bourbon County, Kansas (Lat: 37.69774°N, Lon: -94.88572°W).
LRL-2020-00532-LCL	NPR	Dirk Ricke Farms Ditch Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rush County	IN	Dirk Ricke Farms Ditch Project. Tile and fill 3,000 ft of excluded (b)(5) ephemeral ditch. AJD issued 7-23-20.
SPK-1994-00909	NPR	Edgewood Golf Course Waters Restoration	Activity occurs in waters that are NO longer WOTUS under the NWPR	El Dorado County	CA	excavate accumulated sediments and place fill to restore creeks and wetlands
SPL-2020-00379-LP	NPR	17300 Sesnon Blvd Project - Granada Hills	Activity occurs in waters that are NO longer WOTUS under the NWPR	Los Angeles County	CA	.
LRC-2020-00527	NPR	Glenview Park District	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cook County	IL	Park West, Glenview, Cook County IL
NWW-2020-00334-I02	NPR	Feld, Conan-ditch reconstruction project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bingham County	ID	proposed ditch reconstruction project on Conan Feld property in Springfield Idaho.
LRC-2017-00413	NPR	Dr. Steve Burlison - Wetland Landscaping	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lake County	IL	Residential development nnnnn
LRL-2020-00271	NPR	Alexandria Pike Site	Activity occurs in waters that are NO longer WOTUS under the NWPR	Campbell County	KY	Residential Development
SAJ-1997-00935-CMW	NPR	UNITED PARCEL SERVICE, INC / UPS BAYSIDE - FLBAY / 5201 EAGLE TRAIL DRIVE / HILLSBOROUGH	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hillsborough County	FL	ACTID: 199700935 - UPS site - Project Formerly known as EAGLE CREEK COMM PARK / CRACCHIOLO / UPS 3/25/2019 - JD request to get confirmation that jurisdictional wetlands are not located on project site, and permit is not needed. 7/3/2020 - Request for a letter of No Permit Required.
SAJ-2020-02689	NPR	HTG Bryce Landing, LLC / Bryce Landing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Clay County	FL	-
NWK-2013-00891	NPR	City of Concordia, KS - Blosser Airport Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cloud County	KS	Construct new runways for the airport
SPA-2020-00168	NPR	DJR Nageezi Unit B02-2309	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	DJR is proposing to horizontally drill and possibly produce four oil and natural gas wells. Each well would access federally and/or FIMO managed minerals. The surface features associated with the project would consist of a well pad measuring 435 Å— 480 feet. In addition, there would be a 50-foot-wide construction zone surrounding the well pad's perimeter, a 104-foot-long access road, a 11,322-foot-long pipeline, and a 250 Å— 250 Å½foot G-tank pad, as well as a 30-foot-wide construction zone surrounding the G-tank's perimeter and an irregularly shaped staging area measuring approximately 160 Å— 265 feet.

SPA-2020-00170	NPR	DJR Nageezi Unit H33-2409	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	DJR is proposing to horizontally drill and possibly produce two oil and natural gas wells. Each well would access federally and/or FIMO managed minerals. The surface features associated with the project would consist of a well pad measuring 435 Å— 440 feet; in addition, there would be a 50-foot-wide construction zone surrounding the well pad's perimeter, an 882-foot-long access road, and a 1,113-foot-long pipeline.
SPA-2020-00171	NPR	DJR Nageezi Unit M35-2409	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	DJR is proposing to horizontally drill and possibly produce five oil and natural gas wells. Each well would access federally and/or FIMO managed minerals. The surface features associated with the project would consist of an asymmetrical well pad measuring 565 feet at its widest point and 400 feet at its longest point. In addition, there would be a 50-foot-wide construction zone surrounding the well pad's perimeter, a 2,646-foot-long access road, a 2,655-foot-long pipeline, a 250 Å— 250Å½foot G-tank pad, as well as a 50-foot-wide construction zone surrounding the G-tank's perimeter; and a 250 Å— 100Å½foot staging area.
SPA-2020-00172	NPR	Kinder Morgan Cortez Pipeline washout MP 135	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	KMCO2 plans to install a zippered HYDROTEXT mat system to armor the pipeline, and prevent future exposures. The HYDROTEX AB400 system has an overall Cast-In-Place (CIP) design measurement of 98 feet x 40 feet and provides a block orientation that is offset to dissipate energy from any water down the mat system. The downstream perimeter of the mat system will be trenched in to a target depth of five (5) feet and will be backfilled with large rock or other compactable rock material. The single lateral high bank trench is targeted at three (3) feet and will be backfilled with in-situ material. The mat system will extend ten (10) feet from the toe and will begin to drop down over a distance of approximately thirty (30) feet. The tail and leading edge will be backfilled with rock to help prevent future scour around the mat.
SWF-2020-00274	NPR	Gateway Industrial Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kaufman County	TX	by VanTrust Real Estate to develop an 45-acre industrial site located in the City of Forney, Kaufman County, Texas
SPL-2020-00421-LP	NPR	Ranchero Road Widening Project - Hesperia, San Bernardino County	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	.
POA-2020-00355	NPR	Emmet Trimble, Anchor Point, Anchor River, JD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD/NPR
SAM-2019-00653-JDC	NPR	Jefferson Co Board of Education-new Warrior Elementary School	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	AL	new school
MVK-2020-00174-AEL	NPR	William Lewis/030420/ Alleged Violation Concrete Culvert and Wall Across Stream, Garland County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Garland County	AR	William Lewis, Alleged Violation Concrete Culvert and Wall Across Stream, Garland County, Arkansas
NWK-2018-01233	NPR	KCI Raymore Industrial Land, LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cass County	MO	Construction of three industrial buildings at N. Cass Pkwy & Dean Ave. in Raymore, MO.
LRN-2020-00587	NPR	Project Sunshine, Sweetwater, McMinn County TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	McMinn County	TN	The applicant proposes to construct Phase 1 of Project Sunshine which will consist of a 430,000 square foot warehouse/distribution building on the western 68.4 acres of a larger 150-acre site. The project is located on Pleasant Grove Road in Sweetwater, McMinn County, Tennessee. The project will include interior access roads, utilities, and a mix of conventional and green stormwater infrastructure. The project requires unavoidable alterations to 0.14 acres of wetlands and a total of 172 linear feet of ephemeral stream channel through fill impacts. Based on these impacts, the applicant is seeking coverage for the project under Nationwide Permit 39, Commercial and Institutional Developments.
SAW-2019-01644	NPR	Captain Smyth's Preserve	Activity occurs in waters that are NO longer WOTUS under the NWPR	Henderson County	NC	Residential development
MVP-2019-02516-SSC	NPR	Mary Lake Outlet Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hennepin County	MN	Delineation
SWF-2014-00458	NPR	CEMEX Krueger Canyon Tract	Activity occurs in waters that are NO longer WOTUS under the NWPR	Comal County	TX	by CEMEX Construction Materials South, LLC for verification of an aquatic resource delineation report for approximately 800 acres located in Comal County, Texas
SWF-2020-00201	NPR	Riverset Phase 2	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	TX	by Wilbow Riverset, LLC to construct a residential development located in the City of Garland, Dallas County, Texas
MVS-2020-00460	NPR	Withrow Creek Clean Out	Activity occurs in waters that are NO longer WOTUS under the NWPR	Perry County	MO	Clean gravel from channel
MVP-2020-01151-JMB	NPR	Jesse Jones Construction / Commercial Site Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Chippewa County	WI	ATF-Discharge of fill material into wetlands for the construction of a gravel building pand and an extension to a gravel access. Located in the SE NW of S28, T32N, R6W in Chippewa County, WI

SPA-2020-00187	NPR	Kinder Morgan Cortez Pipeline Erosion Control Project - MP 94 Site 2	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	KM proposes to install an engineered erosion control structure to reduce soil erosion at an existing pipeline crossing of a desert wash in order to maintain pipeline integrity and environmental/public safety. At this distinct wash location along the existing Cortez CO2 Pipeline, erosion has resulted in reduced soil cover over the existing pipeline. By implementing this Project, KM would be able to protect the pipeline right-of-way (ROW) against further erosion associated with high flow events within the wash. The Project will encompass 4,800 square feet of cast in place articulated mat and include approximately 0.07 acres of additional temporary workspace (ATWS) to accommodate construction activities.
LRL-2020-00066	NPR	The Veridian	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	KY	The project would include the construction of eight multi-family apartment buildings along with associated roads, utilities, stormwater management and other required infrastructure.
POA-2020-00365	NPR	Trimble, Anchor Point, Danver Street Pond, AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD Lot 18A
LRL-2019-00930	NPR	Anchor Richwood	Activity occurs in waters that are NO longer WOTUS under the NWPR	Boone County	KY	Development
NWP-2019-00519	NPR	Buffalo Slough Outfall Replacement (Minor Discharge)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Multnomah County	OR	Portland meadows redevelopment proposal
NWK-2019-00219	NPR	Southwest Kansas Groundwater Management District No. 3 - Irrigation Head Gate Replacement & Ditch Lining	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kearny County	KS	Replace Irrigation head gate structure to Farmers Ditch from the Arkansas River. Line three miles of the canal with clay from Lake McKinney.
NWK-2020-00579	NPR	Whisman, Berdena - Livestock watering pipeline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rooks County	KS	Installation of a livestock watering pipeline according to NRCS design standards.
NWP-2020-00234	NPR	Penske Truck Leasing Facility	Activity occurs in waters that are NO longer WOTUS under the NWPR	Multnomah County	OR	Penske Truck Leasing Co., LP is proposing to build a 23,924 sq.ft. truck rental and repair building on a 13.03-acre property in Portland, Multnomah County, Oregon
NWO-2020-01386-RWY	NPR	Chris Crosby, Crosby Ditch, AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Big Horn County	WY	AJD
NWK-2020-00582	NPR	Bucklin Tractor and Implement Company, Inc. - New commercial facility	Activity occurs in waters that are NO longer WOTUS under the NWPR	Barton County	KS	New 88,000 sq ft building for Jon Deere dealership.
LRL-2020-00515	NPR	UNT to Little Indian Creek Pipeline Maintenance	Activity occurs in waters that are NO longer WOTUS under the NWPR	Monroe County	IN	Pipeline Maintenance
NWK-2020-00607	NPR	Pospichal, Gale - Grassed waterway rebuild	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ellis County	KS	Reshaping of a 2,796 foot grassed waterway according to NRCS design standards.
SAJ-2008-04602-LEO	NPR	LINDVEST FRUITVILLE, LTD. AND LINDVEST SARASOTA EAST, LTD. / LINDVEST FRUITVILLE PROPERTY / SARASOTA (fka: Dog Kennel Road Parcels)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sarasota County	FL	2008 - Formal JD / SWFWMD Formal Determination # 42 034558.000 5/6/2016 - RESIDENTIAL SUBDIVISION 12/6/2017 - Request to obtain a time extension of 1 additional year (until March 13, 2019)
MVP-2020-01308-MJB	NPR	Anoka Ponds	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	AJD
MVP-2020-01194-DAS	NPR	Byron Storm Water Pond 8100.29	Activity occurs in waters that are NO longer WOTUS under the NWPR	Olmsted County	MN	Delineation
NWK-2020-00348	NPR	Scannell Properties - Project Super Bowl	Activity occurs in waters that are NO longer WOTUS under the NWPR	Wyandotte County	KS	Commercial development
MVR-2020-00635-ajf	NPR	Mid American Energy	Activity occurs in waters that are NO longer WOTUS under the NWPR	Johnson County	IA	Jurisdictional Determination
SPA-2020-00200-ABQ	NPR	Nambe Pueblo/Low Water Crossing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Fe County	NM	The applicant proposes to construct a lower water crossing within an ephemeral waterway and has requested a jurisdictional determination of the project area.
MVP-2005-06049-DCR	NPR	Zander Construct Roadway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Waseca County	MN	AJD
MVP-2020-01242-DCR	NPR	Pine Brook Estates	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dakota County	MN	AJD
MVP-2019-02082-DCR	NPR	Glenwood Heights Subdivision	Activity occurs in waters that are NO longer WOTUS under the NWPR	Nobles County	MN	Discharge of Fill Material
MVP-2014-03699-DCR	NPR	Waconia, City of / TH 5 Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Carver County	MN	Discharge fill material into 2.15 acres of wetlands
NWK-2020-00437	NPR	Davidson, Bruce - Wetlands enhancement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pratt County	KS	Proposed construction of berms in order to flood out portions of cattail choked wetlands and manage wetland hydrology/vegetation with stop-log structures. Applicant stated max depth of pools would be about 3.5' at the deepest portions out to 0" with much microtopography throughout. The project would be located in non-adjacent wetlands in the SE 1/4 of Section 30 and the NE 1/4 of Section 31; all in Township 27 South, Range 11 West, Pratt County, Kansas (Lat: 37.661145Â°, Lon: -98.560519Â°).
MVP-2020-01268-DCR	NPR	Dairyland Power Cooperative N-14N-250 69 Kilovolt (kV) Transmission Line Rebuild Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Freeborn County	MN	Pre-App
SAC-2020-00290	NPR	Clements Ferry Towns fka Thompson Tract	Activity occurs in waters that are NO longer WOTUS under the NWPR	Berkeley County	SC	a
MVR-2019-01294-AF	NPR	Hallet Matierals	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	IA	Commercial Development
NWK-2020-00630	NPR	Salmans, Galen - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hodgeman County	KS	Construction of a 1,875 foot grassed waterway according to NRCS design standards.
LRL-2020-00677-MKD	NPR	Goecker Housing Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	IN	Housing Development
SAJ-2020-01528	NPR	Smith, Jerry / US1 Offices / fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Johns County	FL	-
NWK-2020-00577	NPR	Lippert, Jim - Pond Construction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	MO	Construction of a recreational pond in Lee's Summit, MO.
SWF-2020-00033	NPR	Lewisville 11.87-Acre Commercial Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Denton County	TX	by AR Reddy Spring Creek, LLC to construct a commercial development located in the City of Lewisville, Denton County, Texas

MVK-2012-00732-TB	NPR	William Murphy Jones/080212/Construct Crossing to Provide Ingress/Egress to a Single Family Residential Tract of Land, Jefferson County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	AR	William Murphy Jones, Construct Crossing to Provide Ingress/Egress to a Single Family Residential Tract of Land, Jefferson County, Arkansas
SWT-2020-00259	NPR	Ron Walters Home Construction Proposed Crystal Creek at Westbury Earthwork and Grading Improvements Sec 11 T11N R5W Canadian County OK	Activity occurs in waters that are NO longer WOTUS under the NWPR	Canadian County	OK	Earthwork and Grading Improvements
MVS-2020-00481	NPR	St. Louis Bombers Rugby Club	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Wetland Delineation for Rugby Club
SAJ-2020-01837-RGH	NPR	TOWNE REALTY / LWR 4 / 4400 BLOCK OF LAKEWOOD RANCH BLVD / MANATEE	Activity occurs in waters that are NO longer WOTUS under the NWPR	Manatee County	FL	Construction of multifamily structures and associated infrastructure. Includes filling of approximately 0.29 acres of WOUS ditch for roadway crossings
SWF-2020-00238	NPR	QTS-TRP	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bexar County	TX	by QTS Data Centers to construct a data center located in San Antonio, Bexar County, Texas
SPA-2020-00216-LCO	NPR	TXDOT- Culvert 64 Jurisdictional Determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	Culberson County	TX	A request by Texas Department of Transportation to do an approved jurisdictional determination on RM 652 in Culberson County, TX
MVR-2020-00907-AF	NPR	Iowa DOT	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pottawattamie County	IA	The proposed project is located entirely within Pottawattamie County, Iowa along Interstate 29 (1-29) and Interstate 480 (1-480). The major components of the project include the reconstruction of northbound and southbound 1-29 from just north of the Union Pacific Railroad north to approximately 0.28 mile north and east of Avenue G, and the reconstruction of the 1-29/1-480 System Interchange. Other work will involve the relocation of the 1-480/41 st Street interchange, the reconstruction/reconfiguration of the I-29/9th Avenue interchange and the I-29/Avenue G interchange, the construction of new one-way frontage roads parallel to mainline 1-29 between 9th Avenue and Avenue G, the removal of the 35th Street interchange and ramps, the construction of new dual 1-29 bridges over West Broadway/US Highway 6, 9th Avenue, and 2nd Avenue, the relocation of a segment of Dodge Riverside Drive, the construction of new local road connectors in residential areas east of 1-29, the construction of new retaining walls at several locations, the installation of culverts for drainage and/or storm sewer improvements, and the construction of a seepage berm on the landward side of the Federal levee (south of 1-480).
SAM-2020-00490-CMS	NPR	Shelby County Environmental Services Landfill - Proposed New Cell #5	Activity occurs in waters that are NO longer WOTUS under the NWPR	Shelby County	AL	Proposed Cell #5 landfill expansion area
SAW-2020-01381	NPR	Claes Property 4004 Ellijay Road	Activity occurs in waters that are NO longer WOTUS under the NWPR	Macon County	NC	Proposed pond
MVP-2020-01386-SSC	NPR	Territorial Greens West	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hennepin County	MN	Discharge of fill Material
MVS-2018-00455	NPR	Top Soil Removal From Wetland 1illy Dr	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Top Soil Removal From Wetland
MVS-2020-00027	NPR	Premier Pkwy Lot 28 & Harry S Truman Blvd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Wetland Delineation
SAW-2020-00987	NPR	2525 Snow Hill Road Pump Station / Durham NC / Durham County	Activity occurs in waters that are NO longer WOTUS under the NWPR	Durham County	NC	Proposed fill of 0.129 acre wetland for a new wastewater pump station and associated infrastructure. NWP application was withdrawn. Waters determined to be excluded under NWPR.
MVM-2019-00141-jfb	NPR	H & H Farms / Landclearing	Activity occurs in waters that are NO longer WOTUS under the NWPR	Crittenden County	AR	convert wooded wetlands to agriculture field
MVS-2020-00522	NPR	Residential Development @ 720 Ries Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Residential Development, Request for JD
MVP-2020-00799-MJB	NPR	Windermere South 3rd Addition Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Scott County	MN	Delineation
SPA-2020-00218	NPR	Plexxar Capital, Ltd. 27-acre lot Jurisdictional Determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	El Paso County	TX	A request by Kimley-Horn and Associates, INC on behalf of Plexxar Capital, Ltd. to do an approved jurisdictional determination on a 27-acre study area in El Paso, El Paso County, Texas. The study area is located at approximately latitude 31.901, longitude: -106.571.
NAE-2020-00216	NPR	Hotel Range Fort Devens Devens & Lancaster, MA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Worcester County	MA	request for preliminary jurisdictional determination
SPL-2017-00769	NPR	Atwell Butterfield Phased Development (TTM 37298), Pardee Homes, GLA, Banning, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Pardee Homes proposes to develop Phase I of the Butterfield Specific Plan Development Project (residential/commercial development of 1,543 acres over five phases; Phase I is on approximately 199 acres and proposes approximately 529 residential units).
NWP-2020-00299	NPR	City of Eugene (Commercial Development-Airport)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lane County	OR	City of Eugene (Commercial Development-Airport)
NWP-2020-00319	NPR	Aster St Multi-Family	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lane County	OR	The proposed project consists of a complex of three multi-family buildings, a private joint-use driveway, parking stalls, stormwater, wastewater, associated utilities and a public right-of-way extension for Aster St.
SAW-2017-00274	NPR	Morehead City CC - Golf Course Improvement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Carteret County	NC	Pre application
MVP-2019-02831-SSC	NPR	Love's Truck Stops	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	Delineation
SPL-2020-00502-VCL	NPR	XpressWest 7 West Cronese Dry Lake AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	West Cronese Dry Lake AJD
POH-2020-00091	NPR	Tetra Tech, Paeahu Solar, Kihei, Maui, HI	Activity occurs in waters that are NO longer WOTUS under the NWPR	Maui County	HI	x
SAJ-2020-01585-RGH	NPR	3KS FAMILY LIMITED PARTNERSHIP / LYKES RD PROPERTY / 4611 LYKES RD / HILLSBOROUGH	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hillsborough County	FL	JD request for a site in Plant City
MVP-2020-01428-DCR	NPR	Vault Storage Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dakota County	MN	Development
MVR-2020-00896-KB	NPR	Leidahl Farms	Activity occurs in waters that are NO longer WOTUS under the NWPR	Buena Vista County	IA	Wetland Restoration
POA-2020-00360	NPR	Simpson, JD, Un-named trib to K-Bay, Homer	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD

SAJ-2020-03491	NPR	Pulte Group & Home Corp. / Build Single Fa. Homes	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
NWK-2020-00693	NPR	Devlin, Lane - Farm Pond Removal	Activity occurs in waters that are NO longer WOTUS under the NWPR	Smith County	KS	Removal of a farm pit pond and embankment dam.
SWL-2019-00214	NPR	AECC - Cleburne Co - Pertain to Heber Springs Transmission Line	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cleburne County	AR	T-Line Construction under Nationwide 12. This will complete a transmission loop that will improve the reliability of electric service to the members of Petit Jean and First Electric Cooperatives. Switching Station construction
SWT-2019-00219	NPR	Residential Development Annecy Sec 9 T13N R4W Oklahoma County OK	Activity occurs in waters that are NO longer WOTUS under the NWPR	Oklahoma County	OK	Bill Roberts Residential Development Annecy Sec 9 T13N R4W Oklahoma County OK
NWP-2019-00406	NPR	New Holland	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	OR	Includes the residential development of 4.67 acres with two new roads that extend from existing roads (SE Powell and SE Bell avenues), a new private alley (Bell Court), a new parking lot (40 spots), three community garden areas, a play area, and 44 units.
MVS-2020-00461	NPR	Fick Supply Expansion	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Expand Existing Storage
MVP-2020-00829-DCR	NPR	MN CSG 14, LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rice County	MN	Delineation NPR
LRB-2020-01001	NPR	Monroe County DOT - Elmgrove Road over Round Creek Tributary	Activity occurs in waters that are NO longer WOTUS under the NWPR	Monroe County	NY	Culvert Rehabilitation
SPL-2013-00853-GS	NPR	Esperanza Hills Residential Development Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	CA	The proposed project would develop 340 single family homes on 468.9 acres.
NWK-2020-00083	NPR	Wet Waders LLC - road/levee construction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Henry County	MO	Road/levee construction.
SWF-2020-00321	NPR	Alexander Village Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	TX	by the City of Balch Springs to construct a commercial development located in the City of Balch Springs, Dallas County, Texas
MVP-2020-01549-DCR	NPR	The Waters North Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Nicollet County	MN	Residential Development
SAJ-2015-00216-JDP	NPR	Jel Land Development - Jakubcin Place Townhouse	Activity occurs in waters that are NO longer WOTUS under the NWPR	Seminole County	FL	Applicant proposes to construct townhouses s16t21r31
SWF-2019-00074	NPR	Big Springs Siding Project Toyah Subdivision MP 513.79 to 516.54	Activity occurs in waters that are NO longer WOTUS under the NWPR	Howard County	TX	by Union Pacific Railroad to install 2.75 miles of siding track and widen the embankment along Toyah Subdivision Mainline located in the City of Big Spring, Howard County, Texas
SPL-2020-00270-EBR	NPR	Monarch Hills Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	Construct a residential community containing 489 residential units. The project also includes the relocation of right-of-way Hawker-Crawford Channel
MVN-2020-00657-CE	NPR	Mark McCrory - Construction of 18249 McCrory Dr. Lot A-1 & A-2, Clear & Fill - Ascension	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ascension Parish	LA	Construction of 18249 McCrory Dr., Lot A-1 & A-2; to include site clearance, fill for concrete homesite and fill (limestone) for driveway.
LRN-2017-00799	NPR	Vanderbilt University Medical Center-Proposed Commercial Development JD, Spencer Creek Watershed, Franklin., Williamson County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Williamson County	TN	Vanderbilt University Medical Center-Proposed Commercial Development JD, Spencer Creek Watershed, Franklin., Williamson County, TN
SAJ-2020-03621-LCK	NPR	LTC Ranch DRI - Village 2/ Port St Lucie	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Lucie County	FL	20200904; requesting verification that the project elements entailing the discharge of dredged or fill material into select portions of these waters would not require a DA permit.
SPK-2020-00114	NPR	Montessori and Camero Unit 1	Activity occurs in waters that are NO longer WOTUS under the NWPR	Clark County	NV	housing
SAJ-2020-02106-JDP	NPR	Reserve at Hillview, Develop. / Request for JD Only-JCP-NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Seminole County	FL	Request for JD Only-JCP-NPR
SPL-2020-00390	NPR	Arrowhead Estates TTM 33540	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Applicant applying for NWP #29 for residential project, proposed project aims to develop residential uses and preserve lots for open space, cemetery and flood control uses as allowed under the City's General Plan that will provide housing to serve the community and preserve open space and the existing cemetery on-site.
SPL-2020-00538	NPR	Atwell Butterfield Phase 3-8 Development, non JD, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	See SPL-2017-00769 for details of planned development. This is the upper portions (phases) of the planned development for JD purposes (no JD due to NWPR)
MVR-2019-00365-JCK	NPR	Candace Cummins	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sangamon County	IL	Pond / Dam Construction
SWF-2020-00348	NPR	UPRR Dothan Siding Extension, Baird Subdivision	Activity occurs in waters that are NO longer WOTUS under the NWPR	Eastland County	TX	by Union Pacific Railroad to extend existing siding track on the Baird Subdivision located in the City of Cisco, Eastland County, Texas
MVR-2020-01020-AM	NPR	Snyder & Associates	Activity occurs in waters that are NO longer WOTUS under the NWPR	Polk County	IA	PreApp
MVS-2020-00569	NPR	Trico Replace Existing Wastewater Treatment Plant	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	IL	Replace Existing Wastewater Treatment Plant
NWK-2020-00780	NPR	Esfeld Construction Inc. - Borrow Pit (KDOT KA-5539-01)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Borrow pit for a KDOT construction project.
SPL-2020-00547-DLC	NPR	Baldy Mesa Solar Project--Adelanto, San Bernardino County, CA.	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	.
SAJ-2020-03418	NPR	RUKJS Inv. 3, LLC / ATF Fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bay County	FL	for after the fact wetland impacts associated with a commercial convenience store development

SAJ-2010-02269	NPR	Oviedo, City of / Build Kiosk, S. Walk, B. Walk & Fishing Pier	Activity occurs in waters that are NO longer WOTUS under the NWPR	Seminole County	FL	Previous: Oviedo, City of/Washington Heights and Area Sidewalks. The applicant proposes to construct 5-foot wide sidewalks and drainage improvements to the Washington Heights, Johnson Hill and Round Lake Estates Areas. The project will result in 68.1 square feet of wetland impacts associated with a culvert extension.
NWK-2019-00989	NPR	Ryan Companies US, Inc - Oxford on the Blue	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jackson County	MO	Request for a JD on a parcel in Kansas City, MO.
MVS-2020-00438	NPR	Wentzville I-70 Parkway South Interchange Modification	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Interchange Modification
SWF-2020-00343	NPR	Big Spot Lake	Activity occurs in waters that are NO longer WOTUS under the NWPR	Milam County	TX	by Mr. Fouch to construct a lake located in the City of Milano, Milam County, Texas
SAJ-2006-02025-MJD	NPR	Hamilton, David / Build 1400Sqft Metal Garage w Conc. Floor	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Previous: Gil, Constante s.f. wetland fill
SWF-2020-00375	NPR	Rianna Woods Pond Proposal	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bastrop County	TX	by Mr. Nissen to construct 8-acre pond on property located in the City of Dale, Caldwell County, Texas
SWF-2020-00161	NPR	Davis Ranch Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bexar County	TX	Removal of trees, shredding/mulching
POA-2013-00257	NPR	Great northwest, Inc., Channel B	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	JD
POA-2003-01422	NPR	Tin Cup LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	POA-Historical
POA-2008-00550	NPR	Universal Welding and Fabrication, Inc., Channel C	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	2008 permit application for wetland fill associated with gravel mining; 2010 JD request for 3 parcels - Quinnell subdivision
POA-2005-00384	NPR	Peterson, Larry	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	south fairbanks JD
MVS-2020-00471	NPR	MO RT A Roadway and Signal Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Roadway and Signal Improvements
NWK-2020-00794	NPR	Barton County, KS - Request for Approved Jurisdictional Determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	Barton County	KS	Request for an Approved Jurisdictional Determination (AJD) concerning a culvert replacement project.
MVP-2020-01530-SRK	NPR	ArcelorMittal Minorca Mine East Pit #2	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MN	AJD
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
LRN-2018-00670	NPR	Middle Tennessee Natural Gas Utility District; 12 in Steel to Crossville Phase II; Cumberland County, TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cumberland County	TN	12" Piping Rock Island to Crossville, Phase II 12" Steel Natural Gas Installation Cumberland County
NWO-2020-01777-RWY	NPR	Chris and Martha McCool, McCool Livestock Reservoirs, Kinnaman Draw and Marrow No. 1 Stock Reservoir, Sheridan County, NPR/AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sheridan County	WY	We have reviewed the information provided by WWC Engineering and from a site visit conducted on September, 9, 2020 and have determined that the proposed activity would not result in the discharge of dredged or fill material into a "waters of the United States." The existing irrigation ditch and livestock reservoir are excluded from the new Navigable Waters Protection Rule and are not jurisdictional. A Department of the Army (DA) permit will not be required for the construction of the proposed reservoirs.
POH-2020-00071	NPR	Farrington Highway Bridges Expansion, Ewa, Oahu, HI	Activity occurs in waters that are NO longer WOTUS under the NWPR	Honolulu County	HI	to expand a section of Farrington Highway between Old Fort Weaver Road and Kapolei Golf course Road
POH-2020-00063	NPR	WCME, Maui Coast Hotel Expansion, Kihei, Maui HI	Activity occurs in waters that are NO longer WOTUS under the NWPR	Maui County	HI	x
NWO-2020-00729-RWY	NPR	Wyoming Sugar Company, Precipitated Calcium Carbonate Ponds Expansion, Drainage Ditch (Ditch #1), Washakie County, ARI/AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Washakie County	WY	ARI and AJD for Wyoming Sugar Company
MVP-2020-01481-JRS	NPR	Premier Clayton Avenue Estates	Activity occurs in waters that are NO longer WOTUS under the NWPR	Winnebago County	WI	residential development with 7846 sf of wetland impacts
LRL-2020-00820	NPR	Fedex Parking Lot Expansion: Boone Co., KY	Activity occurs in waters that are NO longer WOTUS under the NWPR	Boone County	KY	Parking lot expansion
SAJ-2019-01797	NPR	Collier County Government / Sports Complex	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Sports Complex
NWK-2020-00795	NPR	Tilley, Todd Grassed Waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ford County	KS	Construct a grassed waterway
SWF-2020-00396	NPR	Rueter Solar	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bosque County	TX	by Belltown Power Texas to construct a solar power generation facility located in the Bosque County, Texas

SPK-2011-01121	NPR	Ash Creek Pipeline and Toquer Reservoir	Activity occurs in waters that are NO longer WOTUS under the NWPR	Washington County	UT	new water supply reservoir
LRC-2020-00871	NPR	800 Oak Brook Road, Village of Oak Brook, DuPage County IL	Activity occurs in waters that are NO longer WOTUS under the NWPR	DuPage County	IL	800 Oak Brook Road, Village of Oak Brook, DuPage County IL
SPK-2020-00586	NPR	Foothills Development Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Placer County	CA	to construct commercial development
SPA-2020-00243	NPR	Enterprise Largo Canyon Trunk F Bank Stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rio Arriba County	NM	Mats will be placed over the pipeline and stream bank to protect the pipeline and prevent erosion of the stream bank. The area covered by the mats is 496' L x 39' W. All of the proposed work is within the pipeline's ROW. The ends of the mats will be anchored in a 5' deep x 3' wide trench filled with 12" rock.
POA-2008-01421	NPR	Fountain Head Development, Inc., Tanana River (also see POA-2002-620)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	JD
SPK-2006-00691	NPR	Placer Gold Industrial Park (Phase I & II)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Placer County	CA	to construct a rail-served industrial park with manufacturing and warehouse space within the Sunset Industrial Area.
SAJ-2020-02874	NPR	Alley, Arthur / Build Single Family Home	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	(NWP29 (404))
SAJ-2018-01410-ACM	NPR	Paddyfote, Daniel / Build Home & Driveway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Previous: SFR Fill
NWK-2020-00823	NPR	Renken, David - Construct a Grass Waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Smith County	KS	Construct a new 1140 linear feet grassed waterway
MVS-2006-00475	NPR	Corisande Woods	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	MO	-
NWK-2020-00826	NPR	Gilliland, Harrison - Grass Waterway Rehab	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ellis County	KS	Rehabilitate 3746' of grass waterway
SPN-2020-00397	NPR	Mt. Shasta Driveway project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Siskiyou County	CA	construct driveway to undeveloped property
POA-2011-00966	NPR	Dosch, Tanana River	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	JD
SAJ-2020-01769	NPR	AARC Holding, Inc./ Nona AARC/ airport parking	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	FL	airport parking
NWW-2020-00487	NPR	Trilogy Development - Feather Cove Subdivision No. 3 (AJD)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Canyon County	ID	Residential Development
NWK-2020-00860	NPR	Pearson, George - Grassed Waterway Rebuilds	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osage County	KS	Rebuild two existing grassed waterways
SAJ-1999-02045-hwb	NPR	Nat. Develop. Corp. of America / Bucks Run JD Review for Land Parcel	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	Previous: ACTID: 199902045
SAJ-2020-04051	NPR	3HWA Land Hold., LLC / NPR Req. for Resid. Develop.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
SWF-2020-00276	NPR	Wolf Lakes	Activity occurs in waters that are NO longer WOTUS under the NWPR	Williamson County	TX	Wolf Lakes, LP request of an NPR and AJD for a 162-acre tract of land located in the City of Georgetown, Williamson County, Texas
SAJ-2011-01869-JPF	NPR	Mosaic Corporation/Ona Phosphate Mine	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hardee County	FL	Ona Phosphate Mine
MVR-2020-01354-AM	NPR	Terracon	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pottawattamie County	IA	JD Request
SAJ-2020-04094	NPR	Donovan & Livingston Parcel / AJD Rev. for Construct or Develop.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SWF-2017-00354	NPR	East Centre Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dallas County	TX	by Gray and Company Realtors, Inc. to construct a culvert in existing open channel to facilitate the development of a distribution facility located in DeSoto, Dallas County, Texas
MVR-2020-01395-WF	NPR	Kelsey Farms	Activity occurs in waters that are NO longer WOTUS under the NWPR	Putnam County	IL	Pond Construction
LRN-2013-00519	NPR	Community Health Systems-Tennova Medical Park- Entrance Road	Activity occurs in waters that are NO longer WOTUS under the NWPR	Knox County	TN	JD verification
SWF-2017-00148	NPR	Meadows at Morgan Creek	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rockwall County	TX	by Oak National Holdings, LLC to dredge a pond and install an outfall for a residential development in Royse City, Rockwall County, Texas
SWF-2020-00438	NPR	Bowie-Cass Solar Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bowie County	TX	by Hecate Energy Piney Woods, LLC for the development of a solar farm located in the City of Sims, Bowie County, Texas
LRH-2002-01163-OHR	NPR	Red Stone Farm Wetland Mitigation Bank, Baker Fork	Activity occurs in waters that are NO longer WOTUS under the NWPR	Pike County	OH	Fish & Wildlife-Enhancement
NWK-2020-00886	NPR	Jezek, Ernest - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ellsworth County	KS	Construction of 1300 foot grassed waterway according to NRCS design standards.
NWK-2020-00852	NPR	Heier, James - Grass Waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sheridan County	KS	Construct Grasswaterway
SAJ-2003-12445-ACM	NPR	Youngquist Trade Center	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	Commercial development
SPL-2020-00411-AJS	NPR	Bank Stabilization for 3200 Beachcomber Drive, Morro Bay	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Luis Obispo County	CA	install approximately 60 linear feet of bank stabilization consisting of rock gabion baskets
SAJ-2006-07020-	NPR	Dunn Jax, LLC / US1 Watson Coml Parcel	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Johns County	FL	-
SPA-2020-00106	NPR	Chimayo Fire Station Bank Stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Fe County	NM	Bank Stabilization
MVP-2020-01844-SRK	NPR	Donnay Soccer Field	Activity occurs in waters that are NO longer WOTUS under the NWPR	Stearns County	MN	Discharge fill into 0.203 ac of wetland
MVN-2020-00466-EG	NPR	Renaissance Neighborhood Development - JD Henry - Construction at the NW corner of LA Hwy 190 and Privette Blvd, Covington - St Tammany	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Tammany Parish	LA	JD to An 18ac site at the NW corner of La.Hwy 190 and Privette Blvd in Covington SITE PREP, INFRASTRUCTURE AND CONSTRUCTION OF AN 18.919 ACRE MULTI-FAMILY DEVELOPMENT ON LA.HWY 190 IN COVINGTON, LA .
NWK-2020-00902	NPR	Finkenbinder, Dustin - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Construction of 2 grassed waterways according to NRCS design standards.
LRB-2020-00756	NPR	Chemung County Department of Public Works - Christian Hollow Road Culvert Replacement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Chemung County	NY	Replace existing culvert
SPA-2020-00258	NPR	California Water Service Group JD Request	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	Requesting JD of aquatic resource
SPK-2020-00370	NPR	Whitney Residence	Activity occurs in waters that are NO longer WOTUS under the NWPR	Placer County	CA	to construct a single-family home
SAJ-2004-01549	NPR	Contractors Business Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	FL	-
SAJ-2017-03438-JKA	NPR	Supreme Builders Inc/ 17775 72nd Road N, Loxahatchee/ Palm Beach	Activity occurs in waters that are NO longer WOTUS under the NWPR	Palm Beach County	FL	20200903; jurisdictional 20171221; fill for new construction
SAJ-2020-03453-JKA	NPR	Rose, Jacqueline/ 6510 Duckweed Road, Lake Worth (Homeland Lot 275)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Palm Beach County	FL	20200826; jurisdictional determination

NWK-2020-00913	NPR	Whipple, Rex - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ness County	KS	Construction of a 2800 foot and a 1800 foot NRCS designed grassed waterway.
NWK-2020-00915	NPR	Anschutz, Warren - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Russell County	KS	Construction of a 800 foot NRCS designed grassed waterway.
NWK-2020-00723	NPR	Vitt, Don & Vera - Fourmile Creek Tributary Bank Stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Neosho County	KS	Possible bank stabilization along eroding stream banks
SPA-2020-00261	NPR	Los Lunas Subdivision - AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Valencia County	NM	housing
SAJ-2020-04465	NPR	The Harmony on the S. Barbara / JD Rev. for Construct or Develop	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SPA-2020-00207	NPR	SSCAFCA AJD Black Arroyo loc 2	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00208	NPR	SSCAFCA AJD Montoyas loc 3	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00209	NPR	SSCAFCA AJD Montoyas loc 4	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00210	NPR	SSCAFCA AJD La Barranta loc 1	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00211	NPR	SSCAFCA AJD Black Arroyo loc 3	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00212	NPR	SSCAFCA AJD Venada loc 4	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00213	NPR	SSCAFCA AJD Montoyas loc 5	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2020-00214	NPR	SSCAFCA Venada Loc 3	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	AJD
SPA-2016-00139-ABQ	NPR	White Mesa Gypsum Mine Expansion Project on Pueblo of Zia Lands in Sandoval County, New Mexico	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sandoval County	NM	A proposal to expand the existing and currently operational White Mesa Gypsum Mine on Pueblo of Zia lands in Sandoval County, New Mexico.
SPA-2020-00169	NPR	St. Anthony Mine	Activity occurs in waters that are NO longer WOTUS under the NWPR	Cibola County	NM	Mine protection and reclamation
SAJ-2020-04078-KRD	NPR	PRICE, BRYAN / SEAWALL AND DOCK REPLACEMENT / 212 HUNTLEY OAKS BLVD / HIGHLANDS	Activity occurs in waters that are NO longer WOTUS under the NWPR	Highlands County	FL	To replace 44 LF of the existing seawall in the same footprint and to remove and replace the existing 4-foot-wide by 20-foot-long dock with 16-foot by 16-foot T-head along Saddlebags Lake at 212 Huntley Oaks Boulevard, Lake Placid, Highlands County, FL.
SWF-2010-00380	NPR	Belmont Mixed-Use Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Denton County	TX	by Realty Capital Belmont, Ltd & Argyle 114 Ltd. to construct a mixed-use development that will include a mixed use residential and commercial development located at the northwest corner of the intersection of Interstate Highway 35W and Farm-to-Market Road (FM) 407, Cities of Northlake and Argyle, Denton County, Texas.
NAO-1999-02948	NPR	Given Bulkhead Replacement	Activity occurs in waters that are NO longer WOTUS under the NWPR	Virginia Beach city	VA	04SEP20 construct a 82LF of open pile timber bulkhead with fill
MVN-2019-01295-MM	NPR	Slidell Fremaux Convenience Store - JD - Construction on Squares 12 & 13 in Beverly Hills SUB at US Hwy 190, Slidell - St Tammany	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Tammany Parish	LA	JD to A 2.2ac site located north of Hwy 190 in Slidell Clear, grade, and fill to construct convenience store and gas pumping station.
NWK-2020-00950	NPR	Meyer, Brad - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Washington County	KS	Construction of a 2550 foot long grassed waterway according to NRCS design standards.
SWL-2020-00204	NPR	Javiation - Lawrence Co - Request for AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Barry County	MO	Request Approved Jurisdictional Determination for the purpose of construction project
SAJ-2019-03458	NPR	Seminole Tribe of Florida / Hunting Adventure Pond MOD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hendry County	FL	Applicant requested a MOD
SPL-2020-00654	NPR	AJD Alta Mesa Wind Project Repower AJD north Palm Springs Aspen Riverside County CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	request for AJD
SPL-2020-00657	NPR	AJD Mesa Wind Project Repower AJD Whitewater Aspen Riverside County CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	AJD on wind energy site
SPL-2020-00660	NPR	AJD Tract 35011 AJD Murrieta Riverside County CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	ajd request
SPA-2020-00260	NPR	Northeast aquifer storage and recharge enhanced arroyo project	Activity occurs in waters that are NO longer WOTUS under the NWPR	El Paso County	TX	The project site would be used by the City of El Paso to develop the proposed aquifer storage and recharge enhanced arroyo project. Located between Martin Luther King Boulevard and McCombs Street, in the Northeastern portion of El Paso, El Paso County, Texas. Located at approximately latitude: 31.957123 and longitude: -106.422488.
MVP-2020-00973-CCK	NPR	Ham Lake, City of / SAP 197-124-004 / 133rd Lane NE Twin Birch Reconstruction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	No Permit Required
SAJ-2020-04615	NPR	MA Inv. Boca, LLC / Develop Resid. Housing Proj.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
NWK-2020-00973	NPR	Cornwell, Lowell - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Reshaping of a 568 foot grassed waterway according to NRCS design standards.
LRB-2020-00817	NPR	Rochester's Cornerstone Group, Ltd. Hubbard Springs Apartments	Activity occurs in waters that are NO longer WOTUS under the NWPR	Monroe County	NY	Discharge of fill into 0.20 acres of delineated federal jurisdictional Wetland A
POA-2020-00517	NPR	Olgoonik Construction Services, Fish Creek, Legacy Wells - Inigok #1	Activity occurs in waters that are NO longer WOTUS under the NWPR	North Slope Borough	AK	Remediate the Inigok #1 well
NWK-2020-00976	NPR	Flax, Roger - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Trego County	KS	Construction of a 3138 foot grassed waterway according to NRCS design standards.
NAO-2020-01733	NPR	Bede shoreline stabilization	Activity occurs in waters that are NO longer WOTUS under the NWPR	Virginia Beach city	VA	12 existing trees must be removed to install the riprap revetment that will stabilize the new bank.
SAJ-2020-04096	NPR	Peguero SFR Fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
MVK-2020-00870-KB	NPR	James Carson/111820/James Carson T12805 Wetland Determination, Franklin Parish, Louisiana	Activity occurs in waters that are NO longer WOTUS under the NWPR	Franklin Parish	LA	James Carson, James Carson T12805 Wetland Determination, Franklin Parish, Louisiana
NWK-2020-00987	NPR	City of Valley Center, KS- W 77th St. N Road improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Sedgwick County	KS	Proposed road improvements including replacement of RCBs
SAJ-2020-04108	NPR	Aleksiejczuk, Maciey / Build Driveway through Wetlands	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-

NWO-2020-02051-RWY	NPR	Paul G. & Kathleen L. Kimball Revocable Trusts, Deland Ditch, Owl Creek Lot 4, PreApp, AID	Activity occurs in waters that are NO longer WOTUS under the NWPR	Teton County	WY	Alder Environmental is requesting an Aquatic Resources Inventory (ARI) and Request for Jurisdictional Determination (JD) on behalf of Paul and Kathleen Kimball for their property, Owl Creek Lot 4 in Teton County, WY.
NWO-2020-01783-RWY	NPR	DRM, Inc. (Largent & Sons landowner), drainage of South Fork Powder River, Borrow Source for I-25 Casper-Kaycee, PreApp, AID, NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Johnson County	WY	DRM, Inc. is proposing a borrow source and enlargement of the Largent No. 1 Stock Pond on a tributary to South Fork Powder River for a WYDOT project I-25 Casper-Kaycee, TTT Section-NBL (WYDOT #0255095 & 1310002 Comb).
SAJ-2020-02112-ACM	NPR	MWC Land, Develop. LLC / New Home Const., 68th Ave	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	SFR
SAJ-2020-04248	NPR	TKR #3, LLC (Frey, B.) / Build Driveway in W. lands	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SAJ-2020-02866	NPR	Kopper, Maria / Install 4000 Sqft Driveway W/Lands Impact	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	(NWP29 (404))
SAJ-2018-03242-JKA	NPR	Androsiglio, Jeanne/ 15608 85th Way N, Palm Beach Gardens/ Palm Beach Co.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Palm Beach County	FL	20201202; new JD under NWPR 20181101; Clear site for house pad (END)
NAO-2020-01816	NPR	Jubilee bulkhead	Activity occurs in waters that are NO longer WOTUS under the NWPR	Virginia Beach city	VA	construct a 66' timber bulkhead with fill for erosion prevention
SAJ-2020-01297	NPR	Lescault, Henry / 2 Story Home Const.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
SWF-2020-00452	NPR	Brownwood Quarry	Activity occurs in waters that are NO longer WOTUS under the NWPR	Brown County	TX	by Vulcan Lands Inc. to request an approved jurisdictional determination for the construction of a quarry located in the City of Brownwood, Brown County, Texas
SWL-2020-00185	NPR	MoDOT - Jasper Co - New Roundabout at Route 171/96	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jasper County	MO	Construction of a new roundabout at the intersection of MO Route 171 and MO Route 96 in Jasper County MO
MVR-2020-01713-AF	NPR	Tom Rappenecker	Activity occurs in waters that are NO longer WOTUS under the NWPR	Des Moines County	IA	Pond Excavation
MVP-2020-02238-RJH	NPR	BFW Wetland Commercial Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fond du Lac County	WI	Commercial Development (Discharge of fill material) for 4,098 sf of wetland impacts
NWP-2020-00404	NPR	Wastewater System Improvements	Activity occurs in waters that are NO longer WOTUS under the NWPR	Union County	OR	The proposed project consists of constructing a wetland and transmission pipeline north of the existing treatment ponds.
MVK-2020-00632-KB	NPR	Barry Bridgforth /082620/ JD Request for Laughter Road 12.3 Acres, DeSoto County, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	DeSoto County	MS	Barry Bridgforth, JD Request for Laughter Road 12.3 Acres, DeSoto County, Mississippi
SAM-2017-01215-JSC	NPR	Woodward Oaks Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	AL	PJD
SPL-2016-00817	NPR	Rancho San Geronio Development Project, Banning, Sycamore Creek, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Approximately 3,400 dwelling unit residential/commercial development within the city limits of Banning
SPL-2018-00746-PJB	NPR	Tuscany Valley/Crest Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	Construction of 336 single family homes on 97.4 acres.
SPL-2020-00716-DLC	NPR	Euclid Commerce Center Project--Chino, San Bernardino County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	-
MVP-2020-02277-MJB	NPR	Highum Pit Delineation	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fillmore County	MN	Delineation
SAJ-2020-04949	NPR	Heron Bay/Moore Haven/NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Glades County	FL	JD & NPR
SWL-2020-00152	NPR	Woody - Lawrence Co - Farm Pond Construction	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lawrence County	MO	build a dam, which will in turn pool water to form a multiuse pond. Provide Livestock Water, Fishing, improve wildlife habitat. The dam will also provide a secondary access to private residence
SAJ-2008-02942	NPR	IPS Enterprises / Bassett Rd School	Activity occurs in waters that are NO longer WOTUS under the NWPR	Duval County	FL	x
MVK-2009-00398-BAG	NPR	Southern Trace Development Corp/022809/Norris Ferry Road at Southern Loop Development Site, Caddo Parish, LA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Caddo Parish	LA	Southern Trace Development Corporation - Norris Ferry Road at Southern Loop Development Site, Caddo Parish, Louisiana
NWO-2020-01913-MTH	NPR	Double C Ranch (Pond & Stream Consulting) Construct Trout Pond - Unnamed Wetland (Beaverhead County)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Beaverhead County	MT	Construct Trout Pond
SAJ-2020-04971	NPR	Beiswenger, Alex / Build Single Family Home (24066)	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	-
NWK-2020-01029	NPR	Hendrich, Clarence - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Grassed waterway
NWK-2020-01030	NPR	Hendrich, C.E. - Grassed waterway	Activity occurs in waters that are NO longer WOTUS under the NWPR	Osborne County	KS	Grassed waterway
SAJ-2020-03882	NPR	3E On Time Inv. Corp. / Const. of Single Family Home	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SAJ-2020-03771	NPR	Frey, Barry / JD & Pre-App. Req. for Const. & Develop.	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	-
SAJ-2020-04995	NPR	Alico Road Project/JD & NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lee County	FL	commercial development
MVK-2018-00756-TB	NPR	City of Hot Springs/092818/Proposed Water Supply Improvements, Garland County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Garland County	AR	City of Hot Springs, Proposed Water Supply Improvements, Garland County, Arkansas
SAJ-2020-05032	NPR	Iconic Homes/36th Ave SE/JD & NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SPA-2020-00273	NPR	Enterprise Products Operating LLC, Simmons No. 10 Removal	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	Enterprise is proposing to remove approximately 80 feet of pipe from Largo Wash and approximately 125 feet of pipe landward of the wash.
SAJ-2020-05052	NPR	Valeiras/30th Ave SE/SFD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SAJ-2020-02197	NPR	Velazquez, Abril / Build Driveway to Home	Activity occurs in waters that are NO longer WOTUS under the NWPR	Charlotte County	FL	(RGP 20)
SAJ-2020-05060	NPR	Capital Homes/6th Street NW/Southern Parcel	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SAJ-2020-04852	NPR	Capital Homes 6th Street NW/SFD Fill	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collier County	FL	construct SFD
SAJ-2019-04331	NPR	Gooden Investment Holdings LLLP / Lt 22 Blk 128 Jasper St	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Rosa County	FL	-
NWK-2020-01051	NPR	Marmaton Watershed Joint District #102 - Geiger Site watershed dam	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bourbon County	KS	NPR request for proposed WJD dam site
MVR-2020-01467-AM	NPR	Foth	Activity occurs in waters that are NO longer WOTUS under the NWPR	Dubuque County	IA	JD Request
LRH-2020-00440-OHR	NPR	Mr. Robert Jones - Retention Pond	Activity occurs in waters that are NO longer WOTUS under the NWPR	Hamilton County	OH	Retention Pond for Agricultural activities.
SWF-2020-00198	NPR	Three Corners	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collin County	TX	by Three Corners, LLC to develop a 24-acre commercial site located in the City of Frisco, Collin County, Texas

MVP-2020-01953-SSC	NPR	128th Ave Parcels Blaine KES#2020-148	Activity occurs in waters that are NO longer WOTUS under the NWPR	Anoka County	MN	AJD
SPA-2020-00284	NPR	BNSF Abo Arroyo AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Valencia County	NM	The AJD requested by authorized agent, Jacobs Engineering Group, Inc. on behalf of BNSF Railway for the purpose of determining Corps jurisdiction of the single stream feature labeled as the Abo Arroyo resides within the proposed study area. Located near the city of Belen and situated in both Valencia County and Socorro County, New Mexico. The coordinates for the proposed study area are approximately latitude: 34.457082 and longitude: -106.504325.
MVR-2021-00048-AS	NPR	Giesking HUD Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Tama County	IA	HUD Project
MVS-2020-00772	NPR	Proposed Grading 17485A N Outer 40 Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Proposed Grading, OD-R 20-048
MVR-2020-01512-DH	NPR	Marlyn Jorgensen	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	IA	Earthen Embankment
NWW-2020-00620	NPR	Trilogy Development - Fossil Creek Subdivision No. 1	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	Production of single-family lots in Kuna, requiring the filling of irrigation ditches
NWK-2021-00082	NPR	Hajek, John - AJD determination	Activity occurs in waters that are NO longer WOTUS under the NWPR	Marion County	KS	AJD determination
LRL-2020-01063-jlb	NPR	East Kentucky Network - Proposed Culvert Crossings for Tower Access Road near McDowell	Activity occurs in waters that are NO longer WOTUS under the NWPR	Floyd County	KY	Proposal to install 4 culverts between 21 and 36 inches in diameter into an unnamed tributary in Floyd County, Kentucky. The proposed length of culverts are less than 200 feet with an impact area less than 0.05 acres. The culverts are proposed with ephemeral drains to construct an access road to a tower site. Based on the NWPR, these streams are excluded from regulation
SPL-2020-00568-ERS	NPR	Robert A. Curtis Park Expansion Project -- Mission Viejo, Orange County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Orange County	CA	.
NWW-2021-00041	NPR	Drainage District 2, Lateral 10 Box Culvert Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	installation of a new box culvert to facilitate roadway expansion along N Hamlin Ave
NWW-2020-00035	NPR	Snoqualmie Falls Subdivision No. 15	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	build out of an existing subdivision in Eagle
MVK-2021-00030-KB	NPR	City of Thornton/010821/ Application Request for the Thornton Community Center Funded by a Block Grant from Arkansas Economic Development Commission, Calhoun County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Calhoun County	AR	City of Thornton, Application Request for the Thornton Community Center Funded by a Block Grant from Arkansas Economic Development Commission, Calhoun County, Arkansas
LRL-2021-00051-jws	NPR	Kraft Nursery	Activity occurs in waters that are NO longer WOTUS under the NWPR	Vanderburgh County	IN	AJD request for a previous dump site
LRL-2020-01105-jws	NPR	Pollack Lynn Road JD Request	Activity occurs in waters that are NO longer WOTUS under the NWPR	Vanderburgh County	IN	AJD Request
MVS-2020-00784	NPR	Mikesch Construct Lake 6417 Oak Hills Dr	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ste. Genevieve County	MO	Construct Lake
NAO-2010-02201-tca	NPR	6418 Telegraph Road	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairfax County	VA	This is a request for a verification of a jurisdictional determination. 10-V1851- To construct a swale west of the retaining wall and east of the property line. It may need to be lined with riprap or similar material to prevent erosion. At the end of the retaining wall the water will begin to sheet flow across the front of the lot.
MVS-2021-00037	NPR	Orchard Farm School & Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	JD for School & Park
SPA-2021-00040	NPR	Photosol Solar Farm	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Juan County	NM	Construction of a solar farm
MVK-2019-00438-TB	NPR	Waggoner Engineering, Incorporated/052219/Request for a Preliminary Jurisdictional Determination on a 4.1 Acre Site for the New Fire Crash Rescue Station, Rankin County, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rankin County	MS	Waggoner Engineering, Incorporated, Request for a Preliminary Jurisdictional Determination on a 4.1 Acre Site for the New Fire Crash Rescue Station, Rankin County, Mississippi
POA-2021-00064	NPR	Exclusive Paving, Southside Pit	Activity occurs in waters that are NO longer WOTUS under the NWPR	Fairbanks North Star Borough	AK	Request for a JD and NPR
MVN-2020-00242-ES	NPR	Capital Automotive Real Estate Services - JD - Construction fronting and north of Holiday Square Blvd, Covington - St Tammany	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Tammany Parish	LA	JD to A 4.35 ACRES FRONTING AND NORTH OF HOLIDAY SQUARE BLVD Infrastructure and construction of an automotive dealership on a 4.35 acre tract in Covington, LA.
SPL-2020-00579-VN	NPR	San Bernardino International Airport City Creek Bypass Channel Project--San Bernardino, San Bernardino County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	San Bernardino County	CA	The San Bernardino International Airport Authority (SBIAA) is proposing to conduct maintenance activities within an approximately 5,280-foot-long ephemeral channel that is maintained by the San Bernardino International Airport (SBIA) and located in the City of San Bernardino, San Bernardino County, California.
NWO-2021-00239-RWY	NPR	John Leibowitz and Ruth Marcus, Deland Ditch, Owl Creek Lot 29, PreApp AJD, NPR	Activity occurs in waters that are NO longer WOTUS under the NWPR	Teton County	WY	AJD requested for Owl Creek Lot 29 for eventual residential development. Agent - Alder Environmental. Requested by Cairn Landscape Architects on behalf of landowners, John Leibowitz and Ruth Marcus.
NWK-2021-00124	NPR	City of Manhattan, KS - Manhattan Regional Airport - Reconstruction of Runway 03/21	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riley County	KS	Reconstruction of Runway 03/21 at Manhattan Regional Airport, which includes runway, building and hangars, and adjacent taxiways and open areas.
SWF-2020-00476	NPR	Forney Tract D	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kaufman County	TX	by Seefried Industrial Properties, Inc. to request an approved jurisdictional determination for industrial site development located in the City of Forney, Kaufman County, Texas

SPA-2021-00022	NPR	Calabacillas Arroyo West Branch Watershed Grade Control Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Bernalillo County	NM	The AJD requested by Albuquerque Metropolitan Arroyo Flood Control Authority for the purpose of determining Corps jurisdiction of the unnamed single stream feature residing in the Calabacillas west branch water shed. Located near the Village of Rio Rancho and situated in Bernalillo County, New Mexico. The coordinates for the proposed study area are at approximately latitude: 35.207355 and longitude: -106.73825.
MVS-2020-00185	NPR	IL AM Water Chouteau Island Water Intake Facility Repair	Activity occurs in waters that are NO longer WOTUS under the NWPR	Madison County	IL	IL American Water Company seeks authorization for the repair of their Chouteau Island water intake facility following the 2019 Flood event after a adjacent levee breached and created a scour how within the facility. The project is located on Chouteau Island, Madison County, IL.
MVS-2017-00189	NPR	Valley Park Lakehill Grading	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Fill In Lake
MVS-2014-00760	NPR	I 74 and 57 Interchange	Activity occurs in waters that are NO longer WOTUS under the NWPR	Champaign County	IL	expand the interchange
MVR-2021-00354-SC	NPR	Sunpin Energy Services	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kankakee County	IL	Solar Development
POA-2021-00094	NPR	Gall, Homer, Kachemak Bay, JD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Kenai Peninsula Borough	AK	JD
MVS-2017-00177	NPR	Fox Creek (Willjeck Tract) Residential Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Jefferson County	MO	Construct Subdivision
SWF-2021-00076	NPR	Longview North Business Park	Activity occurs in waters that are NO longer WOTUS under the NWPR	Gregg County	TX	by Longview Economic Development Corporation to request an approved jurisdictional determination for two properties located in the City of Longview, Gregg County, Texas
MVS-2021-00133	NPR	Build Retention Pond between 339 & 347 Eureka Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Louis County	MO	Build Retention Pond
MVK-2018-00303-JLD	NPR	Prairie Mist Solar Project, LLC/041618/Request for Preliminary Jurisdictional Determination for Proposed Solar Farm Developments, Ashley County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ashley County	AR	Prairie Mist Solar Project, LLC, Request for Preliminary Jurisdictional Determination for Proposed Solar Farm Developments, Ashley County, Arkansas
SWF-2021-00153	NPR	Proposed Commercial Development	Activity occurs in waters that are NO longer WOTUS under the NWPR	Collin County	TX	by Winkelmann & Associates, Inc. request an approved jurisdictional determination for property located in the City of Melissa, Collin County, Texas
MVS-2021-00153	NPR	Residential Development @ 150 Kammeier Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Residential Development
SAM-2021-00262-JSC	NPR	Maxwell Air Force Base Airfield Drainage Improvements Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Montgomery County	AL	Jurisdictional Determination (AJD) regarding man-made drainage conveyances within the Maxwell AFB airfield located in Montgomery County, Alabama.
NAE-2021-00749	NPR	Scannell Properties, LLC	Activity occurs in waters that are NO longer WOTUS under the NWPR	Middlesex County	CT	Jurisdictional determination-irrigation pond
SPA-2021-00044	NPR	LANL Potrillo Canyon AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Los Alamos County	NM	AJD
MVK-2020-00850-TB	NPR	Hub Water Association/102920/Proposed FY 2020-Drinking Water Improvements, Marion and Lamar Counties, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	Marion County	MS	Hub Water Association, Proposed FY 2020-Drinking Water Improvements, Marion and Lamar Counties, Mississippi
MVS-2021-00113	NPR	Crooked Lake Maintenance @ 8251 Bunkum Rd	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Clair County	IL	Lake Maintenance
LRL-2021-00261-jlb	NPR	Jurisdictional Determination for EastPark Lot 22 Build Site	Activity occurs in waters that are NO longer WOTUS under the NWPR	Boyd County	KY	Ashland Alliance, Inc. has requested a Jurisdictional Determination for Lot 22 at the EastPark Multi-Use Business Park Site B in Boyd County, Kentucky
MVR-2021-00465-AS	NPR	Mike Phillips	Activity occurs in waters that are NO longer WOTUS under the NWPR	Poweshiek County	IA	Stormwater Improvements
MVS-2015-00150	NPR	Defiance RV Park (Trail Smokehouse and Visitors Center)	Activity occurs in waters that are NO longer WOTUS under the NWPR	St. Charles County	MO	Replace span bridge with culvert crossing unnamed trib to Femme Osage Ck
MVK-2021-00237	NPR	Grant Parish Police Jury/030921/JD Request for 35 Acres, Grant Parish, LA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Grant Parish	LA	Grant Parish Police Jury/030921/JD Request for 35 Acres, Grant Parish, LA
SPL-2018-00831	NPR	Painted Desert Solar Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Coconino County	AZ	Develop the Painted Desert Solar Project on Navajo Nation.
MVS-2021-00209	NPR	Pontoon Park Develop Lots 3, 4 & 5	Activity occurs in waters that are NO longer WOTUS under the NWPR	Madison County	IL	Develop Lots for Construction
MVR-2021-00523-AS	NPR	Iowa County Conservation Board	Activity occurs in waters that are NO longer WOTUS under the NWPR	Iowa County	IA	Watershed Improvements
SPA-2021-00078	NPR	Vista de la Sierra AJD	Activity occurs in waters that are NO longer WOTUS under the NWPR	Santa Fe County	NM	AJD
MVM-2021-00101-jme	NPR	Nucor Steel, Tioga, Memphis, Shelby Co., TN	Activity occurs in waters that are NO longer WOTUS under the NWPR	Shelby County	TN	JD request
SPL-2021-00114	NPR	AJD Keller Crossing Project	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	JD Request
MVK-2021-00314-TB	NPR	Alleged Violation/040521/Mr. John McCuan has placed Fill Material in a Stream Flowing from Ms. Stephens Property Across his Property and on into a Perennial Stream for a Garden Spot, Lincoln County, Arkansas	Activity occurs in waters that are NO longer WOTUS under the NWPR	Lincoln County	AR	Alleged Violation, Mr. John McCuan has placed Fill Material in a Stream Flowing from Ms. Stephens Property Across his Property and on into a Perennial Stream for a Garden Spot, Lincoln County, Arkansas
MVK-2018-00609-ael	NPR	Jim Webb /08092018/ Wetland Delineation on Flowood Industrial Park LLC 6 Acre Parcel Caterpillar Drive, Rankin County, Mississippi	Activity occurs in waters that are NO longer WOTUS under the NWPR	Rankin County	MS	Jim Webb, Wetland Delineation on Flowood Industrial Park LLC 6 Acre Parcel Caterpillar Drive, Rankin County, Mississippi
MVK-2021-00219-AEL	NPR	Aethon Energy Operating, LLC/030221/ Proposed Well Pad Expansion for Existing Caplis 30-16-12 Well Pad Project, Caddo Parish, Louisiana	Activity occurs in waters that are NO longer WOTUS under the NWPR	Caddo Parish	LA	Aethon Energy Operating, LLC, Proposed Well Pad Expansion for Existing Caplis 30-16-12 Well Pad Project, Caddo Parish, Louisiana
SWL-2007-00509-krc	NPR	Bentonville, City of - Opal Road Sewerline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	AR	placement of approximately 3500 linear feet of 36" interceptor sewer line Replacement of previously constructed 36-inch sewer line.
SWL-2007-00509-krc	NPR	Bentonville, City of - Opal Road Sewerline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	AR	placement of approximately 3500 linear feet of 36" interceptor sewer line Replacement of previously constructed 36-inch sewer line.
SWL-2007-00509-krc	NPR	Bentonville, City of - Opal Road Sewerline	Activity occurs in waters that are NO longer WOTUS under the NWPR	Benton County	AR	placement of approximately 3500 linear feet of 36" interceptor sewer line Replacement of previously constructed 36-inch sewer line.
NWW-2020-00410	NPR	W. State Street Warehouse Shells	Activity occurs in waters that are NO longer WOTUS under the NWPR	Ada County	ID	The project will include installing a concrete bridge across Sand Creek for the purpose of truck turnaround capability and fire access between two commercial warehouse parcels.

SPL-2016-00641	NPR	Western Bypass and Altair Project, Temecula, Riverside County, CA	Activity occurs in waters that are NO longer WOTUS under the NWPR	Riverside County	CA	The Altair project proposes a mixed-used land plan consisting of approximately 870-1,750 residential units; a small commercial component in the center of the project overlooking a central park on axis with Main Street; a larger civic/commercial use at the southern end of the property; and the revised alignment completing the Western Bypass Corridor.
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**Southern Environmental Law Center • Natural Resources Defense Council •
National Parks Conservation Association**

March 11, 2021

Via Electronic Mail

Radhika Fox
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 4101 M
Washington, DC 20460
Fox.Radhika@epa.gov

Re: Harm Resulting from the 2020 Waters of the United States Definition

Dear Acting Administrator Fox:

Thank you for your concern about the widespread harm to our nation's waters resulting from the implementation of the so-called "Navigable Waters Protection Rule" (NWPR).¹ We summarize below some of the more egregious jurisdictional determinations we have reviewed that deny Clean Water Act protections to streams and wetlands. The examples we highlight here demonstrate that the NWPR undermines the Biden-Harris administration's priorities of environmental justice and climate change, threatens federally protected lands, and leaves important resources without federal Clean Water Act protection.

Byhalia Pipeline—Mississippi/Tennessee

The Byhalia Pipeline is a high-pressure oil pipeline intended to connect two existing crude oil pipelines that deliver oil to Valero refineries in Memphis and northern Mississippi. The proposed pipeline route cuts through a drinking water well field in southwest Memphis operated by Memphis, Light, Gas and Water, which draws water from the Memphis Sand Aquifer. The well field is adjacent to an area of the aquifer known to be vulnerable to contamination. The pipeline route cuts through several African American communities in southwest Memphis, including one known as Boxtown. The community got its name after formerly enslaved people used scraps of materials and wood from train boxcars to build homes there in the late 19th century. The Boxtown community is already burdened by dozens of industrial facilities, including the Valero refinery and the Tennessee Valley Authority's recently retired coal plant

¹ The Southern Environmental Law Center and Natural Resources Defense Council are currently engaged in litigation regarding the NWPR. Geoff Gisler and SELC attorneys represent numerous clients in *South Carolina Coastal Conservation League, et al. v. Nishida, et al.* (No. 20-cv-01687-BHH, D.S.C.). Jolie McLaughlin and other NRDC attorneys represent NRDC and other clients in *Conservation Law Foundation, et al. v. U.S. Environmental Protection Agency, et al.* (No. 20-cv-10820-DPW, D. Mass). NPCA has filed an amicus brief in the *Conservation Law Foundation* case. This letter does not discuss the legal issues in those cases. Nonetheless, EPA counsel have been given advance notice of, and are copied on, this letter.

and active gas plant. A company spokesperson recently offended many community members by stating that the company chose to site the pipeline in “the path of least resistance.”

The NWPR appears to have removed dozens of streams in the pathway of the pipeline from the protection of the Clean Water Act in Mississippi, clearing the path for construction of the pipeline. According to a January 25, 2021 jurisdictional determination summary form,² approximately 95 ephemeral streams have been excluded from the protections of the Clean Water Act. They total more than 10,400 feet, nearly 2 miles, of stream impacts. Although these streams are not within the drinking water well field that Boxtown relies on, the removal of protections for the streams increases the likelihood that the project will advance without meaningful consideration of overall water quality impacts. The effects of the NWPR in and around Boxtown are unclear, as the Memphis Corps district has not made public its jurisdictional determination.

Twin Pines Mining—Georgia

Alabama-based mining company Twin Pines has proposed a heavy mineral sand strip mine on the doorstep of the Okefenokee Swamp, one of the largest and most celebrated wetlands in the country and home to both a National Wildlife Refuge and a National Wilderness Area. The proposed mine would be 50-feet deep on average and would destroy hundreds of acres of wetlands that are critical to the Okefenokee’s diverse ecosystem, threatening the hydrology of the swamp. Recently, the Corps determined that nearly 400 acres of previously jurisdictional wetlands near the Refuge are now unprotected by the Clean Water Act, allowing the mining company to begin mining without any involvement by the agency. This decision has important implications for the initial part of the mine as well as the longer-term expansion of the mine to more than 8,000 acres near the Refuge.

RiverPort—South Carolina

The Savannah River National Wildlife Refuge sits on the border of South Carolina and Georgia. The Refuge’s roughly 30,000 acres contain pristine wetland systems, including freshwater marshes, tidal rivers and creeks, and bottomland hardwoods. Nearly half of the refuge is bottomland hardwoods, composed primarily of cypress, gum, and maple trees.³ Just outside the Refuge’s boundaries are thousands of acres of wetlands that provide a critical buffer for the Refuge as well as important flood storage capacity in this low-lying part of the coastal plain.

The proposed RiverPort development would put a significant acreage of wetlands in peril. In total, the development spans close to 4,300 acres. The project would fill 33 acres of wetlands directly, but the future impacts are likely much greater. A recent jurisdictional determination denied Clean Water Act protection for more than 200 acres of wetlands in the project area. But the development would also fragment nearly 1,400 acres of wetlands, potentially causing those wetlands to lose the hydrologic connection required by the NWPR and,

² <https://www.mvk.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/Approved-JDs/FileId/306445/>

³ <https://www.fws.gov/refuge/savannah/about.html>.

therefore, to become non-jurisdictional as well. Because South Carolina is unlikely to exercise state authority over the wetlands, future impacts are likely to be much more significant than what has been proposed, with harmful consequences to the Refuge and the area’s climate change resilience.

Indiana Dunes National Park—Indiana

The Indiana State Assembly is considering a bill that would repeal the state’s Isolated Wetland Law. At present, anyone proposing to impact a non-federally protected wetland must apply for and obtain a permit from the state. If a proposed project meets certain criteria, the developer must mitigate these impacts, ensuring that wetlands across the state are maintained and healthy.

Following the prior administration’s rollback of federally jurisdictional waters, the percentage of federally protected wetlands in Indiana decreased from 60% to 20%, leaving 80% of wetlands—approximately 700,000 acres—solely under state jurisdiction. Should the bill pass, these wetlands will be without necessary safeguards. Nearly 70% of wetlands around Indiana Dunes National Park will be newly vulnerable, jeopardizing water quality, habitat, and recreation in the park, which is home to more than 350 species of birds and sees more than 3 million visitors annually.

National Impacts

These examples are part of a broader trend. When NRDC staff recently analyzed the impacts of the rule nationwide using EPA’s database of jurisdictional determinations and its filtering tool, they found that the Army Corps determined 6,608 individual features not to be “waters of the United States” under the NWPR between June 22, 2020 and February 3, 2021. Of these features, at least 1,496 ephemeral waters and at least 3,087 distinct wetlands were declared not to be “waters of the United States” under the NWPR. Waters by the thousands are being cut out of the Clean Water Act’s protections.

A review of jurisdictional determinations shows significant losses throughout the country. Among those are the following, though this list represents only a sampling of the numerous troubling examples we identified after reviewing a small fraction of the determinations made under the NWPR:

- The Army Corps excluded 355 acres of wetlands in Fairbanks, Alaska, finding that, despite a prior determination that the site included wetlands “directly abutt[ing]” a relatively permanent tributary to the Chena River (a traditional navigable water), the wetlands were separated from the river by an artificial berm that does not allow a direct surface water connection in a typical year, rendering it not “adjacent” under the NWPR.⁴
- The Army Corps excluded 273 ephemeral streams in Arizona and Utah (encompassing over eight acres of area) from Clean Water Act protections. The jurisdictional determination form indicates that the site was previously the subject of a preliminary jurisdictional determination that found at least some of the streams to be “waters of the

⁴ https://www.poa.usace.army.mil/Portals/34/docs/regulatory/JDs/2020/POA_2003_01422_JD_29OCT2020.pdf.

U.S.”⁵ The project involves the construction of a pipeline in Arizona and Utah to withdraw water from Lake Powell (a reservoir on the Colorado River) to two counties for municipal supply. According to the Army Corps’ initial evaluation of a prior application for an individual section 404 permit: “The proposed activity may affect Federally-listed endangered or threatened species or their critical habitat.”⁶

- The Army Corps excluded 30 streams in Nevada as either ephemeral or not having a surface water connection in a typical year to a traditionally navigable water. There was a total of 251,053 linear feet of streams covered by this determination (47.5 miles).⁷ Based on the location of the site, the project seems to be associated with the Round Mountain gold mine.
- The Army Corps excluded 190 acres of wetlands and 10,000 linear feet of streams in Texas from Clean Water Act coverage. The site appears to be either near or on the site of the Red River Army Depot.⁸
- The Army Corps excluded 22 wetlands in Ormond Beach, Florida from Clean Water Act protection, classifying all of them as non-adjacent. The wetlands area totaled 145.3 acres and included a single wetland 57.69 acres in area.⁹ This determination was made at the request of Ormond Crossings, which is a planned business/residential development on a 3,000-acre tract.¹⁰

In sum, every day that the NWPR is in effect, we move farther from the Clean Water Act’s ultimate objective as streams and wetlands across the nation are slated for destruction. EPA must move quickly to restore federal clean water protections to critical waters. In the interim, the agency has tools to mitigate some of the damage that the rule is doing. We look forward to discussing these tools with you and working with EPA to restoring the proper scope of the Clean Water Act.

⁵ <https://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/2020/2020.11-Nov/200800354-AR-Apprvd-JD-Form-NWPR.pdf>.

⁶ <https://www.spk.usace.army.mil/Media/Regulatory-Public-Notices/Article/1716369/spk-2008-00354-lake-powell-pipeline-project/>

⁷ <https://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/2020/2020.11-Nov/200325089-AR-Apprvd-JD-Form-NWPR.pdf>.

⁸ <https://www.swt.usace.army.mil/Portals/41/docs/missions/regulatory/JD/SWT-2020-322%20NWPR%20AJD%20FORM.pdf?ver=qA4x2YW8F3StCf1zH1nTCg%3d%3d>.

⁹ <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/15241>.

¹⁰ <https://www.ormondbeach.org/199/Ormond-Crossings>.

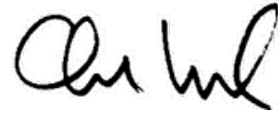
Sincerely,



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How the Trump Administration Eased Destruction of the Nation's Wetlands and Streams, David Groves, 51 Env'l Law Reporter 10194 (2021). Available at: <https://elr.info/news-analysis/51/10194/how-trump-administration-eased-destruction-nations-wetlands-and-streams>.
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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)
 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. Env’tl. 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.

17. However, the Pueblos rely on the Agencies to implement nearly all of the CWA's pollution programs on their behalf and do not have the financial or administrative resources or capacity to administer these programs themselves.

18. Further, both Pueblos rely on the federal jurisdiction of the CWA to protect themselves from upstream pollution.

19. For the Pueblos, high water quality is essential to day-to-day life, as well as cultural and religious practices.

20. The removal of federal jurisdiction creates the imminent risk of the degradation and destruction of the Pueblos' waters and would harm the Pueblos' agriculture, as well as cultural and religious practices.

21. The Agencies promulgated both the 2019 Repeal Rule and the 2020 Navigable Waters Rule without due respect to the sovereignty of either Pueblo.

22. The Agencies' actions violated the Administrative Procedure Act ("APA"), the CWA, and the federal trust responsibility toward tribes, as described herein.

23. The Pueblos respectfully request that the Court vacate and set aside the 2019 Repeal Rule and 2020 Navigable Waters Rule and return to the post-*Rapanos* case-by-case application of the "significant nexus" test.

II. JURISDICTION AND VENUE

24. This Court has jurisdiction over the claims set forth in this complaint pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1362, and 5 U.S.C. § 702. *See Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (holding that challenges to the Agencies' regulations defining "waters of the United States" must be brought in federal district courts).

25. The relief sought is authorized by 28 U.S.C. § 2201(a), 28 U.S.C. § 2202, and 5 U.S.C. § 706.

26. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c)(2) and (e)(1). This action seeks relief against federal agencies and federal officers acting in their official capacities. Additionally, venue is proper because a substantial part of the property, including water resources, that is the subject of the action is situated within this judicial district. 28 U.S.C. § 1391 (e)(1)(B).

III. PARTIES

A. Pueblo Petitioners

27. Petitioners, Pueblo of Jemez and Pueblo of Laguna, are both federally recognized American Indian tribes with a government-to-government relationship with the United States. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021).

28. Unlike many other Indian tribes in the United States, the Pueblos were never removed from the land they have held since time immemorial and have retained their property rights to their lands. *See e.g.*, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922; *New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976) (*Aamodt I*) (outlining the history of congressional confirmation of Pueblo land and resource rights within New Mexico).

1. Pueblo of Laguna

29. The Pueblo of Laguna is located approximately 10 miles west of Albuquerque, New Mexico, with the Pueblo's westernmost boundary approximately 50 miles from Albuquerque.

30. The Pueblo of Laguna encompasses approximately 500,000 acres of combined restricted fee and United States trust land in Cibola, Valencia, Bernalillo, and Sandoval counties. It includes the six villages of Encinal, Laguna, Mesita, Paguete, Paraje, and Seama.

31. As of 2020, there are approximately 4,800 members of the Laguna Pueblo within the reservation boundaries, and there are about 8,900 total enrolled members.

32. The Pueblo of Laguna is located within both the Rio Puerco and Rio San José watersheds. The Rio Paguete also runs through the Pueblo. Each of these three rivers is ephemeral or intermittent.

33. The people of Laguna have been residing within the watersheds of the Rio Puerco and the San José River and using water from both rivers for irrigation and domestic purposes since before European contact.

34. Water is essential to Laguna beliefs, cultural practices, ceremonies, and daily activities. Members of the Pueblo of Laguna consume water directly from the rivers as part of domestic uses and for ceremonial practices.

35. Members of the Pueblo of Laguna are directly affected by upstream water activities that occur beyond the exterior boundaries of the Pueblo and on federal lands.

36. Ephemeral and intermittent streams are a significant source of surface water for the Pueblo of Laguna.

37. The Pueblo of Laguna contains approximately 1,795 miles of linear streams. Under the 2015 Clean Water Rule, all 1,795 stream miles within the Pueblo were considered jurisdictional waters and were protected under the CWA. The 2020 Navigable Waters Rule will remove 79% to 97% of stream miles within the Pueblo from protections under CWA jurisdiction.

38. The Pueblo of Laguna was granted “Treatment in a similar manner as States” (“TAS”) status by the EPA for three CWA programs under Section 518(e) of the Act. The Pueblo of Laguna has received TAS status to participate in the Section 106 pollution control grant program, the Section 303(c) water quality standards program, and the Section 401 water quality certification program.

39. The Pueblo of Laguna has obtained TAS, federally recognized water quality standards, and section 401 certification authority, but must rely on the Agencies and their expertise for permitting and enforcing CWA requirements. These requirements include permit conditions under the National Pollutant Discharge Elimination System (“NPDES”) and section 404 dredge-and-fill programs to help protect the Pueblo’s water.

40. The department responsible for water quality at the Pueblo of Laguna consists of one full-time Surface Water Quality Specialist and one part-time employee who assists the Surface Water Quality Specialist with the water quality monitoring program.

41. The Pueblo of Laguna has relied on the protections of the 2015 Clean Water Rule to protect its water quality standards from degradation by upstream dischargers such as the City of Grants, and the Roca Honda, L-Bar, Homestake, Rio Grande Resources Mount Taylor, and Bluewater uranium mines. The Lee Ranch Coal Company is also located upstream of the Pueblo of Laguna.

42. According to public census data, the Pueblo of Laguna has an average annual per capita income of \$14,743, less than half of the average annual income in the United States, with a poverty rate of 32%, more than double the rate of the United States at 13.4%.

43. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule harm the Pueblo of Laguna by removing the ability to enforce federal water quality standards within nearly all its waterways. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule also harm the Pueblo of Laguna by leaving the Pueblo without the capacity or resources to administer its own water quality standards and without the legal authority under the CWA to enforce water quality standards against upstream discharges.

2. Pueblo of Jemez

44. The modern-day Pueblo of Jemez is located approximately 40 miles northwest of Albuquerque, New Mexico.

45. The Pueblo of Jemez's reservation encompasses more than 89,000 acres. The Pueblo's land includes lands held in fee with federal restrictions, thereby constituting federal trust lands, federal reservations held by the United States in trust for the Pueblo, and fee lands. These figures do not include Indian aboriginal title lands.

46. The Pueblo of Jemez is home to more than 3,400 enrolled tribal members.

47. The Pueblo of Jemez is historically linked to the Pueblo of Pecos, as they were legally merged into one Pueblo by an Act of Congress. Act of June 19, 1936, Pub. L. No. 74-693, 49 Stat. 1528 (1936) (consolidating the Pueblos of Jemez and Pecos). The Pecos culture and traditions have been preserved and incorporated with the Jemez culture, as the Pueblo of Jemez recognizes the Governor of Pecos as their second Lieutenant Governor.

48. The Pueblo of Jemez is located within the Jemez River watershed, and the Jemez River flows through the Pueblo's lands and jurisdiction. There are 57.5 stream miles located

within the Pueblo of Jemez's reservation, of which 80% are ephemeral streams and 7% intermittent streams. Additionally, there are 888.9 stream miles located outside the Pueblo's reservation lands that are part of the hydrologic systems that have supported Pueblo life for more than a millennium. These waters have a direct effect on the Pueblo and the waters within it.

49. The Pueblo of Jemez lacks the authority to regulate and protect those hydrologically connected waters outside its jurisdiction, which consist of 80% ephemeral streams and 14% intermittent streams.

50. The Pueblo of Jemez relies on federal authority under the CWA to protect the waters of the Pecos watershed that lie outside of the Pueblo's jurisdiction.

51. The Pecos watershed consists of 189,789 acres and is culturally significant to the Pueblo as ancestral homelands. The Pecos watershed consists of 309 stream miles, all of which have a direct effect on the Pueblo way of life and safety.

52. The Jemez Natural Resources Department manages water and air quality monitoring, in addition to managing the Pueblo of Jemez's forestry, range, wildlife, environmental and cultural compliance, farm services, and overseeing the irrigation system. A department of 22 full-time employees plus a tribal Youth Conservation Corps manages this program.

53. According to Jemez core beliefs, water is considered the key to life. Throughout time, water has been the greatest predictor of villages, farms, commerce, and other markers of human success.

54. For the Pueblo, there is a significant connection between the Jemez River and the sustainability of the Pueblo's agriculture and way of life. Given this connection, members of the

Jemez community directly consume and use water from the Jemez River and other streams on and off the reservation as part of daily life and ceremonial practices.

55. These streams continue to have historic, spiritual, and cultural significance to the Pueblo, and Pueblo members continue to visit and use these waters for ceremonial purposes, including spiritual purposes, which require that a high level of water quality be maintained.

56. The Pueblo of Jemez currently receives two grants annually from the EPA. One grant is the General Assistance Program that the Pueblo receives because of its TAS status. It also receive a water quality grant to fund the water quality work that includes sampling, written sampling programs, and documentation of best practices.

57. According to public census data, the Pueblo of Jemez has an average annual per capita income of \$15,538, about half the per capita income in Albuquerque, New Mexico. Jemez Pueblo has a poverty rate of 24.8%, about 1.5 times the rate of Albuquerque at 16.2%.

58. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule harm the Pueblo of Jemez by removing its authority to enforce federal water quality standards within waterbodies on and off Pueblo lands that are critical to Pueblo agriculture, culture, and religion. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule also harm the Pueblo of Jemez by leaving the Pueblo without the capacity or resources to administer its own water quality standards and without the legal authority under the CWA to enforce water quality standards against upstream discharges.

B. Government Defendants

59. Defendant Michael S. Regan is the Administrator of the EPA, and as such is charged with the primary duties and responsibilities of the United States and the EPA, including

as trustee and fiduciary regarding protection of clean air, land, and water under EPA control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

60. Defendant United States Environmental Protection Agency is the federal agency charged with primary implementation and enforcement of the CWA. Together with the Corps, EPA promulgated the 2019 Repeal Rule and 2020 Navigable Waters Rule. EPA's responsibilities include duties as trustee and fiduciary regarding protection of clean air, land, and water under EPA control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

61. Defendant Taylor N. Ferrell is the Acting Assistant Secretary of the Army for Civil Works, supervising the Corps' Civil Works program, and is trustee and fiduciary regarding implementation of the CWA and management of lands under the Corps' control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

62. Defendant United States Army Corps of Engineers is the federal agency responsible for delivering public and military engineering services, and whose Civil Works mission includes regulatory programs and permitting power. The Corps is housed within the United States Army, as part of the United States Department of Defense. Together with the EPA, the Corps promulgated the 2019 Repeal Rule and 2020 Navigable Waters Rule. The Corps' responsibilities include those as trustee and fiduciary regarding protection of clean air, land, and water under the Corps' control or responsibility to which federally recognized Indian tribes have rights, including Plaintiff Pueblos.

IV. STATUTORY AND REGULATORY BACKGROUND

A. Federal Government Trust Obligations

63. The United States trust responsibility is one of the oldest and most foundational doctrines of federal Indian law. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831) (describing Indigenous tribes as “domestic dependent nations”); see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (rejecting the State of Georgia’s claim of jurisdiction over the Cherokee Nation and re-affirming the federal government’s responsibility to protect the tribes); *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (“[T]he legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes . . .”).

64. The United States trust responsibility entails recognizing and protecting tribal lands, assets, and resources, including the water that flows over and through tribal lands, and the natural resources that depend on that water. See *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (relying on “the undisputed existence of a general trust relationship between the United States and the Indian people.”). The Supreme Court reasoned in *Mitchell*, a case involving the Bureau of Indian Affairs’ control over a tribe’s timber resources, that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.” *Id.* at 225²; cf. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed.

² Further, the Court stated “where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.” 463 U.S. at 225 (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).

Reg. 9223 (Mar. 12, 1990) (the Department of the Interior’s express recognition that “Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”).

65. In 1913, the United States Supreme Court held that Pueblos are tribes for purposes of federal jurisdiction, and Congress holds the power to “enact laws for the benefit and protection of [Pueblo] Indians as a dependent people.” *Sandoval*, 231 U.S. at 48.

66. As dependent Indian communities, Pueblos are considered Indian Country for which the United States has a “duty of exercising a fostering care and protection.” *Id.* at 46; *see also* 18 U.S.C. § 1151.

67. The Tenth Circuit has acknowledged the United States trust responsibility to the Pueblos. *Aamodt I*, 537 F.2d at 1111 (“Under *Sandoval* . . . , the United States has treated the Pueblos like other Indians. It is their guardian and trustee.”).

68. The United States has recognized its trust responsibility to protect Pueblo water resources in the recent settlement involving the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque. *See* Claims Resolution Act of 2010, Aamodt Litigation Settlement Act, Pub. L. No. 111-291, § 613(c), 124 Stat. 3064, 3141–42 (2010).

69. In addition, Congress recognized and preserved the priority of Pueblos’ water rights in Section 9 of the Pueblo Lands Act of 1933, 48 Stat. 108.

70. It is the duty of the EPA to “restore and maintain the . . . integrity of the Nation’s waters.” 33 U.S.C. § 1251(a), (d). The Pueblos’ water resources necessarily entail the right to clean water for domestic and ceremonial uses. *Cf.*, *United States v. Washington*, 853 F.3d 946, 965 (9th Cir. 2017) (holding that the State of Washington’s construction of culverts blocking

streams necessary for salmon habitat violated tribes' treaty rights because "the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish.").

71. Under executive branch policies relating to the trust duty, executive agencies have a duty to meaningfully consult with tribes, consider how agency actions affect tribal rights and resources, and respect tribal self-governance and sovereignty when taking actions that have tribal implications. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 9, 2000); Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009) ("executive departments and agencies (agencies) [sic] are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications"); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021) (President Biden recognizing the policy announced in Executive Order 13,175 and continuing commitment to "honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities.").

72. Executive Order 13,175 requires agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." 65 Fed. Reg. at 67,250.

73. These high standards of conduct apply to all executive departments, not just agencies with a "special statutory responsibilit[y]," such as the Bureau of Indian Affairs. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 225 (1982 ed.)).

74. The federal government's trust duty and the policies of the Agencies relating to the trust duty require that the Agencies consider how their rulemakings impact tribal rights and resources. *See Nw. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996) (stating that the federal trust obligation imposes a fiduciary duty on “any government action” relating to Indian tribes) (citing *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981)); *HRI, Inc.*, 198 F.3d at 1245.

75. The EPA has assumed a trust responsibility to Indian tribes as articulated in the agency's own official policies and procedures. In a 2019 policy statement, the EPA “reiterate[d] its recognition of the unique legal relationship with tribal governments” and “acknowledge[d] the federal government's trust responsibility to tribes.” Andrew R. Wheeler, *Envtl. Prot. Agency, Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy 1* (2019). The policy states that the “EPA works with tribes on a government-to-government basis to protect their land, air, and water.” *Id.*

76. The EPA has also developed specific consultation policies which require the EPA “to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests.” U.S. *Envtl. Prot. Agency, EPA Policy on Consultation and Coordination with Indian Tribes 1* (2011). The EPA describes consultation as “a process of meaningful communication and coordination between the EPA and tribal officials prior to the EPA taking actions or implementing decisions that may affect tribes.” *Id.*

77. The EPA policy requires four phases in the consultation process: “Identification, Notification, Input, and Follow-up.” *Id.* at 4–5.

78. The Identification Phase requires the EPA to identify “activities that *may be* appropriate for consultation” and the policy lists a number of avenues to ensure such activities are properly identified, including regular meetings with tribal partnership groups, analysis by tribal consultation advisors located in regional and national offices, and initiating an Action Development Process (“ADP”) as early as possible to ensure the results of the ADP are available to affected tribes. *Id.* at 4, 6 (emphasis in original).

79. The Notification Phase requires the EPA to “notif[y] the tribes of activities that may be appropriate for consultation.” *Id.* at 4. This notification entails direct communication with tribes and “includes sufficient information for tribal officials to make an informed decision about the desire to continue with consultation and sufficient information to understand how to provide informed input.” *Id.*

80. During the Input Phase, the “EPA coordinates with tribal officials . . . to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input.” *Id.* at 5. As “new issues arise,” the EPA “may need to undertake subsequent rounds of consultation.” *Id.*

81. During the Follow-up Phase, the EPA should “provide[] feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final action.” *Id.* The feedback “should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.” *Id.*

82. The EPA has also established an environmental policy for working with Native American tribes “to better clarify and integrate environmental justice principles in a consistent manner in the Agency’s work with federally recognized tribes.” U.S. Env’tl. Prot. Agency, EPA

Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 1 (2011). The policy states that “[t]he EPA consults with federally recognized tribes and provides meaningful involvement opportunities for indigenous peoples . . . and considers the potential impact of Agency actions that may affect their human health or environmental interests.” *Id.* at 2.

83. In the policy, “meaningful involvement” is defined as: “(1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their human health or environment; (2) the public’s input can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.” *Id.* at 5.

84. This trust responsibility also extends to the Corps in the exercise of its CWA responsibilities. *Nw. Sea Farms*, 931 F. Supp. at 1519–20 (finding that the fiduciary duty extends to the Corps in permitting duties) (citing *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D. Wash. 1988)).

85. The Corps similarly states in its Tribal Consultation Policy that “[t]he trust responsibility will be honored and fulfilled” and that the Corps “will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands.” U.S. Army Corps of Eng’rs, Tribal Consultation Policy in the Regulatory Program and Related Documents, USACE Tribal Nations Community of Practice 2, 3 (2016); U.S. Army Corps of Eng’rs, Tribal Consultation Policy and Related Documents, USACE Tribal Nations Community of Practice 2, 3 (2013).

86. The federal trust duty alters the standard deference afforded to federal lawmaking. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (“the standard principles of statutory construction do not have their usual force in cases involving Indian law.”); *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”).

87. The Tenth Circuit has also held the trust duty and the Indian law canons of construction to be extended to executive agency actions. *HRI*, 198 F.3d at 1245 (“Considering this duty . . . we conclude that it is reasonable for EPA to adopt an interpretation of its regulations requiring, when lands are in dispute, presumptions in favor of Indian country status and resulting federal jurisdiction.”); *see also United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935) (holding that the federal executive is held to a strict fiduciary standard in relations with Indian tribes and is to take “all appropriate measures for protecting and advancing” those tribes’ interests).

88. The canons of construction regarding federal Indian law apply even when an executive official is implementing a statute of general applicability. *HRI*, 198 F.3d at 1246–47 (stating that an EPA decision “made within the framework of administering the [Safe Drinking Water Act], implicates the core federal trust responsibilities of administering—and safeguarding—Indian lands.”). In reaching its holding, the Tenth Circuit relied on Felix Cohen’s articulation of this trust responsibility as it applies to executive agencies:

[T]he federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies—unless, of course, Congress has expressly authorized a deviation from these standards in exercise of its “plenary” power. Since the trust obligations are binding on the United States, these standards of conduct would seem

to govern all executive departments that may deal with Indians, not just those such as the Bureau of Indian Affairs which have special statutory responsibilities for Indian affairs. Moreover, in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies.

Id. at 1245 (quoting Cohen, Handbook at 225). The federal trust responsibility has been expressly acknowledged by the EPA. *See* U.S. Env'tl. Prot. Agency, EPA Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 4 (2011) (“The EPA ... acknowledges the federal government’s trust responsibility to federally recognized tribes, based on the U.S. Constitution, treaties, statutes, executive orders, and court decisions.”).

B. The Administrative Procedure Act

89. The APA establishes requirements for federal agency decision making, including the agency rulemaking process. Final agency actions, including final rules, are subject to judicial review if there is no otherwise adequate remedy in a court. 5 U.S.C. § 704.

90. An agency must publish a notice of a proposed rulemaking in the Federal Register and provide an opportunity for public participation through the submission of comments or other information. 5 U.S.C. § 553(b)–(c).

91. A rule is unlawful and must be set aside when an agency acts in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, . . . or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (C), (D).

92. As detailed in *Motor Vehicle Manufacturers Ass’n. v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 43 (1983), a rule is arbitrary and capricious if “the agency has relied

on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

93. When an agency changes or reverses a prior rule, it must “provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005)); *Renewable Fuels Ass’n v. EPA*, 948 F.3d 1206, 1255 (10th Cir. 2020).

94. While an agency need not show that a new rule is “better” than the rule it replaced, it must demonstrate that there are good reasons for the change in policy and that the change is permissible under the statute. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

95. Furthermore, when an agency’s new policy contradicts a previous policy, the agency must provide a more detailed justification for that change in position when “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* (internal citation omitted).

96. Any “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Brand X*, 545 U.S. at 981.

C. Environmental Justice

97. In 1994, President Bill Clinton signed Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. 59 Fed. Reg. 7629 (Feb. 16, 1994). As amended in 2021 by President Biden, Executive Order 12,898 remains in force today. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629–32 (Jan. 27, 2021).

98. Executive Order 12,898 requires that each federal agency “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” 59 Fed. Reg. 7629. By its terms, Executive Order 12,898 also applies expressly to Indian tribes such as the Pueblo of Laguna and Pueblo of Jemez. § 6-606 (“Each Federal agency responsibility set forth under this order shall apply equally to Native American programs.”).

99. Since 1994, in order to ensure compliance with Executive Order 12,898, administrative and judicial courts have required agencies to conduct an environmental justice analysis. For example, in one citizen challenge to proposed oil drilling in the Arctic Ocean, the EPA Environmental Appeals Board (“EAB”) remanded permits under the CWA, directing the EPA “to reconsider the adequacy of its environmental justice analysis.” *In re Shell Offshore, Inc.*, 15 E.A.D. 103, 157 (EAB 2010). In a citizen challenge to an airport runway expansion near Boston, the D.C. Circuit concluded that the “environmental justice analysis in [FFA’s] [National Environmental Policy Act] evaluation [was] properly subject to ‘arbitrary and capricious’ review under the APA.” *Cmtys. Against Runway Expansion, Inc., v. FAA*, 355 F.3d 678, 689 (D.C. Cir.

2004). In a challenge by the Standing Rock Sioux Tribe to construction of the Dakota Access Pipeline, the district court agreed with the Tribe that the Corps failed to adequately consider the environmental justice aspects of the project in question “and thus failed to take a hard look at its environmental consequences.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017). In a citizen challenge to construction of the Atlantic Coast Pipeline, the Fourth Circuit found that a state agency subject to federal oversight “fail[ed] to consider the disproportionate impact” of the project on a predominantly African-American community. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020) (observing that “environmental justice is not just a box to be checked,” the court vacated the state air permit and remanded for further proceedings).

100. As the district court noted in *Standing Rock*, “[t]he purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations.” 255 F. Supp. 3d at 140 (internal citations omitted). As indicated in the cases cited above, administrative and judicial courts have required environmental justice analyses from federal agencies operating under different federal statutes, including the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* Under NEPA, for example, while agencies are not required to take “the course of action that best serves environmental justice,” they are required “to take a ‘hard look’ at environmental justice issues.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 102 (D.D.C. 2017) (quoting *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017)).

101. In *Standing Rock*, the district court explained that “[t]he National Environmental Policy Act . . . has two aims: it ‘places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,’ and ‘it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking [sic] process.’” 255 F. Supp. 3d at 112 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). In evaluating the impact a proposed action might have, an agency is to consider, along with other factors, “the degree to which the action ‘may cause loss or destruction of significant . . . cultural[] or historical resources.’” 255 F. Supp. 3d at 123 (citing 40 C.F.R. § 1508.27).

102. An assessment of the impact on cultural and historical resources should be considered a vital part of an environmental justice analysis. An agency, such as the EPA, should “recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action.” Council of Env'tl. Quality, Executive Office of the President, *Environmental Justice Guidance Under the National Environmental Policy Act* (1997).

103. The EPA’s own guidance on environmental justice states that the “EPA should be particularly careful not to diminish tribal resources, including cultural and natural resources and treaty rights, without tribal concurrence and the EPA should ensure the protection of such resources from environmental harm.” U.S. Env'tl. Prot. Agency, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (1998).

104. Removing or limiting access to clean water for both Pueblos’ populations directly threatens to diminish tribal resources and adversely impact their cultural practices.

105. Both Pueblos use water from local sources, both on and off their reservations, for domestic, ceremonial, and cultural practices.

106. The Agencies failed to recognize the interrelated cultural factors that amplify the environmental effects of narrowing the definition of “waters of the United States,” leaving unprotected hundreds of miles of ephemeral streams and wetlands that are essential to domestic uses and ceremonial and cultural practices.

107. The Agencies additionally failed to consider the adverse and disproportionate effects on the populations of the Pueblos by promulgating the 2019 Repeal Rule and the 2020 Navigable Waters Rule in direct violation of executive direction regarding environmental justice and their own stated policies on incorporating environmental justice concerns into the NEPA process.

108. Loss of protection for waters used by the Pueblos for domestic, ceremonial, and cultural practices is a direct impact from the EPA’s rulemaking, and the cultural importance of using water from ephemeral streams and wetlands greatly amplifies the effects of the Agencies’ new rule.

109. The EPA arbitrarily failed to conduct an environmental justice analysis, falsely—and illogically—asserting that one was not required “because there is no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12,898.” Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328). Had the EPA conducted an environmental justice analysis to support the 2020 Navigable Waters Rule, the agency would have learned and

understood how the narrowed definition of “waters of the United States” disproportionately affects the Pueblos.

110. “Environmental justice is not just a box to be checked,” *Friends of Buckingham*, 947 F.3d at 92. Addressing the issue of environmental justice would have and should have informed the Agencies’ decision-making before they disregarded concerns expressed previously on behalf of the Pueblos. In particular, in promulgating the 2020 Navigable Waters Rule, the Agencies ignored the oral and written comments of the Pueblos opposing the proposed rule that would narrow the scope of “Waters of the United States.” *See infra* ¶¶ 173–78. Accordingly, the Agencies failed to meet their obligations under Executive Order 12,898 and subsequent case law for achieving the ends of environmental justice.

D. Clean Water Act

1. Legislative Intent and Structure of the Clean Water Act

111. In 1972, Congress enacted the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

112. Congress intended the CWA to be an “all-encompassing program of water pollution regulation” that would remedy the prior “inadequate” legal framework that left water pollution control primarily to states. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 319 n.10 (1981); S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3669, 3674.

113. To achieve that aim of an all-encompassing program, Congress incorporated into the statute “a broad, systemic view of the goal of maintaining and improving water quality” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

114. Congress chose to apply the protections of the CWA broadly because it recognized that “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” *Id.* at 133 (citing S. Rep. No. 92–414, *as reprinted in* 1972 U.S.C.C.A.N. at 3742).

115. The CWA’s “definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.” *Riverside Bayview*, 474 U.S. at 133.

116. The CWA expanded federal jurisdiction over water quality beyond the “traditional navigable waters” that had been the subject of prior, much weaker legal protections. Although the key substantive provisions of the CWA continue to apply to “navigable waters,” 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), Congress defined the term in 1972 to more expansively mean “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

117. Congress also included in the CWA another provision that made clear that the term “navigable waters” applied to “waters . . . other than those waters which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce” 33 U.S.C. § 1344(g)(1). This provision shows “that the Act’s term ‘navigable waters’ includes something more than traditional navigable waters.” *Rapanos*, 547 U.S. at 731.

118. The Conference Report from the passage of the CWA makes clear that Congress intended a broad reach through this definition: “The conferees fully intend that the term ‘navigable waters’ be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes.” S. Rep. No. 92-1236, at 144 (1972) (Conf. Report), *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3822

(emphasis added); *see also Hubenka*, 438 F.3d at 1033 (stating that the CWA was intended “to cover, as much as possible, all waters of the United States instead of just some.”).

119. The CWA effects its comprehensive scheme of controlling water pollution at its source by prohibiting the discharge of any pollution into the “waters of the United States” without a permit. *See* 33 U.S.C. §§ 1311, 1342.

120. The CWA establishes two broad types of permitting programs.

121. Section 402 establishes the NPDES permitting program, which is administered by the EPA for the discharge of pollutants from point sources. 33 U.S.C. § 1342.

122. The CWA allows the EPA to delegate the operation of this program to states and tribes. 33 U.S.C. § 1344(g)(1); 33 U.S.C. § 1342(b); 40 C.F.R. § 123.33(a)–(b). Most states have received authority to administer the NPDES permitting program in their jurisdictions. There are only a few states that do not have this authority. For those states, including New Mexico and the tribes within its borders, the EPA administers this program.

123. The second major permitting program is the Section 404 program, which establishes a permit process for the discharge of dredge-and-fill materials into “waters of the United States,” administered by the Corps. 33 U.S.C. § 1344. As with Section 402, the CWA allows the EPA to delegate certain parts of Section 404 operation to states and tribes. However, such delegations are rare. To date, the Corps administers the Section 404 program for all but three states and for all tribes.

124. In addition, Section 303 of the CWA requires states to adopt water quality standards that meet EPA minimum guidelines, or, if states fail to adopt adequate standards, to have the EPA set standards for the state. 33 U.S.C. § 1311. Section 401 in turn prohibits a federal

agency from permitting or licensing a discharge into “waters of the United States” unless the state (or tribe) where the discharge originates issues a certification that the permit or license will comply with applicable water quality requirements under Section 303 or waives its right to do so. 33 U.S.C. § 1341.

125. Other sections of the CWA establish minimum federal requirements for pollution controls that together establish a minimum level of nationwide pollution protection, including requirements for technology-based standards that must be incorporated into NPDES permits. *See* 33 U.S.C. §§ 301, 302, 304, 306, 307, 510(1); 33 U.S.C. §§ 1311, 1312, 1314, 1316, 1317, 1370(1).

2. Treating Tribes in a Similar Manner as States Under the CWA

126. Federally recognized eligible tribes may apply to the EPA for “treatment in a similar manner as a state” status to implement particular CWA regulatory programs. 33 U.S.C. § 1377.

127. Tribes that receive TAS have the option to administer CWA regulatory programs that would otherwise be administered by the EPA, which include Section 303(c) water quality standards, Section 303(d) impaired water listing and total maximum daily loads programs, Section 401 water quality certification programs, Section 404 dredge-and-fill permitting, Section 402 NPDES programs, and Section 405 sewage sludge management programs. 40 C.F.R. §§ 123.32, 130.16, 131.8, 233.60, 501.23.

128. Tribes are not required to obtain or apply for TAS status. Tribes that choose to apply must go through a rigorous application process, which includes providing information on

the tribe's substantial capacity and technical experience to administer and enforce CWA provisions. 40 C.F.R. §§ 123.32, 130.16, 131.8, 501.23.

129. Nationwide, at least 70 tribes have received TAS status to establish Section 303(c) water quality standards, administer Section 401 water quality certifications, or to administer both programs. No tribes have received TAS authority for Section 402 NPDES permitting, Section 404 dredge-and-fill permitting programs, or Section 303(d) impaired water listings and total maximum daily loads programs.

130. The Pueblo of Laguna was granted TAS status for Section 303(c) and 401 programs.

131. The Pueblo of Laguna and the Pueblo of Jemez have applied for and received federal Clean Water Act grants under Section 106 for administering water quality programs.

132. Despite the TAS designation, the Pueblo of Laguna and the Pueblo of Jemez rely heavily on the EPA and the Corps to implement the majority of CWA protections within and around their boundaries.

3. Prior Regulations and Case Law on “Waters of the United States”

133. Beginning with rulemakings in 1975, the Agencies have interpreted the “waters of the United States” to apply to “not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non[-]navigable intrastate waters whose use or misuse could affect interstate commerce.” *Riverside Bayview*, 474 U.S. at 124; Permits for Activities in Navigable or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975).

134. The Supreme Court has on several occasions issued decisions interpreting the permissible scope of “waters of the United States.”

135. In *Riverside Bayview*, a unanimous Court found that the Corps' assertion of CWA jurisdiction over wetlands adjacent to open waters was a permissible interpretation of "waters of the United States" given the language, policies, and history of the CWA. 474 U.S. at 139.

136. In *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987), the Court found that the CWA preempted state common law where that law would require "standards of effluent control . . . incompatible with those established" by the CWA. The Court found field preemption in part because of Congress' intent to establish a "comprehensive" program that "applies to all point sources and virtually all bodies of water." *Id.* at 492.

137. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166 (2001) (hereinafter *SWANCC*), the Supreme Court held that "isolated," non-navigable intrastate ponds used by migratory birds were not permissibly classified as "waters of the United States." The Court explained that in contrast to the isolated ponds at issue, the finding of jurisdiction over wetlands in *Riverside Bayview* was predicated on "the significant nexus between the wetlands and 'navigable waters.'" *SWANCC* at 167.

138. In 2006, the Supreme Court considered the permissible interpretation of "waters of the United States" in a plurality decision in *Rapanos*, 547 U.S. at 715–16.

139. 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.

140. 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.”

141. In response to *Rapanos*, the Corps and the EPA issued a guidance letter clarifying how they would address CWA jurisdiction in light of the Supreme Court’s decision. *Envtl. Prot. Agency & U.S. Dep’t of Army, Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. & Carabell v. U.S. (2008)*. In the guidance, the EPA and the Corps stated that they would assert jurisdiction over waters and wetlands in a manner “consistent with the *Rapanos* decision.” *Id.* at 4.

142. The Agencies’ post-*Rapanos* Guidance Memo “identifies those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the *Rapanos* decision.” *Id.* at 4. Accordingly, the Agencies determined that they would apply jurisdiction to “non-navigable tributaries that are not relatively permanent” and “certain adjacent wetlands” on a case-by-case basis by applying the significant nexus test. *Id.* at 8.

143. The Agencies would “assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.” *Id.* at 8.

144. Prior to the Supreme Court’s *Rapanos* decision, the Tenth Circuit followed a significant nexus test in *Hubenka*. 438 F.3d 1026, 1031, 1034 (citing *United States v. Rapanos*,

339 F.3d 447, 452) (6th Cir. 2003); *Headwaters Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001)).

145. After *Rapanos* was decided by the Supreme Court, several federal appellate courts interpreted and applied Justice Kennedy’s significant nexus test, alone or in unison, to determine whether waterbodies were under CWA jurisdiction. *See, e.g., Gerke Excavating, Inc.*, 464 F.3d 723, 725 (the Seventh Circuit holding that the significant nexus test “must govern the further stages of [the] litigation. . . .”); *N. Cal. River Watch*, 496 F.3d 993, 999 (the Ninth Circuit holding that Justice Kennedy’s concurrence “is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases.”); *Robison*, 521 F.3d 1319, 1322 (the Eleventh Circuit affirming application of the significant nexus test) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) (for the proposition that the courts must determine “which of the positions taken by the *Rapanos* Justices *concurring in the judgment* is the ‘narrowest,’ i.e., the least ‘far reaching.’”) (emphasis in original)).

4. 2015 Clean Water Rule

146. The Agencies promulgated the Clean Water Rule in 2015 to help regulated entities better understand the scope of “waters of the United States,” protect the nation’s public health and aquatic resources, and to provide predictability as to where the CWA regulatory programs would be implemented. 80 Fed. Reg. at 37,054.

147. In the rule, the Agencies articulated a definition of “waters of the United States” based on the significant nexus test and the CWA’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* at 37,056.

148. The Agencies based their jurisdictional determination on an analysis of the best available peer-reviewed science to determine the “strength of . . . chemical, physical, and biological” connectivity between various waters and wetlands and navigable waters in order to demonstrate the “nexus” between such waters. *Id.* at 37,062.

149. The EPA’s Office of Research and Development prepared a comprehensive report that formed the technical basis for the 2015 Clean Water Rule, 80 Fed. Reg. at 37,057. *Envtl. Prot. Agency, Connectivity of Streams and Wetlands To Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (2015) (hereinafter Science Report). *See Env’tl. Prot. Agency & U.S. Dep’t of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (2015). The Science Report, which was subject to a “comprehensive technical review,” synthesized approximately 1,200 peer-reviewed studies, papers, agency guidance and regulatory determination manuals, and federal and state reports that address the connectivity of aquatic resources and effects on downstream waters and reached major conclusions as to the significant nexus between waterbodies and navigable waters. 80 Fed. Reg. at 37,057, 37,062.

150. The 2015 Clean Water Rule includes four waters as "jurisdictional by rule" including traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." 80 Fed. Reg. at 37,058. The 2015 Clean Water Rule also identified two categories of waters that required case-by-case analysis and waters that were categorically excluded from the rule. *Id.*

151. Based on the scientific analysis, the 2015 Clean Water Rule states that to meet the definition of “tributary” a water must both “flow, either directly or through another water, to a

traditional navigable water, interstate water, or the territorial seas” and possess a “bed and banks and an indicator of ordinary high-water mark.” *Id.* at 37,076.

152. Critically, as long as these criteria were met, the Agencies determined that the flow in a tributary could be “perennial, intermittent, or ephemeral,” as the science showed that all of these types of tributaries “are very effective at transporting pollutants downstream.” *Id.*

5. 2019 Repeal Rule

153. On February 28, 2017, President Trump issued Executive Order 13,778, which directed the Agencies to “repeal the 2015 Clean Water Act and promulgate a rule interpreting the term ‘navigable waters’ in a ‘manner consistent with the opinion of Justice Antonin Scalia in *Rapanos.*’” Exec. Order No. 13,778, 82 Fed. Reg. 12,497.

154. On July 27, 2017, the Agencies proposed to repeal the 2015 Clean Water Rule and revert to and recodify the previous regulation and guidance. Definition of “Waters of the United States”-Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,903 (July 27, 2017).

155. On October 22, 2019, the Agencies published the 2019 Repeal Rule which rescinded the 2015 Clean Water Rule and readopted the prior regulations dating back to 1986. 84 Fed. Reg. 56,626. The Agencies stated that they were repealing the 2015 Clean Water Rule in large part because the rule “misapplied and inappropriately expanded the significant nexus standard.” *Id.* at 56,640.

156. In adopting the 2019 Repeal Rule, the Agencies provided no explanation, analysis, discussion, or refutation of the Science Report or any of the other research and science in the administrative record that were relied on to establish which waters met the significant nexus test in the 2015 Clean Water Rule. Nor did the Agencies present any new science that

would support returning to the pre-2015 regulatory definition of “waters of the United States” under the significant nexus standard.

157. In adopting the 2019 Repeal Rule, the Agencies failed to consider, evaluate, or analyze the effects of the repeal on Pueblos or their water resources.

6. 2020 Navigable Waters Rule

158. The Agencies proposed the 2020 Navigable Waters Rule on February 14, 2019. 84 Fed. Reg. 4154. The Agencies promulgated the final rule on April 21, 2020. 85 Fed. Reg. 22,250.

159. Pursuant to President Trump’s Executive Order 13,778, the 2020 Navigable Waters Rule adopts a narrow definition of what waterbodies constitute “waters of the United States” that is “consistent with the opinion of Justice Antonin Scalia” in the *Rapanos* decision. 82 Fed. Reg. 12,497.

160. The 2020 Navigable Waters Rule interprets “the waters” to “encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.” 85 Fed. Reg. at 22,273.

161. Despite making clear that the rule’s interpretation of the “waters of the United States” is based on Justice Scalia’s *Rapanos* opinion, the Agencies stated that their jurisdictional determinations give effect to some commonalities between the Scalia opinion and Justice Kennedy’s concurrence. However, the Agencies did not rely on the significant nexus test articulated by Justice Kennedy to determine the jurisdictional status of different waters. *Id.*

162. The Agencies consider “waters of the United States” under the 2020 Navigable Waters Rule to be “(1) [t]he 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).” *Id.*

163. The Agencies did not explain the rule’s exclusion of some interstate waters and failed to consider the effects that ephemeral waters have on the physical, chemical, or biological integrity of downstream waters.

164. Under the 2020 Navigable Waters rule, waters that do not fall into its jurisdictional categories will not be considered “waters of the United States” regardless of the waterway’s significant nexus to traditionally navigable waters or other jurisdictional waters.

165. These narrow categories are limited further by their corresponding definitions. For example, a tributary, as defined by the 2020 Navigable Waters Rule, must be “perennial or intermittent in a typical year.” *Id.* at 22,339. This definition of tributary eliminates ephemeral streams from federal CWA jurisdiction, which the Agencies made explicit in their Final Rule: “[T]he final rule specifically clarifies that waters of the United States do not include . . . ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools” *Id.* at 22,251.

166. The Agencies failed to address or consider the findings of the Science Report regarding the connectivity and effect of tributaries on downstream waters.

167. Preliminary feedback from the EPA’s Science Advisory Board (“SAB”) was provided to the Agencies on October 16, 2019 and reaffirmed that the Science Report utilized in

the 2015 Clean Water Rule was sound science, warranting respect as the best science available with regards to the connectivity of waterbodies. The SAB criticized the 2020 Navigable Waters Rule as “in conflict with established science, the existing [“waters of the United States”] rule developed based on established science and the objectives of the Clean Water Act.” Env’tl. Prot. Agency, Sci. Advisory Bd., Letter of the Science Advisory Board to EPA Administrator, Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 1 (2019).

168. EPA’s SAB issued final comments on the proposed rule, concluding that it “decreases protection for our Nation’s waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining ‘the chemical, physical and biological integrity’ of these waters.” Env’tl. Prot. Agency, Sci. Advisory Bd., Letter of the Science Advisory Board to EPA Administrator, Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 2 (2020).

169. The final SAB comments specifically criticized the rule for excluding ephemeral streams from CWA jurisdiction. “[T]he proposed definition of [“waters of the United States”] excludes ground water, *ephemeral streams*, and wetlands which connect to navigable waters below the surface. The proposed Rule does not present new science to support this definition, thus the SAB finds that the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health.” *Id.* at 4 (emphasis added).

170. The Agencies finalized the 2020 Navigable Waters Rule before considering the final comments of the SAB.

171. In response to the preliminary comments of the SAB, the Agencies acknowledged that only “certain aspects” of their jurisdictional determinations were “informed” by the Science Report. Instead, they posited that “[s]cience cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the CWA.” 85 Fed. Reg. at 22,261.

172. Pueblo of Laguna staff made oral comments on the proposed 2020 Navigable Waters Rule at the Tribal Co-Regulators Forum in Albuquerque, New Mexico, on March 27, 2019.

173. The Pueblo of Laguna provided written comments regarding the proposed 2020 Navigable Waters Rule. Pueblo of Laguna, Comment Letter on Proposed Revised Definition of “Waters of the United States,” Comment ID: EPA-HQ-OW-2018-0149-4799 (Apr. 14, 2019).

174. In its comments, the Pueblo of Laguna emphasized that the proposed 2020 Navigable Waters Rule posed an imminent threat to tribes, failed to honor trust obligations, and would result in sources of water no longer being considered or protected by the CWA. The Pueblo of Laguna went on to comment that the rule would create significant gaps of protection from pollution in their surface water that would result in pollution that will generate consequences for generations to come. *Id.*

175. The Pueblo of Jemez also submitted written comments on the proposed 2020 Navigable Waters Rule. Pueblo of Jemez, Comment Letter on Proposed Revised Definition of “Waters of the United States,” Comment ID: EPA-HQ-OW-2018-0149-4565 (Apr. 15, 2019).

176. In its comments, the Pueblo of Jemez warned that the proposed 2020 Navigable Waters Rule did not adequately consider the complexity of the drainage system in the arid

southwest. The proposed rule would exclude Pueblo of Jemez waters from protection under the CWA, and also much of the surface water in the Southwest. The Pueblo of Jemez commented that it lacks the resources to fill the gap created by the proposed 2020 Navigable Waters Rule. *Id.*

177. In addition, on April 19, 2019, the All Pueblo Council of Governors (“APCG”), of which the Pueblo of Jemez and Pueblo of Laguna are members, provided written comments on the proposed 2020 Navigable Waters Rule. All Pueblo Council of Governors, Comment Letter on Proposed Revised Definition of “Waters of the United States,” Comment ID: EPA-HQ-OW-2018-0149-5107 (Apr. 15, 2019).

178. In its comments, the APCG warned that the proposed 2020 Navigable Waters Rule weakens CWA protections for tribal waters and poses an imminent threat to tribal communities. The APCG went on to comment that the proposed 2020 Navigable Waters Rule created enforcement gaps and failed to protect tribal lands under the CWA, which would result in pollution and negative consequences for Pueblo generations to come. *Id.*

E. The 2019 Repeal Rule and 2020 Navigable Waters Rule Harm the Pueblo of Laguna and the Pueblo of Jemez

179. The 2019 Repeal Rule and 2020 Navigable Waters Rule harm the sovereign, governmental, environmental, economic, and proprietary interests of the Pueblos.

1. Tribal Water Resources Will No Longer be Protected from Pollution by Federal Standards, and Tribal Governments will not Have the Capacity to Provide the Same Level of Protection

180. The Pueblo of Laguna is located downstream of the City of Grants, the Roca Honda, L-Bar, Homestake, Rio Grande Resources Mount Taylor mine, and Bluewater uranium mines, and the Lee Ranch Coal Mine. Pollution discharged by upstream entities pollutes multiple waterbodies on the Pueblo of Laguna.

181. The Pueblo of Jemez is located downstream of the Village of Jemez Springs, Cañon, Ponderosa, Soda Dam, pumice mines, and thousands of dispersed recreational camp sites. The South Pit Pumice Mine, within the Jemez watershed, is currently proposed for expansion, posing an imminent and increasing threat to downstream water quality of the Pueblo.

182. The 2019 Repeal Rule and the 2020 Navigable Waters Rule narrow the scope of the CWA to waters that flow constantly and explicitly excludes ephemeral waters.

183. Most of the waterways in the Pueblos are ephemeral, which means they lack continuous surface flow of water.

184. The Pueblos use ephemeral waters for domestic, agricultural, cultural, and religious purposes.

185. The Pueblos rely on the protections of the CWA, including federal enforcement of CWA standards and technical assistance, to protect their water resources, including ephemeral waters. They also have relied on the “significant nexus” test and the 2015 Clean Water Rule’s jurisdictional determinations to protect these waters.

186. The 2019 Repeal Rule and 2020 Navigable Waters Rule are harming and will imminently harm the Pueblo of Laguna and the Pueblo of Jemez and their members because they have stripped CWA protections from many waterbodies within the respective Pueblos, from waterways upstream of the Pueblos’ reservation borders, and from waterways that are on federal lands to which the Pueblos’ have ongoing and longstanding legal and cultural connections. Hundreds of miles of ephemeral streams that support the Pueblos’ agriculture, recreation, and cultural and spiritual practice are now at imminent risk of degradation and destruction without federal protection.

187. The Pueblo of Laguna will be and already is subjected to actual harms because it is no longer able to exercise its CWA Section 401 right to certify certain upstream dischargers as meeting its Section 303 water quality standards for those waterbodies that are now stripped of their CWA jurisdiction. For example, the Pueblo of Laguna previously reviewed an upstream NPDES permit through its Section 401 TAS program.

188. Both Pueblos will be and already are subjected to actual harms because they no longer can rely on the Agencies to enforce or provide technical assistance for the protection of waterbodies that are no longer jurisdictional. The Pueblo of Jemez relies on the EPA and the Corps to enforce and administer all water pollution protection programs on its lands. The Pueblo of Laguna relies on the EPA and the Corps to enforce and administer all water pollution programs on its lands except for the Section 303(c) and 401 programs for which it has TAS status. Even for these programs, it relies on federal technical assistance.

189. Although the Agencies suggested that tribes and states now have the advantage of creating their own water pollution protection programs for non-jurisdictional waters, the Pueblos do not have the resources and technical capacity to take over fully the federal role in protecting water quality under the CWA, and the Agencies have acknowledged this contradiction. 85 Fed. Reg. at 22,336–37.

190. To the extent that the Pueblos do attempt to create tribal water pollution control programs for non-jurisdictional waters, they will be economically harmed because they will need to expend scarce resources on these programs. The Pueblos have fewer resources than states to implement their own comprehensive water quality programs.

191. Further, any Pueblo efforts to initiate tribal water pollution control programs for non-jurisdictional waters will take significant time, during which the waters of both Pueblos will be left unprotected and in jeopardy.

192. These harms are directly traceable to the actions of the Agencies in promulgating a narrower, unscientific definition of “waters of the United States,” contrary to the purpose of the CWA.

193. The imminent and actual harms suffered by the Pueblos will be directly redressed by a decision from this court to set aside and vacate the 2019 Repeal Rule and the 2020 Navigable Waters Rule.

2. The Agencies’ Failure to Meaningfully Consult with the Pueblos Regarding Concerns with the 2019 Repeal Rule and the 2020 Navigable Waters Rule is a Violation of the Federal Trust Duty and Adversely Impacts Tribal Sovereignty

194. The Pueblos are federally recognized tribes. 86 Fed. Reg. at 7556.

195. In recognition of the trust duty, federal government policy—as stated by Executive Order and internal agency policy—is to engage in meaningful government-to-government consultation prior to taking significant actions that may affect tribal interests. *See* U.S. Env’tl. Prot. Agency, EPA Policy on Consultation and Coordination with Indian Tribes 1 (2011); Wheeler, Reaffirmation of the U.S. Environmental Protection Agency’s Indian Policy 1; U.S. Army Corps of Eng’rs, Tribal Consultation Policy and Related Documents, USACE Tribal Nations Community of Practice; Exec. Order No. 13,175, 65 Fed. Reg. 67,249.

196. The Agencies failed to follow their tribal consultation policies requiring regular and meaningful government-to-government communication and coordination. Rather, tribes were offered listening sessions, where EPA gave Tribes’ the opportunity to express concerns

about the rollback of protected waters. These listening sessions did not allow for any response or dialogue from the EPA, nor did the EPA provide a consolidated version of the comments provided at these sessions to the tribes afterwards.

197. The EPA failed to “seek out and facilitate” meaningful involvement from tribal leaders. *See* U.S. Env'tl. Prot. Agency, EPA Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 5.

198. The Agencies conducted no leader-to-leader meetings with the Pueblo of Jemez or the Pueblo of Laguna, either in person, or via telephone or video conferencing. *See* U.S. Env'tl. Prot. Agency, Summary Report of Tribal Consultation and Engagement for the Navigable Waters Protection Rule 22–27.

199. The EPA did not follow its own policy of providing feedback to senior tribal officials of either Pueblo explaining how their input was considered in the rulemaking. U.S. Env'tl. Prot. Agency, EPA Policy on Consultation and Coordination with Indian Tribes 4, 6.

200. Despite the Agencies’ establishing tribal consultation policies for the purpose of respecting tribal sovereignty through government-to-government consultation, the Agencies have ignored the Pueblos’ concerns about the 2019 Proposed Rule and 2020 Navigable Waters Rule.

Id.

201. Contrary to their tribal consultation policies, the Agencies actually undermined tribal sovereignty by failing to consider the economic and administrative impact on the Pueblos’ implementation of water resource protections, disregarding the reality that “many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to

expand programs” Instead, the Agencies relied on the flimsy assertion that the rule “preserves tribal authority.” 85 Fed. Reg. at 22,336–37.

202. The Agencies promulgated the 2019 Repeal Rule and the 2020 Navigable Waters Rule without due respect for Pueblo sovereignty by undermining the Pueblos’ ability to protect waters within their boundaries and to gain enforcement of water standards on upstream users. The Agencies failed to consult with the Pueblos on a government-to-government basis and in accordance with their own policies and failed to address the gap in protection that the 2019 and 2020 rules create. By only providing generalized presentations and “listening sessions” but no direct consultation, the Agencies further undermined the Pueblos’ sovereignty by failing to engage with or meaningfully consult tribal leadership, or provide feedback showing how they took into account the Pueblos’ comments and concerns in the final rulemaking.

F. Vacatur of a Current Rule

203. The Administrative Procedure Act provides that the reviewing court shall set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2)(A), (B), (C), (D); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

204. Vacatur is “the presumptively appropriate remedy for a violation of the APA.” *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (citing *Fed. Commc’ns Comm’n v. Nextwave Personal Commc’ns, Inc.*, 573 U.S. 293, 300 (2003)). See also *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (“We have made clear that ‘when a reviewing court determines that the agency regulations are unlawful, the

ordinary result is that the rules are vacated”) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

205. The Tenth Circuit has held that when an agency action is arbitrary and capricious, vacatur “is a common, and often appropriate form of injunctive relief granted by district courts.” *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017).

206. This Court also holds that “vacatur is the normal and presumed remedy” for violations of the Administrative Procedure Act. *N.M. Farm & Livestock Bureau v. U.S. Dep’t of Interior*, No. 15-428, slip. op., 2021 WL 275535 at *8 (D.N.M. Jan. 27, 2021).

207. Because vacatur is the normal remedy, a court is only permitted “to remand without vacating the agency’s action in limited circumstances.” *Id.* at * 5 (citing *Am. Great Lakes Ports Ass’n v. Schultz*, 962 F.3d 510, 518 (D.C. Cir. 2020)).

208. The party seeking remand without vacatur carries the burden of overcoming a presumption of vacatur. *Id.* (citing *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018)).

209. In determining whether to allow unlawful agency action to stand pending agency action on remand, this Court assesses “the seriousness of the [agency action’s] deficiencies (and thus the extent of doubt whether the agency chose correctly)” with “the disruptive consequences of an interim change that may itself be changed.” *Id.* (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (establishing the *Allied-Signal* test)).

210. This Court has recently applied the *Allied-Signal* test to determine that vacatur was the appropriate remedy for APA violations in a variety of cases. *See, e.g., N.M. Farm & Livestock Bureau*, No. 15-428, 2021 WL 275535 (employing the *Allied-Signal* test to vacate

unlawful critical habitat reduction); *N. N.M. Stockman's Ass'n v. U.S. Fish and Wildlife Serv.*, No. 18-1138, 2020 WL 6048149 (D.N.M. Oct. 13, 2020) (same); *N.M. Health Connections v. U.S. Dep't of Health and Human Serv.*, 340 F. Supp. 3d 1112 (D.N.M. 2018) (applying the *Allied-Signal* test to vacate an agency action based on erroneous assumptions).

211. Balancing the equities under the *Allied-Signal* test strongly favors remand with vacatur. The seriousness of the agency's deficiencies in the promulgation of the 2020 Navigable Waters Rule, the potential prejudice to the Pueblos if the rule were to remain in effect on remand, and the purpose of the substantive statute far outweigh any potential consequences of invalidating the agency rule. The removal of federal jurisdiction over the vast majority of the Pueblos' waters leaves them with little ability to adequately protect their waters against upstream polluters, threatening adverse effects on the health and welfare of their members.

212. The Agencies' deficiencies in promulgating the 2020 Navigable Waters Rule were significant, serious, and substantive. The rule is an impermissible interpretation of "waters of the United States" as it fails to protect those waters as required by the CWA and the Supreme Court. By narrowing the definition of "waters of the United States" to exclude waters having an effect on or connection to the integrity of downstream, traditionally navigable waters, the Agencies have violated the statutory mandate.

213. Courts regularly decline to exercise their discretion to order remand without vacatur "when an agency has committed substantive errors, as opposed to procedural ones." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 344 F. Supp. 3d 355, 378 (D.D.C. 2018). In addition to the Agencies' substantive errors, the Agencies also engaged in a variety of procedural errors by promulgating a rule that was arbitrary, capricious, and an abuse of discretion because it was

not adequately supported by the record; by failing to meaningfully consider and address the Pueblos' comments; and by violating their trust responsibility to the Pueblos.

214. This Court has adopted additional equitable factors aiding its *Allied-Signal* analysis to determine if such limited circumstances exist to remand without vacatur. *Id.* (citing *Coal. of Arizona/New Mexico Cnty. for Stable Econ. Growth v. Salazar*, No. 07-CV-00876, 2009 WL 8691098 at *3 (D.N.M. May 4, 2009)) (including “(1) the purpose of the substantive statute . . . ; (2) the consequences of invalidating or enjoining the agency action; (3) potential prejudice to those who will be affected by maintaining the status quo; and (4) the magnitude of the [alleged] administrative error and how extensive and substantive it was.”).

215. In *N.M. Health Connections*, after employing the equitable factors in the *Allied-Signal* test, this Court listed other scenarios in which vacatur is appropriate, including “where ‘such fundamental flaws in the agency’s decision make it unlikely that the same rule would be adopted on remand’” 340 F. Supp 3d at 1178 (quoting *Pollinator Stewardship Council v. U.S. Env’tl. Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015)); as well as “where the agency’s reasoning behind a rule is ‘flimsy and [] half-hearted’” *Id.* (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002)).

216. The Agencies’ promulgation of the 2020 Navigable Waters Rule was fundamentally flawed, arbitrary and capricious, and it is unlikely that it would be adopted on remand; the Agencies’ reasoning that the Rule supports or advances tribal sovereignty by removing federal protection is flimsy and half-hearted. The Pueblos rely on federal protection for clean water; removing that protection for the overwhelming majority of the Pueblos’ waters

endangers them with uncontrolled pollution, threatening adverse effects on the physical, economic, and spiritual health and welfare of the communities.

217. The consequences of vacatur would not be disruptive, as the 2020 Rule itself is already disruptive to the purpose of the CWA; reinstating jurisdiction over non-navigable waters would not strain the Agencies' resources or expertise, as they have provided support and protection to tribes and their waters before. *Compare N. N.M. Stockman's Ass'n*, No. 18-1138 at *443 (noting the disruptive consequences posed to the U.S. Fish and Wildlife Service and the endangered Jumping Mouse outweigh the agency's deficiencies in promulgating the mouse's critical habitat designation), *with N.M. Health Connections*, 340 F. Supp. 3d at 1182 (despite alleged economic burdens, not finding sufficient disruption to outweigh vacatur), *and N.M. Cattle Growers Ass'n v. Norton*, No. 02-0461, 2003 U.S. Dist. LEXIS 18534 at *8–9 (D.N.M. Sept. 30, 2003) (same, and noting “there must be some factual basis for determining what the disruptive consequences might be” (quoting *Bldg. Indus. Legal Def. Found. v. Norton*, 231 F. Supp. 2d 100, 106 (D.D.C. 2002))).

218. The potential prejudice to the Pueblos, if the status quo were to be maintained on remand, is immense. While the Agencies could take months or years to reconsider their rule, the Pueblos would be forced to regulate waters in a similar manner to the Agencies, but with little of the funding, staffing, enforcement power, and expertise afforded to the EPA and the Corps.

219. Applying the *Allied-Signal* test, as this Court has done, to the promulgation of the 2020 Navigable Waters Rule, the Agencies' deficiencies in the promulgation of the rule and the potential prejudice to the Pueblos far outweigh the potential disruptive consequences resulting from vacatur. Vacatur of the 2020 Navigable Waters Rule is therefore an appropriate remedy.

V. CAUSES OF ACTION

CLAIM 1: THE 2020 NAVIGABLE WATERS RULE IS AN IMPERMISSIBLE INTERPRETATION OF “WATERS OF THE UNITED STATES” UNDER THE CWA AND JUDICIAL PRECEDENT

(2020 Navigable Waters Rule - Violation of the Administrative Procedure Act, 5 U.S.C. § 706 and Clean Water Act, 33 U.S.C. § 1251 *et seq.*)

220. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

221. A rule is unlawful and must be set aside by the court when an agency acts in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, . . . or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (C), (D).

222. The purpose of the CWA “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

223. CWA jurisdiction is limited to “navigable waters,” defined as “waters of the United States.”

224. The 2020 Navigable Waters Rule is contrary to law as it fails to protect the “waters of the United States” as required by the CWA and the judgments of the Supreme Court and the Circuit Courts of Appeals by narrowing the definition of “waters of the United States” to exclude multiple waters that can affect the physical, chemical, and biological integrity of downstream traditional navigable waters.

225. The Agencies exceeded their authority and acted contrary to the CWA by adopting provisions in the 2020 Navigable Waters Rule that unlawfully defined waters of the U.S. to exclude waters having an effect on or connection to the physical, chemical, and biological integrity of downstream, traditional navigable waters, including by: (A) defining

“tributaries” to exclude ephemeral waters; and (B) by excluding waters that lack a surface connection to traditional navigable waters in a “typical year,” but that have an effect on or connection to downstream traditional navigable waters. 85 Fed. Reg. at 22,251; see 33 U.S.C. § 1251 *et seq.* As a result, the Agencies’ promulgation of the 2019 Repeal Rule and the 2020 Navigable Waters Rule was not in accordance with the law and short of statutory right.

**CLAIM 2: THE 2019 REPEAL RULE AND THE 2020 NAVIGABLE
WATERS RULE ARE ARBITRARY AND CAPRICIOUS AND AN ABUSE
OF DISCRETION BECAUSE THE FINAL RULE IS NOT ADEQUATELY
SUPPORTED BY THE RECORD**

(2019 Repeal Rule and 2020 Navigable Waters Rule - Violation of the Administrative Procedure Act, 5 U.S.C. § 706)

226. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

227. A rule is unlawful and must be set aside when an agency acts in a manner that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A).

228. An agency must demonstrate good reasons for any changes in policy and must show the change is permissible under the governing statute. *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515.

229. An agency rule contradicting previous policy must include a more detailed justification than rules of first interpretation, when “its new policy rests upon factual findings that contradict those which underlay its prior policy, . . . or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* (internal citation omitted).

230. An unexplained inconsistency in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA].” *Brand X*, 545 U.S. at 981.

231. A rule is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

232. First, the 2019 Repeal Rule and the 2020 Navigable Waters Rule are arbitrary and capricious and an abuse of discretion because they fail to offer a detailed explanation for why they contradict or ignore the scientific factual findings underlying the 2015 Clean Water Rule, and instead reverse course after decades of EPA and Corps practice and judicial decisions supporting federal CWA protections for many types of waters, including ephemeral streams.

233. The 2020 Navigable Waters Rule does not attempt to assess, consider, or explain the effects on this narrowing of jurisdiction, either by characterizing the extent to which waters will lose protections or how this loss of protections may impact their physical, chemical, or biological integrity. Instead, the Agencies claim that they are unable to quantify the changes without any further explanation. 85 Fed. Reg. at 22,332.

234. The Agencies do not offer any detailed refutation or discussion of the findings of the Science Report that served as the basis for the significant nexus determinations in the 2015 Clean Water Rule, stating only that the 2020 Navigable Waters Rule was “informed” by science in “certain aspects.” *Id.* at 22,288.

235. The Agencies fail to provide any support for their assertion that the 2020 Navigable Waters Rule strikes a “better balance” between the objective of the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. §

1251(a), and the statute’s policy “to recognize, preserve, and protect the primary responsibilities and rights of States.” 85 Fed. Reg. at 22,261.

236. The Agencies’ promulgation of the 2020 Navigable Waters Rule also was arbitrary, capricious, and an abuse of discretion because it did not acknowledge, assess, or consider how this reversal of policy would harm the Pueblos’ longstanding reliance on federal CWA protections of their waterbodies. The Agencies failed to consider the economic and administrative impact on the Pueblos’ implementation of water resource protections, disregarded the reality that “many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs,” and instead relied on the flimsy assertion that the rule “preserves tribal authority.” *Id.* at 22,336–37.

237. Finally, the promulgations of the 2019 Repeal Rule and the 2020 Navigable Waters Rule were arbitrary, capricious, and an abuse of discretion because they failed to abide by executive branch policies with regards to environmental justice, including with regards to tribes.

238. The Agencies failed to abide by Presidential Executive Order 12,898, which requires agencies to identify and address, “as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations.” 59 Fed. Reg. 7629.

239. Despite input that the Agencies received from the Pueblos and other tribes, the Agencies arbitrarily and capriciously dismissed environmental justice impacts in the final 2020 Navigable Waters Rule, stating without support that the rule was “not subject to Executive Order 12,898 . . . because there is no significant evidence of disproportionately high and adverse

human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples.” 85 Fed. Reg. at 22,337. The Agencies claimed to find “no significant evidence” of disproportionate impacts even though they failed entirely to conduct an environmental justice analysis that may have identified such disproportionate impacts, in violation of Executive Order 12,898 and subsequent case law.

240. The Agencies arbitrarily ignored their own environmental justice policies, which among other things, require the EPA to use “legal authorities . . . to advance environmental justice goals in its work . . . in Indian country.” U.S. Env’tl. Prot. Agency, Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous Peoples 2.

241. The Agencies failed to adequately demonstrate good reasons for the changes in policy effectuated by the new rulemaking. They further failed to adequately assess the detrimental impacts of the rulemaking considering the Pueblos’ reliance on federal protections and failed to assess the disproportionately high and adverse human health and environmental effects of the rulemaking on tribes and Indigenous peoples. Therefore, the 2019 Repeal Rule and the 2020 Navigable Waters Rule are arbitrary, capricious, and an abuse of discretion.

CLAIM 3: THE 2020 NAVIGABLE WATERS RULE IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION BECAUSE THE AGENCIES DID NOT MEANINGFULLY CONSIDER AND ADDRESS SIGNIFICANT COMMENTS OF PUEBLO PETITIONERS

(2020 Navigable Waters Rule - Violation of the Administrative Procedure Act, 5 U.S.C. § 706)

242. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

243. Under the APA, in a notice-and-comment rulemaking, an agency “must respond in a reasoned manner to those [comments] that raise significant problems.” *City of Waukesha v. Env’tl. Prot. Agency*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quoting *Reytblatt v. Nuclear Regul.*

Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997)). The failure to respond to significant comments demonstrates that an agency's decision was not based on a consideration of the relevant factors. *Texas Mun. Power Agency v. Env'tl. Prot. Agency*, 89 F.3d 858, 876 (D.C. Cir. 1996) (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984)).

244. The Agencies here failed to consider the significant comments of the Pueblos.

245. In particular, the Agencies failed to address how the Pueblos are supposed to fill in gaps in enforcement created by the rule, how the rule satisfies the Agencies' trust responsibility to the Pueblos, or proposals that the Agencies maintain broader federal CWA jurisdiction for the Pueblos.

246. The Agencies' promulgation of the 2019 Repeal Rule and 2020 Navigable Waters Rule therefore impermissibly failed to consider relevant factors and is arbitrary and capricious and an abuse of discretion.

CLAIM 4: THE 2020 NAVIGABLE WATERS RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS A VIOLATION OF THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TO TRIBES

(2019 Repeal Rule and 2020 Navigable Waters Rule - Violation of Administrative Procedure Act, 5 U.S.C. § 706, and the Agencies' trust responsibility)

247. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

248. "The federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies" when they act in relation to Indian tribes. *HRI, Inc.*, 198 F.3d at 1245 (quoting Cohen, Handbook at 225).

249. First, the federal government's trust duty and the Agencies' own policies relating to the trust duty require that the Agencies consider how their rulemakings impact tribal rights and resources. *See Nw. Sea Farms*, 931 F. Supp. at 1519–20 (stating that the federal trust

obligation imposes a fiduciary duty on “any government action” relating to Indian tribes) (citing *Nance*, 645 F.2d at 711); *HRI, Inc.*, 198 F.3d at 1245.

250. The Pueblos and other tribes warned the Agencies about the harmful effects of the rules on tribal water resources and the lack of tribal capacity to implement enforceable water standards to fill the jurisdictional gap created by the 2020 Navigable Waters Rule.

251. Despite these comments, the Agencies failed to adequately analyze or consider how the rule would affect tribal water resources or whether the tribes would have the capacity to implement their own water pollution control programs.

252. Instead, the Agencies summarily acknowledged that the 2020 Navigable Waters Rule “has tribal implications,” but baldly stated that the rule “will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law.” 85 Fed. Reg. at 22,336.

253. The Agencies offered no rationale for ignoring the Pueblos’ concerns, nor did they identify any changes in the final rule that responded to these concerns. The Agencies merely justified their decision by stating that “the rule preserves tribal authority to choose whether or not to regulate waters that are not covered under the CWA.” *Id.* at 22,337.

254. However, the Agencies have admitted that “[w]hile some Tribes have established tribal water programs under tribal law or have the authority to establish tribal programs under tribal law, many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs that currently exist. Other Tribes may rely on the Federal government for enforcement of water quality violations.” *Id.* at 22,336–37.

255. Given this reliance by tribes on the protections of the CWA, the federal government has forgone its responsibilities to protect tribal resources and has violated its trust duty by promulgating the 2020 Navigable Waters Rule. *Id.* at 22,337.

256. The EPA's Economic Analysis similarly "[did] not consider how the 573 federally recognized tribes might react to a change in CWA jurisdiction, nor does it include tribes in its calculations of costs and benefits." U.S. Env'tl. Prot. Agency, Economic Analysis for the Final Rule: "Waters of the United States"—Recodification of Pre-Existing Rules 44, Comment ID: EPA-HQ-OW-2018-0149-11690 (Sept. 5, 2019). Nor did the analysis "account for potential effects related to subsistence fishing, rice growing, or cultural uses of water that are unique to tribes and their reliance on waters that would no longer be considered jurisdictional under the final rule." *Id.* at 45.

257. The 2020 Navigable Waters Rule violates the long-standing trust responsibility to protect tribes and tribal resources. Additionally, the Agencies breached their trust responsibility by not considering how their actions would affect tribal resources. Therefore, the Agencies failed to consider an important aspect of the problem and their promulgation of the rule was arbitrary and capricious.

258. Second, federal agencies have a duty to engage in "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Exec. Order No. 13,175, 65 Fed. Reg. at 67,250.

259. Under executive branch policies relating to the trust duty, executive agencies have a duty to meaningfully consult with tribes, consider how agency actions affect tribal rights and resources, and respect tribal self-governance and sovereignty when taking actions that have tribal

implications. *Id.*; 74 Fed. Reg. 57,881 (“[E]xecutive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications”); 86 Fed. Reg. 7491 (President Biden’s recognition of the policy announced in Executive Order 13,175 and continued commitment to “honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities”).

260. The Agencies failed to follow their tribal consultation policies requiring regular and meaningful government-to-government communication and coordination and therefore breached their duty to meaningfully consult with the Pueblos. Rather, tribes were offered listening sessions, where EPA gave tribes the opportunity to voice concerns about the rollback of protected waters. These listening sessions did not allow for any feedback from the EPA nor did the EPA provide a consolidated version of the comments provided at these sessions to the tribes afterwards.

261. The Agencies never conducted any leader-to-leader meetings with the Pueblo of Jemez or Pueblo of Laguna. *See* U.S. Env’tl. Prot. Agency, Summary Report of Tribal Consultation and Engagement for the Navigable Waters Protection Rule 13–14, 22–27. Instead of engaging in a government-to-government dialogue in the development of policy, the EPA offered generic “listening sessions” that did not allow any meaningful conversations.

262. When agencies change or deviate from their existing policies, they must provide a reasoned explanation for doing so. *See Encino Motorcars, LLC*, 136 S. Ct. at 2125. While an agency’s explanation in this regard is not held to a higher standard of review, the agency must “display awareness that it is changing position” and “show that there are good reasons for the

new policy.” *Id.* at 2125–26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515).

Thus, an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Id.* (quoting *Brand X*, 545 U.S. at 981).

263. The 2020 Navigable Waters Rule is arbitrary and capricious because the Agencies did not provide a reasoned explanation for why they failed to provide meaningful consultation, including leader-to-leader meetings, with the Pueblos. This failure is a change in policy inconsistent with internal agency policies regarding tribal trust responsibilities.

264. Finally, the federal trust responsibility generally requires the government to avoid taking actions that harm tribal resources, including waters that flow over and through tribal lands, and the natural resources that depend on that water. *See, e.g., Mitchell*, 463 U.S. at 225–26; *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

265. The trust duty requires agencies and the courts to construe statutes liberally in favor of tribes, resolving ambiguities in their favor. *See Montana*, 471 U.S. at 766; *HRI, Inc.*, 198 F.3d at 1245.

266. The Agencies had discretion to apply a broader interpretation of “waters of the United States” as they did in the 2015 Clean Water Rule, which would have avoided harm to the Pueblos’ waters. Instead, the Agencies’ narrow interpretation of “waters of the United States” in the 2020 Navigable Waters Rule withdraws federal water quality protections over Pueblo streams that are ephemeral, intermittent, and seasonal, as well as groundwater, upon all of which the Pueblos rely.

267. Accordingly, the Agencies breached their trust duty to the Pueblos by failing to engage in meaningful government-to-government consultation, failing to analyze how the 2020 Navigable Water Rule would impact Pueblo rights and resources, and failing to protect tribal water resources. As a result, the 2019 Repeal Rule and 2020 Navigable Waters Rule are arbitrary, capricious, and otherwise not in accordance with law.

VI. REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court:

- A. Declare that the Agencies acted arbitrarily and unlawfully in promulgating the challenged rules, Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019), and The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020);
- B. Vacate and set aside the challenged regulations;
- C. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys’ fees, associated with this litigation; and
- E. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 26th day of March 2021.

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SCHOOL OF LAW CLINIC


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CIVIL COVER SHEET

JS 44 (Rev. 10/20)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Pueblo of Jemez Pueblo of Laguna</p> <p>(b) County of Residence of First Listed Plaintiff _____ (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) see attached.</p>	<p>DEFENDANTS See attached</p> <p>County of Residence of First Listed Defendant _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <p>(For Diversity Cases Only)</p> <table style="width:100%;"> <tr> <td style="width:25%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:45%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Click here for: [Nature of Suit Code Descriptions.](#)

IV. NATURE OF SUIT (Place an "X" in One Box Only)			
<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)</p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>TORTS</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Personal Injury - Medical Malpractice</p>	<p>PERSONAL INJURY</p> <p><input type="checkbox"/> 365 Personal Injury - Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Management Relations</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 751 Family and Medical Leave Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Employee Retirement Income Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>
<p>REAL PROPERTY</p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p>	<p>CIVIL RIGHTS</p> <p><input type="checkbox"/> 440 Other Civil Rights</p> <p><input type="checkbox"/> 441 Voting</p> <p><input type="checkbox"/> 442 Employment</p> <p><input type="checkbox"/> 443 Housing/Accommodations</p> <p><input type="checkbox"/> 445 Amer. w/Disabilities - Employment</p> <p><input type="checkbox"/> 446 Amer. w/Disabilities - Other</p> <p><input type="checkbox"/> 448 Education</p>	<p>PRISONER PETITIONS</p> <p>Habeas Corpus:</p> <p><input type="checkbox"/> 463 Alien Detainee</p> <p><input type="checkbox"/> 510 Motions to Vacate Sentence</p> <p><input type="checkbox"/> 530 General</p> <p><input type="checkbox"/> 535 Death Penalty</p> <p>Other:</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Condition</p> <p><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 835 Patent - Abbreviated New Drug Application</p> <p><input type="checkbox"/> 840 Trademark</p> <p><input type="checkbox"/> 880 Defend Trade Secrets Act of 2016</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>
<p>OTHER STATUTES</p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692)</p> <p><input type="checkbox"/> 485 Telephone Consumer Protection Act</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 890 Other Statutory Actions</p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

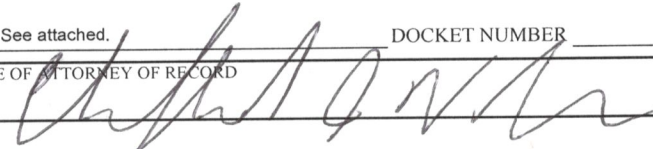
VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 5 U.S.C. § 702

Brief description of cause:
 Unlawful agency action re-defining "waters of the United States" regulated under the Clean Water Act.

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE: See attached. DOCKET NUMBER: _____

DATE: March 26, 2021 SIGNATURE OF ATTORNEY OF RECORD:  /s

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

CIVIL COVER SHEET ATTACHMENT

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MICHAEL REGAN, in his official capacity as Administrator of the United States of the 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

Related Cases, Section VIII

Sr. District Judge Robert C. Brack,
Docket Number: 1:19-CV-00988-RB-SCY

District Judge Martha Vasquez
Docket Number: 2:20-CV-00602

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11 IN THE UNITED STATES DISTRICT COURT '

12 FOR THE NORTHERN DISTRICT OF CALIFORNIA '

13 **STATE OF CALIFORNIA BY AND THROUGH**
ATTORNEY GENERAL XAVIER BECERRA AND
 14 **CALIFORNIA STATE WATER RESOURCES**
CONTROL BOARD, STATE OF NEW YORK,
 15 **STATE OF CONNECTICUT, STATE OF ILLINOIS,**
 16 **STATE OF MAINE, STATE OF MARYLAND,**
STATE OF MICHIGAN, STATE OF NEW JERSEY,
 17 **STATE OF NEW MEXICO, STATE OF NORTH**
CAROLINA EX RE. ATTORNEY GENERAL
 18 **JOSHUA H. STEIN, STATE OF OREGON, STATE**
OF RHODE ISLAND, STATE OF VERMONT,
 19 **STATE OF WASHINGTON, STATE OF**
WISCONSIN, COMMONWEALTHS OF
 20 **MASSACHUSETTS AND VIRGINIA, THE NORTH**
CAROLINA DEPARTMENT OF
 21 **ENVIRONMENTAL QUALITY, THE DISTRICT OF**
COLUMBIA, AND THE CITY OF NEW YORK,

22 Plaintiffs,

23 v.

24 **ANDREW R. WHEELER, AS ADMINISTRATOR**
OF THE UNITED STATES ENVIRONMENTAL
 25 **PROTECTION AGENCY; UNITED STATES**
ENVIRONMENTAL PROTECTION AGENCY; R.
 26 **D. JAMES, AS ASSISTANT SECRETARY OF THE**
ARMY FOR CIVIL WORKS; AND UNITED
 27 **STATES ARMY CORPS OF ENGINEERS,**

28 Defendants.

Case No. 3:20-cv-03005-DMR

DECLARATION OF REBECCA ROOSE

Date:
 Time:
 Courtroom:
 Judge:
 Trial Date:
 Action Filed:

DECLARATION OF REBECCA ROOSE

I, Rebecca Roose, state and declare as follows:

1. My name is Rebecca Roose. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I submit this declaration in support of the motion by the States and Cities for a preliminary injunction. As discussed below, the WOTUS Rule will have a devastating impact on New Mexico’s waters and the State is in no position to fill the regulatory vacuum left by EPA and the Army Corps as a result of that rule.

BACKGROUND

3. I am employed as the Director of the Water Protection Division of the New Mexico Environment Department (Department). In my role, I oversee the Department’s Ground Water Quality, Surface Water Quality, Drinking Water, and Construction Programs Bureaus. I have been employed by the Department for approximately one year. Prior to joining the Department, I worked for the U.S. Environmental Protection Agency (EPA). At EPA Headquarters, I devoted 13 years to supporting EPA, states, and tribes with implementation of Clean Water Act (CWA) programs. Specifically, I drafted and defended National Pollutant Discharge Elimination System (NPDES) program regulations and effluent limitations guidelines promulgated pursuant to CWA Section 402, provided oversight of states’ implementation of NPDES, pretreatment and CWA Section 319 nonpoint source control programs, and developed policy and training for compliance inspections of NPDES permittees and CWA Section 311 spill prevention, control and countermeasures facilities. During my tenure at EPA, I served as a national expert on NPDES requirements for Concentrated Animal Feeding Operations, NPDES program requirements for authorized states and tribes, and NPDES compliance monitoring policy. I earned my law degree and natural resources law certificate from the University of New Mexico in 2004.

4. The purpose of the Department is “to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by

1 the environment; and will maximize the economic and cultural benefits of a healthy people.”
2 N.M. STAT. ANN. § 74-1-2 (1997).

3 5. The Department serves as agent of the State in matters of environmental management and
4 consumer protection. N.M. STAT. ANN. § 74-1-6(E) (2009). The Department has primary
5 responsibility for implementing the activities of the New Mexico Water Quality Control
6 Commission, the state water pollution control agency for purposes of the federal CWA.

7 **THE WOTUS RULE’S HARM TO NEW MEXICO WATERS**

8 6. New Mexico has seven traditionally navigable waters (TNWs): the Rio Grande, the
9 Canadian River, the San Juan River, the Cimarron River, the Rio Chama, the Pecos River, and
10 Navajo Lake. The U.S. Army Corps of Engineers (USACE) has attempted to designate the entire
11 stretch of the Gila River that flows through New Mexico as a TNW, but this designation has been
12 challenged and to date remains unresolved. In its review of the National Hydrology Dataset, the
13 Department has determined that approximately 89% of the State's rivers and streams are
14 ephemeral, 7% are perennial, and 4% are intermittent. Under the WOTUS Rule, none of the
15 ephemeral streams will be protected by the CWA.

16 7. The WOTUS Rule will also result in the loss of many wetlands in New Mexico. Saint
17 Mary’s University of Minnesota's Geospatial Services, with input from the Department, created a
18 model to evaluate the extent of federally protected wetlands and other surface waters in the
19 Cimarron River Watershed.¹ The results of this case study show that by narrowing the scope of
20 federal jurisdiction, the number of wetlands protected by the CWA is substantially decreased,
21 leading to a likely loss of benefits provided by wetlands such as flood control and attenuation,
22 pollution control, wildlife habitat, and recreation. Depending on how the new WOTUS rule is
23 applied, 20-70% of the wetlands in the Cimarron River Watershed would lose CWA protections.

24 8. To represent benefit-cost analyses of the WOTUS Rule, EPA and USACE (collectively
25 the “Agencies”) relied on three case studies in the supporting Economic Analysis, “to explore
26

27 ¹ For details of the Saint Mary’s University of Minnesota model, visit
28 <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>.

(continued...)

1 potential changes and resulting forgone benefits and avoided costs.”² The case studies focused on
2 three geographical regions – the Ohio River Basin, the Lower Missouri River Basin, and the Rio
3 Grande River Basin – that intersect 10 states. The Rio Grande River Basin was divided into two
4 major watersheds, the Upper Pecos (HUC 1306) and Lower Pecos (HUC 1307) River Basins,
5 which contain a combined 44,300 square miles in New Mexico and Texas from east of Santa Fe,
6 New Mexico to the confluence of the Pecos River and Rio Grande at the Texas-Mexico border.
7 This case study found 85% of stream miles within the Upper Pecos River Basin in New Mexico
8 are ephemeral, and 34% of all wetland acres to be “non-abutting” wetlands. These ephemeral
9 waters and non-abutting wetlands in the Upper Pecos River Basin will no longer be protected
10 under the WOTUS Rule. Further, the cost analysis for the Pecos River case study shows benefits
11 of the WOTUS Rule to be minimal or negligible; however, the Agencies did not quantify or
12 monetize the environmental effects and forgone benefits of the WOTUS Rule for the Rio Grande
13 River Basin case study, blaming this deficiency on limitations in the data. The *Economic Analysis*
14 *of the EPA-Army Clean Water Rule*³ monetized the ecosystem services and benefits from
15 wetlands, so it is possible to evaluate this important component of any new rule. In fact, the
16 estimation of nonmarket environmental values is not new – one notable example is compensation
17 for the 1989 Exxon Valdez oil spill in the Gulf of Alaska. It is well known that wetlands provide
18 many ecological and economic benefits to watersheds such as filtering and improving water
19 quality, flood attenuation, erosion control, carbon sequestration, aquifer recharge, and providing
20 fish and wildlife habitat and nurseries.⁴ It is also known that ephemeral waters are ecologically
21 and hydrologically significant in arid and semi-arid watersheds of the southwestern United
22 States.⁵ Loss of environmental protections for ephemeral streams and wetlands, reductions in

23
24 ² Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S.
Environmental Protection Agency and U.S. Department of the Army. January 22, 2020.

25 ³ Economic Analysis of the EPA-Army Clean Water Rule. U.S. Environmental Protection Agency and U.S.
Department of the Army. May 20, 2015. Available at: https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf

26 ⁴ <https://www.epa.gov/sites/production/files/2016-02/documents/wetlandfunctionsvalues.pdf>

27 ⁵ Levick, L., et al. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the
28 Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest
Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

1 water quality, and cumulative impacts will be devastating to wildlife and humans who are
2 dependent on these waters, especially at the local scale, and should have been quantified.

3 9. Because of the ephemeral exemption and new definition of “adjacent wetland,” the
4 WOTUS Rule will create a significant gap in regulation under CWA Section 402 general permits
5 (i.e., construction and industrial stormwater discharges) and CWA Section 404 dredge and fill
6 permits in ephemeral streams and non-abutting wetlands. The Agencies considered the potential
7 effect of the WOTUS Rule on issuance of CWA Section 402 permits for stormwater from
8 construction activities. Overall, the Agencies concluded that the ephemeral exemption would
9 likely change circumstances in arid and semi-arid states where many streams are ephemeral, and
10 CWA protections would be removed from the vast majority of waters in these states.⁶ As a result,
11 many construction sites in arid states will not be required to obtain NPDES permit coverage for
12 stormwater discharges. Dredge and fill and industrial activities in ephemeral streams will not
13 need a CWA Section 404 permit. Besides excess sediment, which can smother bottom-dwelling
14 organisms, fill deep pools that are critical refugia during summer and drought, and clog or injure
15 gills of fish, stormwater carries other harmful pollutants. Construction, industrial, and urban sites
16 generate pollutants such as phosphorus and nitrogen from the application of fertilizer, various
17 metals (arsenic, cadmium, chromium, copper, zinc), acidic wastewaters, pesticides, phenols,
18 paints, solvents, phthalates, petroleum products, and solid wastes that attach to sediment and/or
19 get washed into streams and wetlands during overland stormflows. Sediment loading rates from
20 constructions sites are typically 10 to 20 times that of agricultural lands and 1000 to 2000 times
21 that of forest lands. Even a small amount of construction or industrial activity may have a
22 significant negative impact on water quality in localized areas if permits are not required and
23 proper management practices are not implemented to reduce or eliminate pollutants in
24 stormwater. New Mexico has over a thousand facilities covered by stormwater general permits
25 and approximately 25-45% of these will no longer be subject to those stormwater management
26 requirements as a result of the WOTUS Rule.

27 _____
28 ⁶ Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S.
Environmental Protection Agency and Department of the Army. January 22, 2020.

1 10. The WOTUS Rule will also create a significant gap in regulation of individual permits
2 issued by EPA under CWA Section 402 in New Mexico. The Agencies did not effectively
3 consider the potential effect of the WOTUS Rule on issuance of CWA Section 402 individual
4 permits for discharges to ephemeral or other non-jurisdictional waters under the WOTUS Rule.
5 New Mexico currently has 115 individual, EPA-issued NPDES permits in the State, including
6 permits issued in Indian Country. Under the 2020 Rule, approximately 50% of these current
7 permittees will no longer be required to obtain an NPDES permit because they discharge to
8 receiving streams that lose CWA protections. Examples of facilities in New Mexico that would
9 no longer discharge pursuant to NPDES individual permit requirements include: municipal and
10 private domestic wastewater treatment plants; tribal and Bureau of Indian Affairs wastewater
11 treatment plants; multiple types of mines, both active and in reclamation (coal, uranium, cement,
12 rock, minerals and metals); national laboratories; federal facilities; fish hatcheries; and oilfield
13 sanitary waste treatment plants. Eliminating CWA protections will degrade ephemeral water
14 quality and the downstream TNWs and other jurisdictional waters that they feed.

15 11. The Department has relied upon the Agencies' broad interpretation of WOTUS under the
16 1980s regulations and the *Rapanos* Guidance in order to ensure protection of New Mexico's
17 waters.

18 12. The WOTUS Rule's ephemeral exemption will have a disproportionate effect on water
19 quality in the arid Southwest (e.g., Arizona, Nevada, and New Mexico) because many stormwater
20 discharges from sites into ephemeral streams will no longer be subject to CWA permits. New
21 Mexico is one of the driest states, averaging less than twenty inches of annual precipitation.
22 Ephemeral streams provide the same ecological and hydrological benefits as perennial streams by
23 moving water, sediment and nutrients through the system to be utilized downstream. Ephemeral
24 flows are in need of CWA protection because when they are functioning properly they provide
25 important hydrologic connections across the landscape and across geopolitical boundaries; they
26 dissipate stream energy during high flow events to reduce erosion, thus improving water quality;
27 they recharge aquifers where water can be stored for current and future drinking water supplies;
28 they transport, store and deposit sediment to help maintain floodplains; they transport, store and

1 cycle nutrients for vegetation, wildlife and aquatic life; and they support and provide migration
2 corridors. Given the distribution of ephemeral streams in New Mexico (89% of streams) and their
3 important hydrological and ecological functions, cumulative impacts of ephemeral streams
4 throughout a watershed must be considered in order to protect and maintain water quality and
5 watershed health. Removing protections from ephemeral streams will degrade water quality in the
6 jurisdictional waters that they feed.

7 13. Science has clearly demonstrated that ephemeral waters are ecologically and
8 hydrologically significant in the arid southwestern United States. In New Mexico, ephemeral
9 tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where
10 pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream
11 waters, such as the Rio Grande – a TNW. The cumulative impacts of these non-jurisdictional
12 ephemeral stormflows are detrimental to downstream water quality and threaten human health
13 and the environment.

14 14. More frequent droughts and shifting precipitation patterns due to climate change result in
15 lower water levels in rivers, lakes, and streams, leaving less water to dilute pollutants. In addition,
16 more frequent and more powerful storms increase polluted runoff from urban and agricultural
17 areas, which transports pollutants from the landscape to nearby waterways. These changes will
18 stress aquatic ecosystems and dramatically impact communities throughout the United States,
19 especially in the Southwest. Community impacts include threats to public health, economic strain,
20 and decreased quality of life. The effects of climate change in New Mexico amplify the
21 complexities of western water management. A lack of connectivity or perenniality today or in a
22 “typical year” is not a suitable feature that EPA, USACE and New Mexico can rely upon to
23 define a jurisdictional water.

24 15. Tijeras Arroyo presents an example of the anticipated devastating effects of the WOTUS
25 Rule on water quality. This waterway winds for 26 miles from its headwaters in the Sandia and
26 Manzano Mountains east of Albuquerque, New Mexico through developed and undeveloped
27 areas of Albuquerque in the foothills, including Kirtland Air Force Base, before entering the Rio
28 Grande. The waterway is perennial in the headwaters but is ephemeral for 11 miles as it flows out

1 of the mountains and into the Rio Grande. Tijeras Arroyo is a major tributary of the Rio Grande
2 in the Albuquerque area and carries stormwater, and any pollutants mobilized by stormwater, to
3 the Rio Grande during significant rain events. It is the subject of (1) a Watershed Restoration
4 Action Strategy to address excess *E. coli* bacteria and sedimentation through stormwater
5 management and erosion controls; (2) a Total Maximum Daily Load (TMDL) to reduce
6 watershed nutrient loading during both low-flow and high-flow events; and (3) federal permits
7 including several CWA Section 404 permits, an individual NPDES permit for Kirtland Air Force
8 Base, and the Municipal Separate Storm Sewer System (MS4) permit for the Albuquerque-
9 Bernalillo County area under CWA Section 402. These various permits and requirements limit
10 and/or monitor the discharge of the following pollutants into Tijeras Arroyo: nitrate-nitrogen,
11 ammonia-nitrogen, total nitrogen, total phosphorus, ethylene dibromide (EDB), heptachlor, per-
12 and polyfluoroalkyl substances (PFAS), total residual chlorine, total suspended solids, biological
13 oxygen demand, and oil and grease. In addition, the Rio Grande downstream of Tijeras Arroyo is
14 impaired for *E. coli* bacteria, polychlorinated biphenyls (PCBs) in fish tissue, and dissolved
15 oxygen. Tijeras Arroyo was jurisdictional under the 1980s regulations, the 2008 Rapanos
16 Guidance, and the 2019 Rule but is not jurisdictional under the 2020 WOTUS Rule. Surface
17 water quality is also a major concern for the two acequia associations in the Tijeras watershed and
18 the Pueblo of Isleta, which is downstream of Tijeras Arroyo and the City of Albuquerque. Under
19 the WOTUS Rule, these CWA protections (e.g., *E. coli* strategy, TMDL, NPDES permits) will
20 not be enforceable as is. They will either be modified to move the point of discharge to a
21 jurisdictional water and consequently dilute the limitations and requirements, or they will be
22 terminated.

23 16. Another example of the WOTUS Rule's harm is the Gila River, which originates in the
24 Nation's first designated wilderness area (the Gila National Wilderness) and is the last major wild
25 and free-flowing river in New Mexico. The Gila River supports a remarkable abundance of
26 aquatic life and wildlife, provides significant economic value to the region through abundant
27 outdoor recreation opportunities, and is culturally important to indigenous peoples who have lived
28 in southwestern New Mexico for thousands of years. The Gila River flows from New Mexico into

1 Arizona and typically goes dry before it reaches the Colorado River due to large irrigation
2 diversions, groundwater mining, and sustained drought. Some segments of the Gila River in
3 Arizona have been designated as TNWs, but the Gila River is not a designated TNW in New
4 Mexico. New Mexico's Gila River was named by American Rivers as the country's most
5 endangered river in 2019 because of threats from water diversions and climate change.⁷ If the
6 new WOTUS Rule is implemented, the Gila River in New Mexico would not be protected by the
7 CWA, further endangering this precious resource.

8 17. The Rio Hondo Watershed in south-central New Mexico is yet another example of the
9 irreparable harm the WOTUS Rule will have on New Mexico. As the perennial headwaters of the
10 Rio Ruidoso and Rio Bonito flow downstream, they become interrupted and eventually go
11 underground along several ephemeral segments. Because the ephemeral segments are
12 substantially long (over 50 miles), it is highly unlikely that the Rio Ruidoso, Rio Bonito or
13 upstream portions of the Rio Hondo have a surface connection to the Pecos River (a TNW) in a
14 "typical year." Therefore, everything upstream of these ephemeral breaks/segments would be
15 considered non-jurisdictional under the WOTUS Rule. In this watershed there are several
16 facilities that would no longer be required to obtain a NPDES permit to discharge to the river,
17 including the Ruidoso Downs Wastewater Treatment Plant and the Ruidoso Racetrack. The Rio
18 Ruidoso already exceeds water quality standards for total nitrogen and total phosphorus, two
19 pollutants that are controlled by the aforementioned NPDES permits. Historically, excess nitrogen
20 and phosphorus have negatively impacted downstream irrigation uses. Further, construction and
21 industrial sites would not be required to obtain NPDES permit coverage for their stormwater
22 discharges. This means industrial facilities and construction sites could discharge pollutants into
23 the river without consequence under federal law. Loss of federal pollution control for the Rio
24 Ruidoso could result in polluted water conveyed to local farms via the 82 acequias, or community
25 ditches, in this area. Acequias have important historical and cultural value in New Mexico, with
26 many dating to the 17th and 18th Centuries, and provide essential water for agriculture. Public

27 _____
28 ⁷ <https://www.americanrivers.org/2019/04/americas-most-endangered-rivers-of-2019-spotlights-climate-change-threats/>

1 health and the environment will be directly impacted by the federal rollback and unregulated
2 pollutant discharges in the Rio Hondo Watershed.

3 18. Because the vast majority of New Mexico’s waters are ephemeral and large numbers of
4 wetlands will lose protections, the WOTUS Rule will have a profound adverse effect on water
5 quality in the state. In much of the country, ephemerality of rivers is typically seen in the upper
6 watershed where impacts of the proposed rule may be minimal. That is not the case in the arid
7 West. By removing protections for ephemeral waters, waters like the Santa Fe River, Rio
8 Ruidoso, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito
9 Plateau (which contain legacy contamination from the Manhattan Project) will have severed and
10 interrupted jurisdiction in the middle and lower reaches. This will create a patchwork of
11 jurisdictional and non-jurisdictional segments along the path of a river that will make it nearly
12 impossible to implement an effective water quality protection program. A patchwork of
13 unregulated contamination will have serious public health and economic consequences related to
14 drinking water supplies, cultural and agricultural uses, recreational uses, and aquatic species and
15 wildlife.

16 **DIFFICULTIES OF FILLING THE FEDERAL REGULATORY GAP WITH STATE**
17 **PROGRAMS**

18 19. New Mexico cannot, as a practical matter, fill the regulatory gap created by the WOTUS
19 Rule. The WOTUS Rule disproportionately impacts states that do not have authority to operate
20 the NPDES permitting program under CWA Section 402. This program is the primary
21 mechanism under the Act for regulating and limiting discharges of pollutants into the “waters of
22 the United States.” Further, the WOTUS Rule disproportionately impacts arid states that have
23 many ephemeral waters. The State of New Mexico fits both these characterizations and is
24 therefore particularly adversely impacted by the WOTUS Rule.

25 20. The Agencies state, “[a]bsent CWA jurisdiction, states and tribes can still choose to
26 regulate waters irrespective of federal mandates.” While in theory this may be true, in practice
27 this is impossible for states without NPDES authority or an established state permitting program.
28 New Mexico is one of only three states without NPDES authority, and the only such state in the

1 west. While the Department is interested in having EPA authorize New Mexico to implement the
2 NPDES program, adopting and implementing such a program requires significant time, funding,
3 and staff. Unlike most states with established NPDES programs, New Mexico does not have the
4 legal and procedural program infrastructure to issue NPDES-like permits to regulate discharges of
5 pollutants to surface waters of the state that are not WOTUS under the new definition. As laid out
6 above, the Department estimates that 50% of NPDES individual permits and 25-45% of
7 stormwater general permits will not be required under the 2020 Rule amounting to hundreds of
8 unregulated discharges in New Mexico as a result of the federal rollback, creating a burdensome
9 federal regulatory gap that the state is expected to fill to protect its surface waters and its citizens.

10 21. The WOTUS Rule imposes significant resource burdens on the Department while putting
11 the health of New Mexico waters at great risk. The premise that all states are capable of
12 addressing water quality issues in their state is false. Not all states can implement a robust and
13 successful water quality program without significant federal assistance. Recurring federal and
14 state funds need to be identified to support a New Mexico surface water discharge permitting
15 program because reasonable permit fees would not cover the costs of the program in New
16 Mexico. Federal financial support for pollution control programs has been steadily declining over
17 the past decade to the detriment of New Mexico's precious surface waters.

18 22. To prevent water quality degradation in State surface waters from the rollback of CWA
19 protections, the Department will be required to expand the Surface Water Quality Bureau and
20 develop a State surface water permitting program. The Department lacks sufficient funding to
21 expand the Bureau and implement a permitting program as the WOTUS Rule goes into effect. In
22 addition, expansion and funding requests are dependent on approval from the State legislature.
23 With no new funding associated with this substantial shift in CWA jurisdiction, oversight of
24 WOTUS Rule implementation will force the Department to pull resources from current Surface
25 Water Quality Bureau priorities, such as ambient water quality monitoring, assessment and
26 reporting on the status of the state's surface waters, water quality standards revisions, water
27 quality management and watershed-based planning, watershed and wetland restoration, and
28 program and project effectiveness monitoring. In fulfilling its mission to preserve, protect and

1 improve surface water quality across our state, the Department will be harmed by the WOTUS
2 Rule due to the need to redirect already strained resources, inadequate resources to implement an
3 effective permitting program, and uncertain legislative and federal support.

4 23. The WOTUS Rule introduces great uncertainty into the Department's regulatory efforts
5 and burdens the Department with the onerous task of interpreting and applying the Rule. If the
6 WOTUS Rule becomes effective, previous guidance documents, memoranda, and materials will
7 be rendered inoperative. In addition, the Department is unaware of a firm commitment by the
8 Agencies to provide guidance and training to assist with early implementation of the WOTUS
9 Rule. This would hamper and delay the Department's ability to administer Surface Water Quality
10 Bureau programs affected by the new WOTUS definition when questions arise. For example, on-
11 the-ground investigations will be needed to delineate which waters are truly intermittent and
12 which are ephemeral for compliance and enforcement purposes. Considering New Mexico has
13 over 88,000 miles of non-perennial streams, and the vast majority of streams in the State do not
14 have active gages to measure stream flows, these stream-specific investigations will be extremely
15 resource-intensive. The Department already has received inquiries from various stakeholders
16 about scope and implementation of the WOTUS Rule that cannot be answered due to
17 uncertainties related to jurisdictional interpretation and enforcement. These are not insignificant
18 burdens and may lead to additional costly litigation stemming from the Department's future
19 interpretation the new WOTUS definition

20 **THE WOTUS RULE WILL ADVERSELY AFFECT THE NEW MEXICO ECONOMY**

21 24. The value of healthy surface waters in New Mexico is both cultural and economic. New
22 Mexico's diverse waters recharge aquifers, provide important ecological and hydrological
23 connections, support an amazing variety of wildlife and aquatic life, maintain drinking water
24 resources, and sustain critical economic activity. The State's lakes, reservoirs, rivers, streams, and
25 wetlands are essential to the future vitality of the agricultural, outdoor recreation and tourism
26 industries.

27 25. The WOTUS Rule does not take into account the recreational economy impacts
28 associated with poorer water quality influencing lake and river recreation as well as the many

1 rafting companies in New Mexico that depend on clean water for their business. Sixty-five
2 percent of New Mexicans participate in outdoor recreation activities each year. The New Mexico
3 Tourism Department reports that the State also has a high percentage of visitors who choose
4 outdoor recreation activities, such as river rafting, fly fishing, camping, boating and wildlife
5 viewing along the state's scenic waters. Visitors spent \$846 million on recreation in the state in
6 2017 and spending supports 13,000 direct jobs. In addition, the New Mexico Department of
7 Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending \$268 million
8 on their activities annually. In recognition of the state's iconic natural landscapes and treasured
9 waters, desire to protect and conserve New Mexico's lands and waters, and potential for
10 developing a more robust outdoor recreation-based economy, the New Mexico Outdoor
11 Recreation Division was created by legislation during the 2019 legislative session. This Division
12 is tasked with increasing outdoor recreation-based economic development, tourism and
13 ecotourism, recruiting new outdoor recreation business to New Mexico, and promoting education
14 about outdoor recreation's benefits to enhance public health. Investing in outdoor recreation helps
15 promote healthy lifestyles and a high quality of life and attracts and sustains employers and
16 families. People do not want to recreate on polluted waters that cannot sustain healthy fish, bird
17 and wildlife populations. The outdoor recreation industry in New Mexico will be adversely
18 impacted by the gap in coverage when the WOTUS Rule goes into effect, to the detriment of jobs
19 and revenue in New Mexico.

20 26. The WOTUS Rule will also create economic burdens associated with new regulatory
21 gaps. Approximately 40% of New Mexicans rely on surface water as a drinking water source. The
22 regulatory gaps created by the ephemeral waters exemption and loss of wetlands protections
23 resulting from the WOTUS Rule will result in decreased water quality, as explained above. As a
24 result, the cost to treat drinking water and maintain drinking water infrastructure will increase.
25 The cost to treat surface water to drinking water standards depends on the quality of water
26 coming into the treatment plant, the technologies used, the size of the system, and the energy
27 source. Municipalities will likely need to invest in water treatment infrastructure and other costly
28 technologies, such as desalination and ultrafiltration, to provide clean, safe water for drinking.

1 Degraded water quality coming into the treatment plant, the need for improved and more costly
2 treatment technologies and the less populated, rural nature of New Mexico as a whole will cause
3 water treatment costs to increase substantially for many in the state and may force municipalities
4 to choose lower water quality over necessary investments for clean and safe drinking water. In
5 addition, enhanced treatment to remove pollutants causes increased water loss during treatment,
6 which translates to less potable water in an increasingly arid State.

7 27. The Agencies failed to address cross-media implications of the WOTUS Rule. The
8 federal Resource Conservation and Recovery Act (RCRA) exempts wastewater treatment units
9 from regulation under RCRA if, in addition to a number of other conditions, those units discharge
10 effluent pursuant to a NPDES permit. 42 U.S.C. § 6903(27). Under the WOTUS Rule, many
11 facilities currently discharging pursuant to a NPDES permit would no longer be required to have
12 such a permit due to the jurisdictional change in the waters to which they discharge. As a result,
13 these facilities may be subject to regulation under RCRA for the first time, are likely to not have
14 performed an analysis of whether they are subject to RCRA, and would likely not be in
15 compliance with RCRA as a result. Given that a number of these facilities are industrial or
16 municipal facilities that have not contemplated regulation as a RCRA treatment, storage or
17 disposal facility (TSDF), this will present an additional economic hardship on these facilities in
18 New Mexico. If the industrial or municipal facilities are discharging into an ephemeral stream in
19 New Mexico and that ephemeral stream is no longer a WOTUS, these newly regulated TSDFs
20 may also be deemed as land disposing of waste – or hazardous waste – pursuant to the
21 implications of WOTUS.

22 CONCLUSION

23 28. The Department respectfully requests that the Court enjoin implementation of the
24 WOTUS Rule. If the rule takes effect, it will have a devastating impact on New Mexico's waters
25 and harm the New Mexico economy. The rule creates a regulatory vacuum that the State will be
26 incapable of filling to mitigate its harm.

27 29. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is
28 true and correct.

1 Executed on the 11th day of May 2020 in Santa Fe, New Mexico.

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Rebecca Roose

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April 15, 2019

Filed Electronically at: OW-Docket@epa.gov

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Re: Comments on Proposed Rulemaking, Docket ID No. EPA-HQ-QW-2018-0149

Dear Administrator Wheeler, Mr. Lamont, and Ms. Gude:

On behalf of the All Pueblo Council of Governors (“APCG”), a tribal consortium made up of the Pueblo Indian tribes in New Mexico and an additional Pueblo in Texas, the University of New Mexico School of Law Natural Resources and Environmental Law Clinic submits the following comments on the proposed rule revising the definition of “Waters of the United States” and narrowing the scope of waters that are federally regulated under the Clean Water Act (CWA).¹ The APCG opposes the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (collectively, the “Agencies”) efforts because: (1) the proposed rule weakens the CWA protections for tribal waters and poses an imminent threat to the health and welfare of tribal communities; (2) the Agencies fail to honor and meet their trust obligations owed to tribal people, and to protect trust water and land resources; (3) the Agencies fail to follow established tribal consultation procedures mandating government-to-government collaboration prior to taking actions affecting tribal governments and tribal lands; (4) the proposed rule is unsupported by any science or technical studies or references; (5) the proposed rule creates an enforcement gap on Pueblo lands, and polluters will take advantage of the limited protections for headwater streams and waterways arising off those lands; (6) many of the water sources for the Pueblos would no longer be considered jurisdictional waters and would no longer be protected under the CWA; (7) many Pueblos would no longer receive funding for CWA programs as there would be no jurisdictional waters on their lands; (8) there would be significant gaps in protection from pollution, affecting Pueblo lands and surrounding non-Indian communities; and (9) the resulting

¹ Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (Feb. 14, 2019).

pollution and negative consequences cannot be repaired for generations and will be the legacy for our youth.

On February 14, 2019, the Agencies promulgated a regulation (“proposed rule”) that has broad ramifications for the implementation of nearly every regulatory program under the CWA.² The proposed rule constitutes the Agencies’ latest effort to define the statutory phrase “waters of the United States,”³ and thereby identify the waters subject to CWA jurisdiction. The proposed rule, in part, reaffirms CWA jurisdiction over waters—such as many tributaries and their adjacent wetlands—historically protected by the Agencies. However, in many respects the proposed rule deviates from past Agency practice by imposing severe and unjustified limitations on, or absolute categorical exclusions from, CWA jurisdiction, thereby abandoning crucial federal protections for potentially huge swaths of wetlands, ponds, ephemeral streams, and hydrologically-connected groundwater once protected by the Agencies for their potential effects on interstate commerce. These exclusions -- crafted with no tribal-federal government-to-government consultation and no consideration of the federal trust obligations to tribes —fly in the face of common sense, statutory purpose, lack of scientific foundation, and are wholly unsupported by the administrative record.

I. Introduction

A. The All Pueblo Council of Governors

The APCG is a tribal consortium made up of sovereign Indian tribal governments of the nineteen Pueblos of New Mexico and one Pueblo in Texas. Each Pueblo has significant land, water, and other cultural resources which are located both on and off its current lands. These lands are either held in fee with federal restrictions, thereby constituting federal trust lands, federal reservations held by the United States in trust for a Pueblo, or fee lands. Water is the key to life; throughout time, water has been the greatest predictor of villages, farms, commerce, and other markers of human success. Unlike many other Indian tribes in the United States, the Pueblos were never voluntarily or involuntarily removed from the lands they have held since time immemorial. The Pueblos were agrarian communities based on irrigated agriculture prior to the arrival of the Spanish in the New World. In the Pueblo world, water is not only essential for life, there is a strong cultural component attached to it. Each Pueblo is viewed as a guardian of the water it relies on to sustain its community, and it is a Pueblo’s duty to do what it can to protect the integrity of its cultural and natural resources. For some Pueblos there are perennial water sources, but these sources are not the majority. Many of the Pueblos place heavy reliance on streams that are ephemeral, intermittent, and seasonal, depending on rain and snowfall. An important part of the Pueblo culture is the ability to shepherd these waters for life sustaining needs.

The Pueblos, as irrigated agricultural communities since before the Spanish entrada, have federally recognized aboriginal, senior priority rights to use water, as well as related groundwater.⁴ The Pueblos also have federally reserved rights to use water on additional lands that are federal

² Clean Water Act §§ 303, 311, 401, 402 and 404 all depend on the definition of “waters of the United States”; *see also infra* notes 17-22.

³ *See* 33 U.S.C. § 1362(7) (2012).

⁴ *New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976); *New Mexico v. Aamodt*, 618 F. Supp. 993, 998 (D. N.M. 1985) *pet. for interlocutory appeal denied Nos. 85-8071 and 85-8072* (10th Cir. 1987).

reservations created by federal statutes or executive orders.⁵ These rights to use water are trust resources for which the United States owes the Pueblos a fiduciary duty. The United States has recognized its trust responsibility in the recent water settlements involving the Pueblos of Taos, San Ildefonso, Pojoaque, Nambé and Tesuque.⁶ The Department of the Interior's Indian Water Office criteria for Indian Water Rights Settlements recognize that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."⁷ Much of the Pueblos' rights to use water arise out of their continued ownership in time immemorial before the appearance of Europeans.⁸ And, the United States has an inviolable duty to protect these water rights.⁹

The Pueblos' rights extend to all types of water uses, including ceremonial cultural uses, hunting and fishing, agricultural, domestic, municipal, commercial and industrial; for essentially all uses, the rights are subject to the United States' trust duty by virtue of federal law. Numerous off-reservation tributaries, aquifers, wetlands, streams and other ephemeral bodies of water are all part of the hydrologic systems that have supported Pueblo life for a millennium or more. As such, protecting the instream flows across Pueblo lands is a vital concern of the Pueblos.

There are numerous sites of historic, spiritual, and cultural significance to the Pueblos throughout their aboriginal territories which the Pueblos continue to visit and use to this day. Water is sacred; Water is life. That is what Pueblo people are taught and believe. Pueblo traditions persist and knowledge systems thrive in their communities. Indeed, the reverence for water and its blessings continue to support and shape the tribal political, social, economic, and cultural climate in Indian communities throughout the United States. Today, water remains vital for tribal self-sufficiency, economic development, and providing security for present and future generations. Moreover, many water bodies on or off-reservation have cultural, and ceremonial significance in tribal life and are used for spiritual purification. These types of subsistence, cultural and ceremonial uses directly relate to tribal existence and designation of the area for tribal homelands and, therefore, entitle the tribes to a high level of water quality.

Indeed, in 1996, the EPA recognized the importance of water and its quality to Pueblo people in approving high water quality standards for ceremonial uses by the Pueblo of Isleta. Isleta Pueblo located downstream from the City of Albuquerque received Treatment as a State under the CWA and set water standards to protect their ceremonial practice, more stringent than the federal and state of New Mexico standards.¹⁰ The Court of Appeals for the Tenth Circuit upheld this standard requiring Albuquerque to establish a waste treatment plant to ensure that water in the Rio Grande flowing downstream to the Pueblo would be clean and meet the Tribe's standards. Many other Pueblos have water quality standards similar to those of the Pueblo of Isleta. For example, the Pueblo of Sandia, Pueblo of Acoma, Pueblo of Laguna have adopted water quality standards

⁵ *See id.*

⁶ *New Mexico ex. rel. State Engineer v. Aamodt, Settlement Agreement* (D. N.M. 2012).

⁷ *Criteria and Procedures for Indian Water Rights Settlements*, 55 Fed. Reg. 9223 (Mar. 12, 1990).

⁸ *See New Mexico, ex rel. State Engineer v. Aamodt*, 618 F.Supp. 993, 1010 (D. N.M. 1985) (Aamodt II).

⁹ *White Mountain Apache Tribe v. United States*, 8 Cl. Ct. 677 (1985).

¹⁰ *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

to protect their ceremonial use of water. Similarly, other federal appellate courts have recognized the importance of water and its necessary water quality for ceremonial purposes.¹¹

B. The Southwest in General

By all accounts, water in the Southwestern United States is a sacred and precious resource. A common phrase heard in the Southwest is “El agua es vida” or “water is life.” With most of the Southwest being an arid or semi-arid climate, the reverence towards water originates with the scarcity of water. The lack of perennial surface waters in the Southwestern United States is due to the infrequency of precipitation events and the reliance on seasonal snow melt. According to a 2008 EPA report on ephemeral streams in the Southwest, 81% of all streams in the Southwest are ephemeral and intermittent in nature.¹²



Figure 1: Typical ephemeral stream in the Southwest

According to a New Mexico Environment Department report, 88,810 miles of New Mexico non-tribal waters flow only in response to rain or seasonally.¹³ If tribal waters were included in this number, the percentage of 88% ephemeral and intermittent streams would likely increase due to the particularly dry areas that surround Indian country.

These ephemeral and intermittent streams are often headwaters to larger perennial streams and only flow in response to snow melt or monsoonal rains that cause flash flooding. Although these streams seem insignificant from the perspective of a water-heavy area, these ephemeral streams are vital to survival in Pueblo lands. Most communities in the Southwest only have one source of drinking water and contamination of this source would be devastating to the community. As droughts continue to occur and as population in the Southwest continue to grow, the

¹¹ *Montana v. U.S. Env'tl. Prot. Agency*, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998); *Wisconsin v. U.S. Env'tl. Prot. Agency*, 266 F.3d 741 (7th Cir. 2001).

¹² U.S. ENVTL. PROT. AGENCY, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST iii (2008).

¹³ N.M. ENV'T DEP'T, 2018-2020 STATE OF NEW MEXICO CLEAN WATER ACT SECTION 303(D)/SECTION 305(B) INTEGRATED REPORT 11 (2018).

communities in the Southwest will always be fighting to protect their water resources, knowing how important it is to life.

II. The Proposed Rule

In 2015, the Agencies promulgated a rule clarifying the definition of “Waters of the United States.”¹⁴ This rule applied the current scientific understanding of watershed function and applied the science to the significant nexus test of Justice Kennedy [in *Rapanos v. United States*].¹⁵ Although this rule faced many legal challenges, it is currently in effect in 22 states.

On February 14, 2019, EPA published a proposed rule in the Federal Register: Revised Definition of “Waters of the United States.”¹⁶ This proposed rule is part of a larger scheme of repealing and replacing the 2015 Clean Water Rule promulgated under the past Administration.¹⁷ Both rules, the 2015 Clean Water Rule and the current proposed rule, attempt to clarify the definition of “Waters of the United States” under the CWA.¹⁸ The “waters of the United States” rule is crucial to the meaning of the CWA because the definition sets the boundaries of which waters are federally regulated under the CWA. The “Waters of the United States” definition applies to water quality standards,¹⁹ oil spill prevention plans,²⁰ state certification,²¹ pollutant discharge permits,²² and dredge and fill permits.²³

Paramount to this comment, the proposed rule limits the definition of “Waters of the United States” to a higher degree than seen in the past. Limiting the definition of “waters of the United States” essentially limits the federal jurisdiction of the CWA on a large percentage of water bodies in the United States. One specific limitation is the stated exclusion of ephemeral streams from the definition of “waters of the United States.”²⁴ The proposed rule defines ephemeral as “surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall.”²⁵ Intermittent streams are still considered “Waters of the United States” if they fit the proposed rule’s definition of tributaries.²⁶ Intermittent streams are defined as “surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts.”²⁷

The proposed rule acknowledges that the new definition of “Waters of the United States” will limit the federal government’s jurisdiction over some waters.²⁸ EPA suggests that this rule

¹⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37053 (June 29, 2015).

¹⁵ *Id.*; *See also* *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, J. concurring).

¹⁶ Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (Feb. 14, 2019).

¹⁷ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37053.

¹⁸ *Id.*; Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4155.

¹⁹ Clean Water Act § 303, 33 U.S.C. § 1313 (2012).

²⁰ Clean Water Act § 311, 33 U.S.C. § 1321 (2012).

²¹ Clean Water Act § 401, 33 U.S.C. § 1341 (2012).

²² Clean Water Act § 402, 33 U.S.C. § 1342 (2012).

²³ Clean Water Act § 404, 33 U.S.C. § 1344 (2012).

²⁴ Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4173.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 4156.

protects federalism and Section 101(b) of the CWA which emphasize the role the states and tribes should have over their own waters.²⁹ However, EPA's attempt to protect federalism is misguided, conflicts with the CWA's objective of restoring and maintaining the nation's waters, and ignores the federal-tribal trust relationship and the fact that the role of tribes is essentially unprotected.

III. The Trust Doctrine Requires the United States to Exercise its Fiduciary Responsibilities to Protect and Preserve the Lands, Resources and Best Interests of Indian Tribes, and to Consult with Tribal Governments.

A. United States Has a Trust Obligation to the Pueblos.

The United States has a two-fold trust duty to Indian Tribes. Courts have long recognized the "existence of a general trust relationship between the United States and the Indian people."³⁰ The courts are clear that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes."³¹

Second, the federal government has a specific trust duty to protect the rights of the Pueblos. The federally recognized aboriginal rights held by the Pueblos, include the right to clean, safe water for numerous uses, including, but not limited to instream flows.³² As a result of the federal government's trust responsibilities to the Pueblos, the EPA must ensure that such trust resources are protected in any activity that may impact a Pueblo's uses of water, including regulations such as the proposed rule, that govern discharges into waters that affect the Pueblos' federally protected water rights.

The Supreme Court has consistently recognized that the United States "is something more than a mere contracting party" with Indian tribes, and "has charged itself with the moral obligations of the highest responsibility and trust" to those tribes.³³ The standards of conduct imposed by the trust doctrine apply to all federal agencies when dealing with protected Indian interests.³⁴ The "trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole."³⁵ This fiduciary "duty extends to the Corps of Engineers in the exercise of its permit decisions."³⁶

Moreover, the United States' obligation to tribes is greater than that of any ordinary trustee. The federal executive is to be "bound by every moral and equitable consideration to discharge its trust with good faith and fairness,"³⁷ and must exercise the highest degree of care and all the skill

²⁹ *Id.*; Clean Water Act § 101(b), 33 U.S.C. § 1251(b) (2012).

³⁰ *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

³¹ *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (emphasis in original) (citing *Seminole Nation v. United States*, 316 U.S. 268, 297 (1942)).

³² *See, e.g., United States v. Gila River Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996).

³³ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941).

³⁴ *Id.*; *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981) ("It is fairly clear that any federal action is subject to the United States' fiduciary responsibilities toward the Indian tribes"); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966); *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976).

³⁵ *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995).

³⁶ *Northwest Sea Farms*, 931 F.Supp. at 1519, (citing *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1523 (W.D. Wash. 1988)).

³⁷ *United States v. Payne*, 264 U.S. 446, 448 (1924).

at their disposal to protect trust property from loss or damage.³⁸ Moreover, trust responsibilities require far more than a “judgment call” that subordinates the tribes’ trust resources to competing federal and state interests.³⁹ A tribe is not required to prove to the trustee that particular measures are necessary; indeed, “[a] tribe is ‘entitled’ to rely on the United States, its guardian, for needed protection of its interests.”⁴⁰ Although relevant laws and the federal common law define the contours of the trust obligations, “[t]his does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee’s duties absolves the government of its responsibilities.”⁴¹

Here, the Agencies’ proposed rule must be considered, reviewed, and judged by the trust duties and responsibilities owed to the Pueblos to protect their water resources, lands and community. The United States and its executive agencies, the EPA and Corps, have an established trust relationship with the Pueblos which places a high priority on native interests when trust resource rights are impacted. The courts are clear that “any Federal government action is subject to the United States’ fiduciary responsibilities toward tribes.”⁴²

Federal agencies have tremendous impacts on Indian country through their land management systems, regulatory structure, and implementation of federal environmental laws. Through these processes, the agencies regulate a variety of private activities that have the potential to threaten or degrade the environment. The scheme of environmental laws – the CWA,⁴³ the Clean Air Act,⁴⁴ the Safe Drinking Water Act,⁴⁵ the Endangered Species Act,⁴⁶ and the National Environmental Policy Act⁴⁷ – were enacted to protect the interests of the majority of society, not the specific interests of tribes, tribal resources, cultural resources, or sacred sites. However, the federal agencies are obligated through the trust doctrine and the government-to-government relationship with Indian tribes to protect specific interests of tribes when implementing federal laws.

The trust doctrine creates a heightened level of duty: the United States has charged itself with moral obligations to the tribes of the highest responsibility and trust,⁴⁸ to be judged by “the most exacting fiduciary standards.”⁴⁹ When undertaking federal action, it is incumbent upon agencies to exercise discretion based on the trust doctrine and the accompanying fiduciary duties

³⁸ *Duncan v. United States*, 667 F.2d 36, 45 (Ct. Cl. 1981).

³⁹ *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973), *modified on other grounds*, 360 F.Supp. 669 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

⁴⁰ *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

⁴¹ *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001), (quoting *Mitchell II*, 463 U.S. at 225.11).

⁴² *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (citing *Seminole Nation v. United States*, 316 U.S. 268, 297 (1942)).

⁴³ Pub. L. No. 95-217, 91 Stat. 1566 (1977).

⁴⁴ Pub. L. No. 88-206, 77 Stat.392 (1963).

⁴⁵ Pub. L. No. 93-523, 88 Stat. 1660 (1974).

⁴⁶ Pub. L. No. 93-205, 87 Stat. 884 (1973).

⁴⁷ Pub. L. No. 91-190, 83 Stat. 852 (1970).

⁴⁸ *Seminole Nation v. United States*, 316 U.S. 286 (1942).

⁴⁹ *Cobell v. Norton*, 391 F.3d 251, 257 (D.C. Cir. 2004) (quoting *Morton v. Ruiz*, 419 U.S. 199, 236 (1974), and *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941)).

owed to tribes within the environmental statutory scheme in order to protect these vital tribal interests and resources.

B. The Agencies Have Failed to Consult with the Pueblos on the Proposed Rule.

The federal obligation to engage tribes in government-to-government tribal consultation is rooted in the special relationship that exists between the United States and Indian tribes.⁵⁰ There is a fundamental difference between the public participation process (notice and comment), which is an information-gathering exercise, and meaningful consultation, which is a government-to-government dialogue that requires greater involvement in decision making by Indian tribes.⁵¹ Consultation between federal agencies and tribal governments is a legal requirement. There is a long list of Congressional acts, Executive Orders, and administrative rules that require consultations with tribes, and some require consent before any federal action can be undertaken.⁵² In short, the trust responsibility imposes a duty on the federal government to engage in meaningful pre-decisional consultation on rulemaking and projects that will affect the Tribe's treaty rights and trust resources.

As the EPA knows, meaningful consultation mandates were issued by both Presidents Bush and Obama. The purpose of Executive Order 13175 is "to establish regular and meaningful consultation with tribal officials in the development of Federal policies that have tribal implications, [and] to strengthen the United States government-to-government relationships with tribes. . . ." The Executive Order 13175 defines "Policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements *or actions that have substantial direct effects on one or more tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.*"⁵³ The proposed rule implicates all three concerns set forth in the Executive Order: (1) this action potentially effects all 567 federally-recognized tribes as each nation presumably has water resources that may be impacted by the proposed interpretation, and also those tribes that receive funding under the CWA will be affected; (2) such an interpretation would affect the relationship between the Federal government and tribes by hurting tribal sovereignty, ignoring the federal trust responsibility to protect the interests of tribes, and to defund existing tribal CWA programs that have been in place for years; and (3) could be seen as a

⁵⁰ Colette Routela & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417, 421.

⁵¹ See, e.g., INDIGENOUS PEOPLES SUBCOMM. OF THE NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING 3, 5 (2000) (Discussing the differences between federal-tribal consultation and public participation in agency decision making and noting that consultation "should be a collaborative process between government peers that seeks to reach a consensus on how to proceed").

⁵² In January 2009, the White House published a *List of Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance*. The List notes that it "does not purport to be comprehensive or all encompassing." See also Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 22 n.3 (2000).

⁵³ Exec. Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67, 249 (Nov. 6, 2000) (emphasis Added, Section 1 (a)). President Obama's Memorandum on Tribal Consultation dated November 5, 2009 reaffirms the policy in Executive Order 13175.

unilateral decision due to the lack of consultation, thus creating an imbalance in the distribution of power between the Federal Government and tribes. In particular, Executive Order 13175, directed the Agencies to create internal consultation processes to “ensure the meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”⁵⁴

The Agencies had a clear duty to consult with tribal governments about the proposed rule based on Executive Order 13175,⁵⁵ the EPA Policy on Consultation and Coordination with Indian Tribes,⁵⁶ the EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, February 2016, the EPA Responses to Comments on EPA Policy for Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (“EPA Treaty Guidance Comments”), and the 2009 Memorandum on Consultation.⁵⁷ The conclusions of the U.S. Department of Interior, the U.S. Department of the Army, and the U.S. Department of Justice in their report entitled *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, January 20, 2017 (“*Improving Tribal Consultation*”), also acknowledge the duty to consult with tribal governments. The Corps, is governed by their own consultation policies, including Department of Defense Instruction 4710.02 (“DoD Instruction 4710.02”) and the Corps’ Tribal Consultation Policy (Nov. 1, 2012) (“Corps’ Consultation Policy”).⁵⁸

Pursuant to their trust duty, the Agencies are required to “consult with Indian tribes in the decision-making process to avoid adverse effects on [federally protected] resources.”⁵⁹ The trust obligation is not a discretionary duty.⁶⁰ The duty to consult is binding on an agency at any time, but the right to meaningful consultation is strongest when the agency has announced a consultation policy and the Tribes have come to rely on that policy.⁶¹ At a minimum, this requires that the

⁵⁴ *Id.* at 67,250.

⁵⁵ *Id.* It beyond notice-and-comment rulemakings to include “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes.”

⁵⁶ U.S. Env’tl. Protection Agency, Policy on Consultation and Coordination with Indian Tribes 4-5 (2011) <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf> (noting that the input phase may consist of “written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved... [that create] opportunities to provide, receive, and discuss input”).

⁵⁷ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009). Obama’s Memorandum refers to the necessity of “meaningful dialogue between Federal officials and tribal officials,”⁵⁷ requiring the two parties engage in back-and-forth discussions to work towards a joint resolution of the issues presented.

⁵⁸ See U.S. Army Corps of Engineers Policy Guidance Letter No. 57: Indian Tribal Sovereignty and Government-to-Government Relations with Indian Tribes (1998), <http://www.usace.army.mil/Portals/2/docs/civilworks/pgls/pgl157a/pdf>. Consultation policy promising “pre-decisional and honest consultation” by involving tribes “in collaborative processes designed to ensure information exchange, consideration of disparate viewpoints before and during decision making, and utiliz[ing] fair and impartial dispute resolution mechanisms.”

⁵⁹ *Klamath Tribes v. United States*, No. 10-2130, 1996 WL 924509 (D. Or. Oct. 2, 1996) (quoting *Lac Courte Oreille Band of Indians v. Wisconsin*, 668 F. Supp. 133, 140 (W.D. Wis. 1987)); *Ctr. for Biological Diversity v. Salazar*, No. 10-2130, 2011 WL 6000497, at *11 (D. Ariz. Nov. 30, 2011).

⁶⁰ *Ctr. for Biological Diversity*, 2011 WL 6000497 at *11.

⁶¹ *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D. S.D. 2006); see also *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D. S.D. 1995); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58 (D.C. Cir. 1991); *Indian Educators Fed’n Local 4524 of Am. Fed’n of Teachers, AFL-CIO v. Kempthorne*, 541 F. Supp. 2d 257, 264-65 (D. D.C. 2008).

agency give firm notice of its intentions, which requires, "telling the truth and keeping promises."⁶² An agency's failure to provide tribes with accurate information necessary to meaningfully consult before a decision is made constitutes failure to meet the agency's consultation obligation.⁶³

The federal government has further obligations to tribes under the National Historic Preservation Act ("NHPA") and the Religious Freedom Restoration Act ("RFRA"). The NHPA was enacted to preserve historic resources, including "traditional cultural properties" in the midst of modern projects and requires agencies to fully consider the effects of its actions on historic, cultural, and sacred sites. Section 106 of the NHPA requires that prior to a federal action agencies must take into consideration the effects of that "undertaking" on historic properties.⁶⁴ The Section 106 process also requires consultation between agencies and Indian Tribes on federally funded or authorized "undertakings" that could affect sites that are on, or could be eligible for, listing in the National Register, including sites that are culturally significant to Indian Tribes.⁶⁵ An agency official must "ensure" that the process provides Tribes with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . , articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."⁶⁶ This requirement imposes on agencies a "reasonable and good faith effort" by agencies to consult with Tribes in a "manner respectful of tribal sovereignty."⁶⁷

Furthermore, under RFRA the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."⁶⁸ Tribal religious practices and water are significantly tied to oral tradition, ancestral lands, and natural resources.

Significantly, the EPA and the Corps, along with several other departments of the United States Federal Government, entered into a Memorandum of Understanding on Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites on September 23, 2016. The Memorandum acknowledges that federal agencies hold in trust many culturally important sites and resources held sacred by Indian tribes. The Memorandum also recognizes federal agencies are responsible for analyzing the potential effects of agency projects carried out, funded, or permitted on historic properties and resources of traditional cultural and religious importance to Indian tribes including sacred sites. Additionally, international law, treaties, and jurisprudence has repeatedly affirmed the right of Free Prior Informed Consent.⁶⁹ The purpose of Free Prior Informed Consent is to establish bottom up participation and consultation of an Indigenous population prior to the

⁶² Yankton Sioux Tribe, 442 F.Supp.2d at 784 (citing Lower Brule Tribe, 911 F Supp. at 399).

⁶³ *Id.* at 785; see also Cheyenne River Sioux Tribe v. Jewell, No. 3:15-03072, 2016 WL 4625672 (D. S.D. 2016).

⁶⁴ 54 U.S.C. § 306108; 36 C.F. R. § 800.1.

⁶⁵ 54 U.S.C. § 302706.

⁶⁶ 36 C.F.R. §800.2(c)(ii)(A).

⁶⁷ *Id.*; 36 C.F.R. §800.2(c)(2)(ii)(B); see also *id.* § 800.3(f) (any Tribe that "requests in writing to be a consulting party shall be one").

⁶⁸ 42 U.S.C. § 2000bb-1(b).

⁶⁹ See United Nations, Declaration on the Rights of Indigenous People, art. 10 (Mar. 2008).

beginning of a development on ancestral land or impacts on resources within the Indigenous population's territory.⁷⁰

A "Dear Tribal Leader" letter was sent by former Administrator Pruitt, dated April 20, 2017, to Tribes advising them to direct a request for formal government-to-government consultation to Karen Gude, Office of Water Tribal Program Coordinator. A letter to Tribal leaders advising them to request a consultation on the proposed rule does not meet the consultation requirements. There was no active engagement or meaningful opportunity for tribes to meet with the Agencies unless they responded directly to the Agencies and requested a meeting. And, then it was in the Administrator or staff's discretion to meet with the tribe seeking consultation. Indeed, such letters have been found not to meet the consultation mandates.⁷¹ On May 18, 2017, the EPA hosted a webinar explaining the proposed rule, but this nationwide presentation does not constitute tribal consultation under any Executive Order or Agency consultation policy. It is certainly not meaningful. Some tribes submitted comments to the Agencies, but absolutely no changes were made to the proposed rule published in 2017 and republished for comments in 2019.

Since the publication of the proposed rule on February 14, 2019, the Agencies have never engaged in any tribal consultation to meet with any tribal government leadership to discuss the proposed rule and its impacts on tribal communities. Reviewing a Pueblo's comments submitted in conjunction with an agency's general invitation for public comments is not sufficient to meet its trust obligation. Meaningful consultation requires a careful consideration of tribal views and, if not adopted, setting out the reasons why, so that dialogue can continue. The Agencies held a meeting with tribal technical staff in Albuquerque on March 26, 2019, but the Agencies stated it was not a tribal consultation, only a data and information gathering session. Ironically, the Agencies requested tribal staff to assist them by providing data or maps of their lands showing streams and rivers that may be designated as a "Water of the United States." Clearly, this information gathering should have been undertaken to support the proposed rule rather than its categorical waters approach.

If the Agencies had consulted with tribal governments they would have been informed that the proposed rule will necessarily affect aquifers, wetlands, waterways, and tributaries that are federal trust resources or hydrologically connected to the such resources, and that any decision would impact tribal lands and waters. These lands and waters have been recognized by the United States as trust resources and the United States must act as our fiduciary in protecting them as a matter of federal law as set forth above.

The Pueblos are responsible for maintaining their water and other natural resources for the generations to come. The Pueblos cannot protect their waters from off-Reservation pollutants and other degradation if there is no federal regulation of actors outside their sovereign control. This result would not only be an affront to tribal sovereignty over our lands, but would violate the federal trust responsibility owed by the federal government to Indian tribes. Given the profound and negative impacts that such a change in interpretation would have on tribes and their natural resources, the Agencies should have initiated formal, government-to-government consultation on the proposed rule. Asking tribes to provide written comments in reaction to an Executive Order

⁷⁰ *Id.*

⁷¹ Pueblo of Sandia v. U.S. Forest Service, 50 F.3d 856 (10th Cir. 1995).

cannot replace the meaningful consultation mandated by federal law and policy, and the trust responsibility. Consequently, any revised definition of "Waters of the United States" must thoroughly evaluate impacts to the Pueblos in conjunction with government-to-government consultation with the Pueblos. Failure to do is arbitrary and capricious and risks violating the United States' and the EPA's trust responsibility to all of the Pueblos.

IV. The Proposed Rule is Unsupported by the Record, Scientific Consensus, and Erroneously Relies on Justice Scalia's Opinion in *Rapanos*.

A. The Rule is Unsupported by the Record and Scientific Consensus.

The proposed rule deviates from long-standing Agency practice by expressly excluding "ephemeral features that do not meet the definition of tributary."⁷² Following *Rapanos*, the Agencies considered ephemeral streams jurisdictional if they had a significant nexus with downstream navigable waters, and the presence of an Ordinary High Watermark ("OHWM") was but one consideration.⁷³ The 2015 Clean Water Rule did not contain an express exclusion for "ephemeral features."⁷⁴ The recent proposed rule reverses course and eliminates ephemeral streams, but the recent provisions lack support in the record, are contrary to best available science, and are arbitrary and capricious. Importantly, the proposed rule fails to take into account EPA's own scientific consensus about the contribution ephemeral streams have on navigable waters, ecosystems, and wildlife. According to the EPA website, "[s]cience provides the foundation of Agency policies, actions and decisions made on behalf of the American people."⁷⁵ However, there is very little evidence that EPA utilized any of the science available to them, even the scientific evidence that EPA has published in recent years.

The 2015 Agencies' record makes clear that ephemeral streams—waters that "flow briefly . . . during and immediately following precipitation" and "are above the water table at all times," are a critically important part of the hydrologic landscape. A joint peer-reviewed report by EPA and the U.S. Department of Agriculture ("Ephemeral Stream Report") on the importance of ephemeral and intermittent streams in the desert Southwest, which the Agencies call "a state-of-the-art synthesis of current knowledge of the ecology and hydrology in these systems," recognizes that ephemeral streams "perform the same critical hydrologic functions as perennial streams: they move water, sediment, nutrients, and debris through the stream network and provide connectivity within the watershed."⁷⁶

The ability to protect ephemeral streams under the CWA—either as defined tributaries or by application of the Justice Kennedy's significant nexus test—is critically important in areas like

⁷² 33 C.F.R. § 328.3(b)(4)(vi).22.

⁷³ See U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES*, 10 (2008), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

⁷⁴ See 79 Fed. Reg. at 22,263-64.

⁷⁵ U.S. Env'tl. Prot. Agency, *Role of Science at EPA*, <https://www.epa.gov/research/role-science-epa> (last updated Feb. 2, 2018).

⁷⁶ U.S. ENVTL. PROT. AGENCY, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST 13 (2008). See also 80 Fed. Reg. at 37,063.

the desert Southwest, where ephemeral streams comprise the vast majority of waters.⁷⁷ In such contexts, ephemeral streams “provide much of the ecological and hydrological connectivity in a landscape,” and their disturbance or loss “has dramatic physical, biological, and chemical impacts” on the watershed.⁷⁸ Notwithstanding their importance to arid landscapes in particular, ephemeral streams often lack an OHWM.⁷⁹ For these reasons, members of EPA’s Science Advisory Board “recommended that the presence of OHWM not be a required attribute of a tributary and suggested that the wording in the definition be changed to ‘bed, bank, and other evidence of flow.’”⁸⁰

In addition, the Agencies’ decision to focus primarily upon flow regime—*i.e.*, whether a ditch flows perennially, intermittently, or ephemerally—to determine a ditch’s jurisdictional status is unsupported by prevailing science and flatly contrary to the approach correctly used by the Agencies in their treatment of tributaries. It makes no sense in the southwest where irrigated agriculture has diverted water from flows into ditches, and returns flows to that same flow. The record makes clear that intermittent and ephemeral tributaries “are chemically, physically, and biologically connected to downstream waters, and these connections have effects downstream.” Individual SAB members pointed out the lack of scientific justification to classify ditches based upon their flow regime.⁸¹

Perhaps the Agencies could have lawfully ignored the overwhelming science in the record if they had offered *some* rational explanation for the disparate treatment of ditches and tributaries.⁸² But the only justification they provide in the preamble—that the ditch exclusions would “provide clarity and predictability regarding the regulation of ditches and artificial features,”⁸³ is unsupported by the record. In fact, the Agencies recognize that tributaries can include waters “that flows through a culvert, dam, or other similar artificial break.”⁸⁴ Thus, the distinction between a “ditch” and a “tributary” may be blurred to the point of nonexistence, making the jurisdictional status of such waters impossible to verify under the proposed rule. Ultimately, the Agencies’ exclusion of most ephemeral and intermittent ditches from CWA jurisdiction—even where those ditches meet the Agencies’ own definition of “tributary”—is unsupported by any rationale articulated by the Agencies in the record.

According to the Ephemeral Stream Report, 59% of streams in the continental United States are ephemeral or intermittent, and 88% of streams in New Mexico fit this categorization. This Report discusses the characteristics, functions and ecosystem significance of these streams and concludes that these streams affect the water quality of perennial streams. The Report then recommends effective management of these water resources to protect such water quality.⁸⁵

⁷⁷ *Id.* at 5.

⁷⁸ *Id.* at 8.

⁷⁹ *See, e.g.*, Comments to the chartered SAB, at 2 (noting that “[t]he absence of OHWM is relatively common in ephemeral streams within arid and semi-arid environments or low gradient landscapes”).

⁸⁰ *Id.* at 2.

⁸¹ *See, e.g.*, SAB Comments at Attachment p. 36 (Dr. Harvey) (“there would appear to be no reason [intermittently flowing ditches] should not be considered jurisdictional.”).

⁸² *See Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1182 (D.C. Cir. 1994) (rejecting an agency decision made with “apparent inconsistency, unadorned by any attempt at explanation or justification”).

⁸³ 84 Fed. Reg. at 4179.

⁸⁴ *Id.* at 4173.

⁸⁵ *Id.* at 76.

Throughout the Report, EPA explores the scientific understanding of the importance of ephemeral and intermittent streams to perennial streams. The report goes further by stating that “ephemeral and intermittent streams in the arid and semi-arid Southwestern U.S. are ecologically and hydrologically connected to downstream waters, and have a significant effect on the chemical, physical, and biological integrity of those waters.” Although this language speaks to the language of the significant nexus test, a test abandoned by the proposed rule, the report is clear that ephemeral and intermittent streams are connected to traditionally navigable waters and their water qualities must be protected. This understanding fits squarely within the scientific foundation of EPA and the Agencies’ 2015 Clean Water Rule.

In 2015, the EPA developed a report summarizing the “current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters.”⁸⁶ This Connectivity Report was created to “inform rulemaking by the [EPA] and [Army Corps] on the definition of ‘waters of the United States.’”⁸⁷ The 2015 Clean Water Rule promulgated by the Agencies was a rule amending the definition of “waters of the United States” that was based on scientific consensus, consensus gathered through the 2015 Connectivity Report. The report is based on the “review and synthesis of more than 1,200 publications from the peer reviewed scientific literature.”⁸⁸ The report itself was peer reviewed by independent scientists and EPA’s Science Advisory board. In the report, the EPA concludes that ephemeral streams are physically, chemically, and biologically connected to downstream rivers and are a major transporter of organic materials and chemical contaminants to those downstream rivers.⁸⁹ For ephemeral streams “infrequent, high-magnitude events” are major moments of transmitting materials into downstream perennial rivers.⁹⁰ This finding is extremely important for the ephemeral streams on Pueblo lands in the Southwest where monsoon events in the late summer trigger flash floods that carry large amounts of sediment and other materials through ephemeral streams to larger downstream rivers, such as the Rio Grande.

When promulgating a rule, an agency must examine all the relevant information on the issue and provide a satisfactory explanation of its choice in order to avoid a finding of an arbitrary and capricious decision.⁹¹ In providing a reasonable explanation, a court looks at whether or not there is a rational link between the facts found and the choices made.⁹² In the case of the EPA or other science-based agencies, the facts found are often scientific facts, which must be rationally linked to the rule being promulgated. When promulgating the 2015 Clean Water

⁸⁶ U.S. ENVTL. PROT. AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE ES-1 (2015).

⁸⁷ *Id.*

⁸⁸ *Id.* at ES-2.

⁸⁹ *Id.*

⁹⁰ *Id.* at ES-8.

⁹¹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automobile Ins.*, 463 U.S. 29, 43 (1983); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). In *Motor Vehicle Manufacturers Association*, the court found that the Department of Transportation under Ronald Reagan acted arbitrary and capriciously when it rescinded a seatbelt rule promulgated under the Carter administration because the Reagan rule did not adequately explain its decision to rescind or deal with the previously administration’s reasoning for implementing the rule. *Id.* at 56-57.

⁹² *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*, 463 U.S. at 43.

Rule, the EPA did significant scientific fact gathering through the 2015 Connectivity Report to support the rule. In this proposed rule, the Agencies have failed to provide a rational link between the facts found and the proposed rule. The EPA has not adequately addressed its own scientific reports on the importance of protecting ephemeral and intermittent streams with the CWA.

The Agencies' lack of a scientific basis for the proposed rule is evidenced by the Agencies' desire to receive data from state, tribal and federal agency datasets of "Waters of the United States."⁹³ The Agencies' claim that receiving this data will help the regulated community and co-regulators such as states and tribes know which waterways would be covered under the proposed rule.⁹⁴ However, this desire reveals the lack of scientific understanding or basis behind the proposed rule. It is clear that the Agencies do not know which waterways would no longer be covered under the proposed rule. Without this knowledge, the Agencies do not know the extent of the impacts this proposed rule will have on the United States. The Agencies will know the extent of the impacts only after receiving these datasets from others after the rule is already in effect. This is a clear violation of the arbitrary and capricious standard outlined above and is essentially putting the cart before the horse.

The Agencies entirely fails to support their proposed rule with scientific facts. Instead, of attaching supporting documents dealing with the scientific reasoning for the rule, the Agencies have attached an economic analysis supporting document.⁹⁵ This document seeks to assess the potential impacts of the proposed rule. As discussed earlier, the Agencies attempt to address the potential impacts of the proposed rule without knowing the extent of the affected waters, as evidenced by their request for geospatial data. Although the Agencies explore the negative impacts pollutants will have on unprotected waters, the Agencies fail to address the positive values associated with cleaner waters, including values created by recreation, drinking water sources, wildlife, and religious values associated with the Pueblos. This economic analysis deeply underestimates the high value of clean water to tribal nations/people in all respects.

B. The Proposed Rule Erroneously Relies on Justice Scalia's Opinion in *Rapanos*.

The Agencies state in the proposed rule that the basis for this promulgation is based on the legal writings of Justice Scalia in *Rapanos*, legislative history, and the CWA statute.⁹⁶ The Executive Order that led to the drafting of this proposed rule echoes these sentiments asking for a rule based on Justice Scalia's plurality opinion.⁹⁷ The Agencies have asked for comments on the potential consequences of reinterpreting the "Waters of the United States" rule to be consistent with Justice Scalia's opinion in *Rapanos*. In short, the consequences of such a radical change in interpretation will be devastating. Justice Scalia, was not a scientist and his legal opinion cannot replace decades of reasoned, scientifically supported evidence of the damaging effects of pollution,

⁹³ *Id.* at 4198.

⁹⁴ *Id.*

⁹⁵ U.S. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, ECONOMIC ANALYSIS FOR THE PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES" (2018).

⁹⁶ Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4255-56 (Feb. 14, 2019).

⁹⁷ Exec. Order No. 13778 (Feb. 28, 2017).

and the positive effects of sound stewardship principals. Critically, Justice Scalia's narrow approach to water bodies has never been adopted by any federal appellate court. Indeed, all eleven circuits have adopted the opinion of Justice Kennedy from Rapanos establishing a significant nexus standard to establish the applicability of the CWA.⁹⁸

Justice Scalia's opinion concluded the following: "(1) The phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are describe in ordinary parlance as 'streams,' 'oceans, rivers, [and] lakes, . . . (2) A wetland may not be considered 'adjacent to' remote 'waters of the Unites States' based on a mere hydrologic connection Thus, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between the two, are 'adjacent' to such waters and covered by the Act." For purposes of these comments, the key phrases of concern to the Pueblos in Justice Scalia's opinion are "relatively permanent" and "continuous surface connection." As discussed above, the Pueblos' source of water is primarily ephemeral.

It is the objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Adopting a rule predicated on Justice Scalia's interpretation would undermine the clear objectives of the statute. The scope of "the Nation's waters" and thus the reach of the CWA, and the jurisdiction of the EPA and Corps has been, since 1988, interpreted to include traditional navigable waters as well as their tributaries (as determined through the "significant nexus").⁹⁹ The reason tributaries are protected is the very real phenomenon of upstream pollution contributing to downstream pollution; something that occurs even where there is a "mere hydrological connection." Thus, protecting only traditional navigable waters without protection of their tributaries would fail to meet the objective of the CWA.

V. The Proposed Rule Poses a Serious Threat to the Pueblos

A. The Proposed Rule Would Make Much of the Pueblos' Waters No Longer Jurisdictional Under the CWA.

Under the proposed rule, there are six categories of water that would be considered -- traditional navigable waters; tributaries, certain ditches, certain lakes and ponds, impoundments, and adjacent wetlands. Critically, the proposed rule takes a narrow view of the complex drainage systems that exist in the arid west, and particularly in the Pueblo lands in New Mexico, where

⁹⁸ *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *Simsbury-Avon Preservation Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir.2009); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 2409 (2012); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011); *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), *cert. denied*, 555 U.S. 822 (2008); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 74 (2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); *United States v Robertson*, 875 F.3d 1281 (9th Cir. 2017); *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *cert. denied sub nom* *McWane v. United States*, 555 U.S. 1045 (2008).

⁹⁹ 40 C.F.R. § 230.3(o)(3)(v).

there are large ephemeral streams and less than seasonal intermittent streams, including washes, gulches, arroyos, groundwater and ditches. Much, if not all, of the surface water on Pueblo lands in New Mexico would not be considered “Waters of the United States” under the proposed rule. In fact, much of surface water in the Southwest would be excluded from jurisdiction under the CWA. The number of waters and wetlands likely to be affected has been the subject of several geospatial studies. One, conducted by Saint Mary’s University of Minnesota GeoSpatial Services, provides visual mapping of how a watershed in the Southwest loses much of its CWA protection under a restrictive rule.¹⁰⁰ By restricting the potential jurisdiction of the CWA, the proposed rule has the potential to permit an increase in discharge of pollutants into wetlands, streams and waterways in the river basins.

Under the current interpretation of the CWA, most Pueblo water flows are jurisdictional waters. The CWA allows for each Pueblo to protect the water quality of these waters through implementation of parts of the CWA, setting water quality standards (“WQS”) as well as setting tribal WQS (which protect traditional uses of water bodies), and providing a legal framework to object to off-Reservation and non-tribal users who may negatively impact water quality. However, the arid nature of the Southwest does not allow most Pueblo water flows to meet the criteria of “relatively permanent” as outlined by Justice Scalia. A reinterpretation of the CWA, as described in the proposed rule, would prevent the Pueblos from protecting their water sources from off-Reservation upstream actors.

With the advent of a status for tribes-Treatment as State, later Treatment in the Same Manner as State (“TAS”) under the CWA that allowed tribes to fully implement and participate in environmental regulation, the protection of natural resources on tribal lands and Reservations began to change. With TAS, under the CWA, a tribe has the ability to “implement the permit programs under section 402 and 404 of this Act” and to receive funding-as States do-to support these endeavors.¹⁰¹ However, these tools only apply to waters protected under the CWA, that is, waters of the United States. By adopting Justice Scalia’s rigid and unscientific interpretation of tributaries and streams, the Pueblos would lose all the tools they have gained to assert their sovereignty over their waters on their lands. Additionally, the inability to protect the integrity of the waters flowing across tribal lands will have irreparable harm to non-Indian downstream users. Each Pueblo would also lose the CWA funding promised by law to “support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.”¹⁰² The consequences of this would be devastating to the Pueblos and our surrounding communities.

Waterbodies and tributaries within the United States are as vast and varied as the climates and ecosystems of the U.S. Ecological conditions are not homogenous, and should not be treated as such under the law. Justice Scalia’s interpretation of what a tributary of a traditional navigable water should be, and thus, what type of waterbody should be covered under the CWA, is biased

¹⁰⁰ Saint Mary’s University of Minnesota, GeoSpatial Services, Modeling Federally Protected Waters and Wetlands, <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33> (2019) (using the Cimmaron River watershed in New Mexico as a case study).

¹⁰¹ 40 CFR 101.7(b).

¹⁰² *Id.*

by his lack of understanding of arid ecosystems; he was not a scientist, and his familiarity with western ecosystems was limited. Ecologists understand that the vast majority of waterbodies in the arid Southwest do not exhibit anything resembling "relatively permanent." Their ability to flow is strongly dependent on seasonal precipitation, saturation of soils, and upstream storage and precipitation, which can vary tremendously from one year to the next. These creeks, streams, and rivers, however, are still classified as riparian ecosystems, are still tributaries to traditional navigable waters, and still need to be protected by the CWA in order to meet the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The Pueblos' federally protected rights to use water will be impaired if the EPA's definition of "Waters of the United States" fails to take into account the proven potential of off-Reservation streams, wetlands, and other waterways to carry dangerous pollutants to Pueblo lands. Justice Scalia's formulation of "Waters of the United States" in *Rapanos* has the potential to exclude a great many of those important bodies of water that are so crucial to the health of the Pueblos. Such a result could undo the important work that the EPA has done in conjunction with the Pueblos over the past several decades. More importantly, it would violate the Pueblos' rights under federal law, and it would violate United States' fiduciary duty to the Pueblos.

Cimarron River Watershed, NM

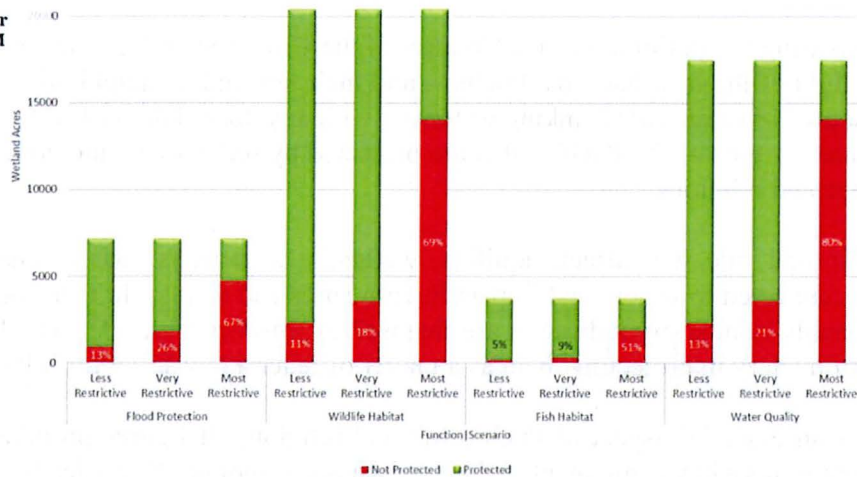


Figure 2: Results from Saint Mary's GIS Modeling Case Study on Cimarron Watershed.¹⁰³

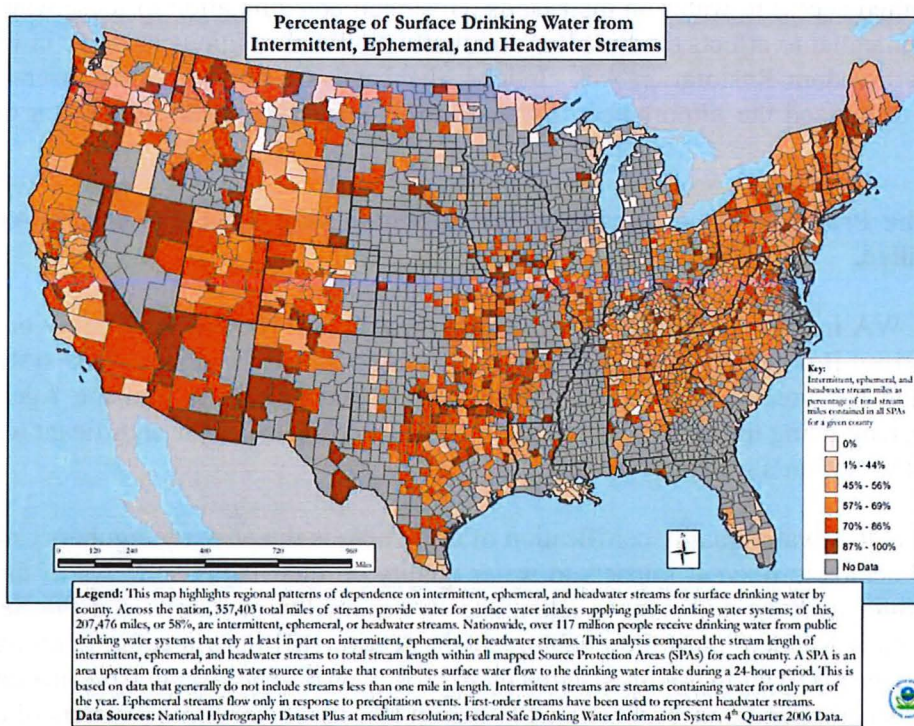


Figure 3: Percent of streams likely affected by the proposed rule.¹⁰⁴

¹⁰³ *Id.*

¹⁰⁴ U.S. Env'tl. Prot. Agency, *Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams: National Map*, <https://www.epa.gov/cwa-404/surface-drinking-water-provided-intermittent-ephemeral-and-headwater-streams-national-map> (last visited Apr. 4, 2019).

B. The Proposed Rule Results in Impacts to all Pueblos' Federally Recognized Water Rights and Religious Exercise.

The narrowing the definition of the “Waters of the United States” is a critical concern for the Pueblos in light of the fact that most Pueblos, and their non-Indian neighboring communities have a single source of clean, safe drinking water. As with any degradation of water quality, such pollution implicates rights of the Pueblos that are protected by federal law, including the practice of Pueblo culture and religions.

The proposed rule will affect, aquifers, wetlands, waterways, and tributaries that are hydrologically connected to waters that impact Pueblo lands and waters. In fact, for the Pueblos, those hydrologically related groundwaters are themselves trust resources.¹⁰⁵ The United States must act as out fiduciary in protecting them as a matter of federal law as set forth Part IA.

Water is an essential aspect of Pueblo life and religion. It figures prominently in their theology and represents a key component of their religious ceremonies. Specifically, many of their religious sacraments require either water or ritual deprivation thereof. These ceremonies require that they use only water that is both environmentally and ritually pure. As noted above, the Pueblos have very limited access to water on their lands. Upstream contamination of these waters has the very serious potential to affects the Pueblos' and their members' religious exercise in violation of the Religious Freedom Restoration Act. Indeed, the Tenth Circuit and other federal appellate courts have recognized the importance of water and its necessary water quality for ceremonial purposes.¹⁰⁶

C. The Proposed Rule Creates a Jurisdictional Gap That Cannot Be Adequately Filled.

The CWA has set up a complex permitting system that requires any entity or person to apply for a permit if pollution would result from that entity/person's actions. This system is well established and has created communication between regulated entities and the Agencies. The permitting system, being the enforcement teeth of the CWA has led to the significant reduction in pollutants in the Nation's waters.

Section 401, water quality certification of the CWA, is the primary regulatory mechanism used by the Pueblos to prevent impacts to water quality on their lands. Twelve of the nineteen Pueblo governments have authority to administer water quality standards and the Section 401 program. In New Mexico, until the Pueblos obtain Section 401 certification authority, the 401 process within the reservation is administered by EPA Region 6. The current EPA process requires that all projects authorized under a Section 404 permit (for dredge or fill to “Waters of the United States”) contact and solicit comments from the Pueblos' Water Quality program as part of the application process, and the Tribes' comments are typically addressed as conditions of any granted 401 certification. This process allows tribal staff to review all projects impacting waters of the United States on a Pueblo's lands to verify that the projects will not result in exceedances of the

¹⁰⁵ See *Aamodt II*.

¹⁰⁶ *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (upholding EPA's approval of Pueblo of Isleta's water quality standards).

Tribes' water quality standards and to ensure that best management practices are employed to limit non-point source pollution.

The overwhelming number of projects on Pueblo lands requiring Section 404 permitting and Section 401 water quality certification involve work on ephemeral or intermittent tributaries. Without "Waters of the United States" designation, these projects would no longer require a 401 water quality certification from the Pueblo or EPA. Without the need for a Section 404 permit and 401 certification, projects would not be required to implement the appropriate best management practices when working on ephemeral or intermittent streams. When best management practices are not used, projects within reservations have the capacity to greatly impact downstream waters. Additionally, without the CWA protections for ephemeral and intermittent streams, the Pueblos do not have the ability to require project components to clean up pollution resulting from impacts to these stream types.

If ephemeral and intermittent streams are no longer considered "Waters of the United States," protections provided to surface waters on Pueblo lands through Section 401 of the CWA would also be weakened. Within the Pueblos' lands, Section 402 permits are also administered by EPA. Projects that disturb greater than one acre of land are required to follow the terms of EPA's 2017 Construction General Permit for Indian Country. The permit requires the development of Stormwater Pollution Prevention Plan to prevent stormwater discharges into "Waters of the United States." Without CWA protection, operation will be allowed to discharge stormwater, and any pollutants it carries, into ephemeral and intermittent streams. These pollutants could be carried to downstream waters and affect groundwater.

Unlike some states where waters that are not classified as "Waters of the United States" can be protected by state-only water quality laws, due to the land ownership nature of Indian reservations, and the complex division of jurisdiction on the a Pueblo's lands among the Pueblo, Federal government and state government, the Pueblo's water quality laws alone might not be effective at protecting water quality within all its lands. The Pueblos depend on the Agencies to prevent impacts to the waters on their lands. Also, many intermittent and ephemeral streams originate outside Pueblo lands and then flow through Pueblo lands and into traditional navigable waters located within or beyond a Pueblo's boundaries. The Pueblos depend upon federal, state, and neighboring tribal agencies to prevent impacts to streams flowing onto their lands.

There are seven Pueblo governments which do not have Treatment as a State authorization from the EPA for a number of reasons – the infrastructure needed to implement the programs has not been established, the Pueblo may not be able to address the contamination without delegation under a federal statute or it may choose to let the EPA address it, and some may not wish to have the EPA dictate what standards and norms are to be adopted by the tribe. These seven Pueblos depend on the EPA to fully protect the waters on their lands. EPA's proposed rule permits it to withdraw any protections to ephemeral and intermittent streams, and groundwater, and thus, permitting projects and pollution to go unchecked.

Without the reach of the federal government to enforce permitting, a Pueblo will lack immediate options to protect their waters. Most pueblos and tribes do not have enforcement provisions in their laws, because they have relied on federal enforcement through the CWA. The

Pueblos may have the ability to write enforcement provisions into the law but this takes time and resources; actual enforcement takes additional resources that some Pueblos simply do not have. As seen in events such as the Gold King Mine Spill in 2015, environmental or water pollution disasters can happen at any moment with devastating effects. Any time lag between the federal government backing away from protecting tribal waters and the tribes creating enforcement provisions leaves the tribes at incredible risk of disaster.

Without the ability of federal agencies to step in and enforce the federal rights of the Pueblos, the Pueblos will be on their own, left to enforce their own tribal laws on entities that may not respect or understand the complicated nature of tribal sovereignty. There is a long history of jurisdictional disputes on reservations involving states versus tribes, and tribes versus non-Indians. The Pueblos are no different. The withdrawal of federal jurisdiction on reservation lands will exacerbate this problem.

The proposed rule envisions that the states will fill the gap of enforcement left by the federal government. However, this grossly underestimates the variability of different states' positions in filling that gap. Some states such as Minnesota have robust state agency enforcement capabilities with a large staff and access to scientific institutions. Other states lack enforcement capabilities or resources such as New Mexico, which does not have primacy over NPDS permitting under the CWA. States are also constrained by their lack of jurisdiction over tribal lands.¹⁰⁷ A state cannot enforce its own permitting standards or requirements on tribal lands but it has not stopped states from seeking to regulate on non-Indian fee lands. Finally, some states are restricted by law in their authority to regulate their water. According to a 50-State study by the independent Environmental Law Institute,

Over two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal CWA. These restrictions take the form of absolute or qualified prohibitions that require state law to be “no more stringent than” federal law; property rights limitations; or a combination of the two.¹⁰⁸

State-by-State Breakdown: Presence of Relevant Limitations Provisions Versus Whether State Waters Are Regulated More Broadly than Required by Federal CWA		
	States that regulate waters more broadly than required by the CWA	States that do not regulate waters more broadly than required by the CWA
States with relevant limitations provisions	FL, IN, ME, MD, MI, MN, NE, NJ, NC, OH, OR, PA, TN, VA, WV, WA, WI [17 states]	AZ, AR, CO, DE, ID, IA, KS, KY, LA, MS, MO, MT, NV, ND, OK, SD, TX, UT, WY [19 states]
States without relevant limitations provisions	CA, CT, IL, MA, NH, NY, RI, VT [8 states]	AL, AK, DC, GA, HI, NM, SC [6 states and DC]

Figure 4: State constraints on regulation their waters.¹⁰⁹

¹⁰⁷ Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).

¹⁰⁸ ENVTL. LAW INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT (2013).

¹⁰⁹ *Id.* at 2.

New Mexico is a state that does not regulate waters more broadly than the required by the CWA, but also does not have relevant limitations provisions.¹¹⁰ On the other hand, Texas does not regulate waters more broadly than the CWA, and also has limiting statutes.¹¹¹ Many other state in the Southwest are similar to Texas, not in a position to regulate their waters and blocked by limiting statutes, including Arizona, Colorado, Utah, Nevada, and Oklahoma.¹¹² The Environmental Law Institute report concludes that states that have limiting provisions in their statutes and states that do not protect waters more broadly than the CWA may struggle to fill the gap left by the proposed rule.¹¹³

The gaps in protection created by the proposed rule are not only enforcement gaps, they are also geographic. The proposed rule eliminates protection of most headwaters and all ephemeral reaches. Many tribes are situated geographically downstream of headwaters and/or ephemeral reaches. If the federal government backs away from protecting these upstream headwaters and ephemeral reaches, the tribes will have no reliable protection for pollution occurring in upstream headwaters, or pollution flowing into tribal lands during a flood event through ephemeral waterways. The unique sovereign nature of tribes leaves a gap in available avenues for protecting their waters from upstream pollution without CWA protection.

D. Many Pueblos Lack the Resources to Fill the Gap Created by the Proposed Rule.

The proposed rule envisions that the tribes will be able to protect their own tribal waters with their own laws. However, this vision lacks a basis in the reality that most tribes face. Most, if not all, of the tribes in the Southwest struggle with a lack of financial and legal resources. This has been an issue since the recognition of the Pueblos' lands by the Spanish, Mexican and United States governments. Many Pueblos are struggling to fund their existing programs, much less new or expanded ones. It is unconscionable to believe that the Pueblos would be able to fill the gap left by this proposed rule and create enforcement standards and be able to implement them with the same force capable by the EPA. The proposed rule does nothing to suggest that the gap in funding and resources will be closed by a committing funds, training, or resources to the tribes.

VI. Conclusion

The proposed rule will likely have a devastating impact on the Pueblos because it will withdraw federal protection of the waters that the Pueblos rely on under the CWA. This withdrawal is a breach of the federal government's trust responsibility owed to the Pueblos. The proposed rule is not supported by science. The Agencies reversed prior practice of asserting jurisdiction over waters with an interstate commerce nexus based solely on the plurality opinion of Justice Scalia in *Rapanos* that has never been adopted by any of the federal appellate courts. The impacts of the proposed rule are far reaching for the Pueblos. It will create a jurisdictional gap that cannot be filled by the State of New Mexico or the Pueblos. New Mexico lacks jurisdiction on Pueblo lands and the Pueblos lack the resources to fill the jurisdictional gap on their own.

¹¹⁰ *Id.*

¹¹¹ *Id.*


¹¹² *Id.*

¹¹³ *Id.*

The Agencies' decision to abandon jurisdiction over such waters within tribal lands means that the CWA's essential safeguard—the prohibition on unauthorized discharges¹¹⁴ would not apply, and that those waters may be dredged, filled, or polluted with impunity. Given the proposed rule's far-reaching impacts for these aquatic ecosystems, the many threatened or endangered species that depend upon them, and the basic water quality needs of rural tribal communities, the Agencies were required to ensure that the proposed rule would not jeopardize the continued existence of lands, communities, species and to engage in meaningful consultation to protect those trust resources. The Agencies have failed utterly.

We ask that the Agencies rescind their proposed rule. The impacts to the Pueblos, are immense and not unique in the Southwest. Further, we demand that the Pueblos or tribes be excluded from a rule limiting the jurisdiction of the CWA to avoid the violation of the federal government's trust relationship. Finally, we ask that the Agencies commit funding, training, and resources to the Pueblos in the event the proposed Rule is adopted.

Sincerely,


Jeanette Wolfley

Supervising Attorney
UNM School of Law
Natural Resources and Environmental Law Clinic
Supervising Attorney

4/15/2019
Date


James Grieco

Clinical Student
UNM School of Law
Natural Resources and Environmental Law Clinic

4/15/2019
Date

¹¹⁴ See 33 U.S.C. § 1311(a) (2012).

Senate Bill 389

Enrolled Senate Bill (S)

Authored by Sen. Chris Garten, Sen. Mark Messmer, Sen. Linda Rogers.

Co-Authored by Sen. Scott Baldwin, Sen. Andy Zay, Sen. Jack Sandlin, Sen. Blake Doriot, Sen. Mike Gaskill, Sen. Rick Niemeyer, Sen. Liz Brown, Sen. Aaron Freeman, Sen. Eric Koch, Sen. Erin Houchin, Sen. Justin Busch, Sen. John Crane, Sen. James Buck, Sen. Chip Perfect, Sen. Philip Boots, Sen. Travis Holdman, Sen. Dennis Kruse, Sen. James Tomes, Sen. Jean Leising.

Sponsored by Rep. Matt Lehman, Rep. Doug Gutwein, Rep. Jeffrey Thompson, Rep. Alan Morrison.

DIGEST

Wetlands. Amends the law requiring a permit and compensatory mitigation for "wetland activity" (the discharge of dredged or fill material) in a state regulated wetland: (1) by changing the definition of "Class II wetland"; (2) by providing that wetland activity may be conducted without a permit: (A) in a Class I wetland; (B) in a Class II wetland with an area of not more than three-eighths acre; (C) in an ephemeral stream; and (D) in a Class II wetland that is located within the boundaries of a municipality and has an area of not more than three-fourths acre; (3) by providing that a permit is not needed for the development of cropland that has been used for agricultural purposes: (A) in the five years immediately preceding the development; or (B) in the 10 years immediately preceding the development if the United States Army Corps of Engineers has issued a jurisdictional determination confirming that the cropland does not contain wetlands subject to federal jurisdiction; (4) by providing that wetland activity in a Class II wetland with an area of more than three-eighths acre requires an individual permit; (5) by providing that: (A) maintenance of a field tile in a Class II wetland can be conducted with a general permit if certain conditions are met; and (B) maintenance of a field tile in a Class III wetland can be conducted with a general permit if certain conditions are met and the applicant obtains a site-specific approval; (6) by establishing conditions for obtaining a site-specific approval; (7) by eliminating the compensatory mitigation requirements for wetland activity in a Class I wetland; and (8) by requiring the department of environmental management (department) to make a decision to issue or deny an individual permit for wetland activity not later than 90 days (instead of 120 days) after receiving the completed application. Amends the law concerning a certification under Section 401 of the federal Clean Water Act for dredge and fill activity in a federally regulated wetland to require the department to make a final determination not later than 90 days (instead of 120 days) after receiving a completed application if the applicant requests a pre-coordination meeting. Establishes the Indiana wetlands task force, a 14 member body that: (1) is required to study and make recommendations concerning a number of wetlands issues; and (2) not later than November 1, 2022, issue a report to the general assembly and the governor setting forth its recommendations. Requires the department of natural resources to provide staff support to the task force.

Actions for Senate Bill 389

Reverse

All Actions House Actions Senate Actions

S 04/29/2021 Public Law 160

S 04/29/2021 Signed by the Governor

S 04/28/2021 Signed by the President of the Senate

H 04/22/2021 Signed by the Speaker

S 04/21/2021 Signed by the President Pro Tempore

S 04/14/2021 Senate concurred in House amendments; Roll Call 441: yeas 31, nays 19

S 04/13/2021 Motion to concur filed

H 04/13/2021 Returned to the Senate with amendments

H 04/13/2021 Third reading: passed; Roll Call 428: yeas 58, nays 40

H 04/12/2021 Amendment #4 (Leonard) prevailed; Roll Call 410: yeas 61, nays 34

H 04/12/2021 Amendment #1 (Lindauer) prevailed; Roll Call 409: yeas 54, nays 42

H 04/12/2021 Amendment #6 (Slager) prevailed; voice vote

H 04/12/2021 Second reading: amended, ordered engrossed

H 04/08/2021 Committee report: amend do pass, adopted

H 03/25/2021 Representative Morrison added as cosponsor

H 03/02/2021 First reading: referred to Committee on Environmental Affairs

S 02/02/2021 Referred to the House

S 02/01/2021 Senators Holdman, Kruse, Tomes, Leising added as coauthors

S 02/01/2021 Senator Boots added as coauthor

S 02/01/2021 Cosponsors: Representatives Gutwein and Thompson

S 02/01/2021 House sponsor: Representative Lehman

S 02/01/2021 Third reading: passed; Roll Call 33: yeas 29, nays 19

S 01/28/2021 Senators Buck and Perfect added as coauthors

S 01/28/2021 Amendment #1 (Tallian) failed; Roll Call 24: yeas 19, nays 29

S 01/28/2021 Second reading: ordered engrossed

S 01/26/2021 Senator Crane added as coauthor

S 01/26/2021 Senator Busch added as coauthor

S 01/26/2021 Committee report: amend do pass, adopted

S 01/25/2021 Senator Houchin added as coauthor

S 01/25/2021 Senators Freeman and Koch added as coauthors

S 01/25/2021 Senator Brown L added as coauthor

S 01/14/2021 First reading: referred to Committee on Environmental Affairs

S 01/14/2021 Coauthored by Senators Baldwin, Zay, Sandlin, Doriot, Gaskill, Niemeyer

S 01/14/2021 Authored by Senators Garten, Messmer, Rogers

First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 389

AN ACT to amend the Indiana Code concerning environmental law.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 13-11-2-25.8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2021 (RETROACTIVE)]:
Sec. 25.8. (a) For purposes of IC 13-18:

(1) "Class I wetland" means an isolated wetland described by one (1) or both of the following:

(A) At least fifty percent (50%) of the wetland has been disturbed or affected by human activity or development by one (1) or more of the following:

- (i) Removal or replacement of the natural vegetation.
- (ii) Modification of the natural hydrology.

(B) The wetland supports only minimal wildlife or aquatic habitat or hydrologic function because the wetland does not provide critical habitat for threatened or endangered species listed in accordance with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and the wetland is characterized by at least one (1) of the following:

- (i) The wetland is typified by low species diversity.
- (ii) The wetland contains greater than fifty percent (50%) areal coverage of non-native invasive species of vegetation.
- (iii) The wetland does not support significant wildlife or aquatic habitat.
- (iv) The wetland does not possess significant hydrologic function;

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(2) "Class II wetland" means ~~(A) an isolated wetland that is not a Class I or Class III wetland; or (B) a type of wetland listed in subdivision (3)(B) that would meet the definition of Class I wetland if the wetland were not a rare or ecologically important type;~~ **an isolated wetland that supports moderate habitat or hydrological functions, including an isolated wetland that is dominated by native species but is generally without:**

(A) the presence of; or

(B) habitat for;

rare, threatened, or endangered species; and

(3) "Class III wetland" means an isolated wetland:

(A) that is located in a setting undisturbed or minimally disturbed by human activity or development and that supports more than minimal wildlife or aquatic habitat or hydrologic function; or

(B) ~~unless classified as a Class II wetland under subdivision (2)(B);~~ that is of one (1) of the following rare and ecologically important types:

- (i) Acid bog.
- (ii) Acid seep.
- (iii) Circumneutral bog.
- (iv) Circumneutral seep.
- (v) Cypress swamp.
- (vi) Dune and swale.
- (vii) Fen.
- (viii) Forested fen.
- (ix) Forested swamp.
- (x) Marl beach.
- (xi) Muck flat.
- (xii) Panne.
- (xiii) Sand flat.
- (xiv) Sedge meadow.
- (xv) Shrub swamp.
- (xvi) Sinkhole pond.
- (xvii) Sinkhole swamp.
- (xviii) Wet floodplain forest.
- (xix) Wet prairie.
- (xx) Wet sand prairie.

(b) For purposes of this section, a wetland or setting is not considered disturbed or affected as a result of an action taken after January 1, 2004, for which a permit is required under IC 13-18-22 but has not been obtained.



SECTION 2. IC 13-11-2-48.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 48.5. (a) "Cropland", for purposes of IC 13-18-22-1(d), means farmland:**

- (1) that is cultivated for agricultural purposes; and
- (2) from which crops are harvested.

(b) The term includes:

- (1) orchards;
- (2) farmland used to produce row crops, close-grown crops, or cultivated hay; and
- (3) farmland intentionally kept out of production during a regular growing season (summer fallow).

(c) The term does not include pasture land unless the pasture land is in active rotation with cultivated crops for purposes of soil maintenance or improvement.

SECTION 3. IC 13-11-2-72.4 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 72.4. "Ephemeral stream", for purposes of IC 13-18-22-1(b)(6), means surface water flowing or pooling only in direct response to precipitation such as rain or snowfall.**

SECTION 4. IC 13-11-2-74.5, AS AMENDED BY P.L.113-2014, SECTION 47, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 74.5. (a) "Exempt isolated wetland", for purposes of IC 13-18 and environmental management laws, means an isolated wetland that:**

- (1) is a voluntarily created wetland unless:
 - (A) the wetland is approved by the department for compensatory mitigation purposes in accordance with a permit issued under Section 404 of the Clean Water Act or IC 13-18-22;
 - (B) the wetland is reclassified as a state regulated wetland under IC 13-18-22-6(e); or
 - (C) the owner of the wetland declares, by a written instrument:
 - (i) recorded in the office of the recorder of the county or counties in which the wetland is located; and
 - (ii) filed with the department;
 that the wetland is to be considered in all respects to be a state regulated wetland;
- (2) exists as an incidental feature in or on:
 - (A) a residential lawn;
 - (B) a lawn or landscaped area of a commercial or



- governmental complex;
- (C) agricultural land;
- (D) a roadside ditch;
- (E) an irrigation ditch; or
- (F) a manmade drainage control structure;
- (3) is a fringe wetland associated with a private pond;
- (4) is, or is associated with, a manmade body of surface water of any size created by:
 - (A) excavating;
 - (B) diking; or
 - (C) excavating and diking;
- dry land to collect and retain water for or incidental to agricultural, commercial, industrial, or aesthetic purposes;
- (5) ~~subject to subsection (c);~~ is a Class I wetland; ~~with an area, as delineated, of one-half (1/2) acre or less;~~
- (6) ~~subject to subsection (d);~~ **(c)**, is a Class II wetland with an area, as delineated, of ~~one-fourth (1/4)~~ **not more than three-eighths (3/8)** acre; ~~or less;~~
- (7) is located on land:
 - (A) subject to regulation under United States Department of Agriculture wetland conservation programs, including Swampbuster and the Wetlands Reserve Program, because of voluntary enrollment in a federal farm program; and
 - (B) used for agricultural or other purposes allowed under the programs referred to in clause (A); or
- (8) is constructed for reduction or control of pollution.
- (b) For purposes of subsection (a)(2), an isolated wetland exists as an incidental feature:
 - (1) if:
 - (A) the owner or operator of the property or facility described in subsection (a)(2) does not intend the isolated wetland to be a wetland;
 - (B) the isolated wetland is not essential to the function or use of the property or facility; and
 - (C) the isolated wetland arises spontaneously as a result of damp soil conditions incidental to the function or use of the property or facility; and
 - (2) if the isolated wetland satisfies any other factors or criteria established in rules that are:
 - (A) adopted by the board; and
 - (B) not inconsistent with the factors and criteria described in subdivision (1).



(c) The total acreage of Class I wetlands on a tract to which the exemption described in subsection (a)(5) may apply is limited to the larger of:

- (1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(5); and
- (2) fifty percent (50%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(5) but for the limitation of this subsection.

(d) (c) The total acreage of Class II wetlands on a tract to which the exemption described in subsection (a)(6) may apply is limited to the larger of:

- (1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(6); and
- (2) ~~thirty-three and one-third percent (33 1/3%)~~ **sixty percent (60%)** of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(6) but for the limitation of this subsection.

(e) (d) An isolated wetland described in subsection (a)(5) or (a)(6) does not include an isolated wetland on a tract that contains more than one (1) of the same class of wetland until the owner of the tract notifies the department that the owner has selected the isolated wetland to be an exempt isolated wetland under subsection (a)(5) or (a)(6). ~~consistent with the applicable limitations described in subsections (e) and (d).~~

SECTION 5. IC 13-11-2-104.8 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 104.8. "In lieu fee", for purposes of 13-18-22-6, means a fee that:**

- (1) is paid pursuant to:
 - (A) the department of natural resources stream and wetland mitigation program; or
 - (B) another in lieu fee mitigation program;
- (2) is paid to:
 - (A) the state government; or
 - (B) the Indiana natural resources foundation created by IC 14-12-1-4; and
- (3) is applied toward the cost of:
 - (A) restoring, establishing, enhancing, or preserving aquatic resources in compensation for the alteration of



other aquatic resources; and

(B) monitoring and providing long term management of the site where aquatic resources are restored, established, enhanced, or preserved with money provided by the fee.

SECTION 6. IC 13-11-2-265.8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 265.8. "~~Wetlands delineation~~" or "~~delineation~~", For purposes of ~~section 74.5~~ of this chapter **and IC 13-18-22:**

(1) "wetlands delineation" or "delineation" means a technical assessment:

(1) **(A)** of whether a wetland exists on an area of land; and
 (2) **(B)** if so, of the type and quality of the wetland based on the presence or absence of wetlands characteristics, as determined consistently with the Wetlands Delineation Manual, Technical Report Y-87-1 of the United States Army Corps of Engineers; **and**

(2) "delineated" describes property that has undergone wetlands delineation.

SECTION 7. IC 13-18-22-1, AS AMENDED BY P.L.166-2020, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. (a) Except as provided in subsection (b), a person proposing a wetland activity in a state regulated wetland must obtain a permit under this chapter to authorize the wetland activity.

(b) A permit is not required for the following wetland activities:

(1) The discharge of dirt, sand, rock, stone, concrete, or other inert fill materials in a de minimis amount.

(2) A wetland activity at a surface coal mine for which the department of natural resources has approved a plan to:

(A) minimize, to the extent practical using best technology currently available, disturbances and adverse effects on fish and wildlife;

(B) otherwise effectuate environmental values; and

(C) enhance those values where practicable.

(3) Any activity listed under Section 404(f) of the Clean Water Act, including:

(A) normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters,



causeways, and bridge abutments or approaches, and transportation structures;

(C) construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) construction of temporary sedimentation basins on a construction site that does not include placement of fill material into the navigable waters; and

(E) construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where the roads are constructed and maintained, in accordance with best management practices, to assure that:

- (i) flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired;
- (ii) the reach of the navigable waters is not reduced; and
- (iii) any adverse effect on the aquatic environment will be otherwise minimized.

(4) The maintenance or reconstruction (as defined in IC 36-9-27-2) of a regulated drain in accordance with IC 36-9-27-29(2) as long as the work takes place within the current easement, and the reconstruction does not substantially change the characteristics of the drain to perform the function for which it was designed and constructed.

(5) Wetland activities in an exempt isolated wetland, as defined in IC 13-11-2-74.5.

(6) Dredge and fill activities in an ephemeral stream, as defined in IC 13-11-2-72.4.

(7) Dredge and fill activities in a Class II wetland that:

- (A) is located within the boundaries of a municipality; and**
- (B) has an area, as delineated, of not more than three-fourths (3/4) acre.**

(c) The goal of the permitting program for wetland activities in state regulated wetlands is to:

- (1) promote a net gain in high quality isolated wetlands; and
- (2) assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program.

(c) If a conflict arises between:

- (1) the provision in subsection (b)(7) under which dredge and fill activities in a Class II wetland with an area, as delineated, of not more than three-fourths (3/4) acre do not require a permit; and**
- (2) the provision in section 3(a) of this chapter under which a wetland activity in a Class II wetland with an area, as**



delineated, of more than three-eighths (3/8) acre require an individual permit;
the exemption in subsection (b)(7) controls.

(d) The development of cropland, as defined in IC 13-11-2-48.5, does not require a permit under this chapter if the cropland has been used for agricultural purposes:

- (1) in the five (5) years immediately preceding the development; or
- (2) in the ten (10) years immediately preceding the development, if the United States Army Corps of Engineers has issued a jurisdictional determination confirming that the cropland does not contain wetlands subject to federal jurisdiction under Section 404 of the Clean Water Act.

After receiving a jurisdictional determination described in subdivision (2) from the United States Army Corps of Engineers, the department shall notify the person proposing the wetland activity that the development of the cropland used for agricultural purposes in the immediately preceding ten (10) years is exempt from the permit requirement of subsection (a) under subdivision (2).

SECTION 8. IC 13-18-22-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. (a) ~~The following shall be authorized by an individual permit: is required to authorize~~

- (1) Wetland activity in a Class II wetland with an area, as delineated, of more than three-eighths (3/8) acre. This subdivision does not apply to the maintenance of a field tile within a Class II wetland under section 4(a)(1).
- (2) ~~A~~ Wetland activity in a Class III wetland.

~~(b) Except as provided in section 4(a) of this chapter, an individual permit is required to authorize a wetland activity in a Class II wetland.~~

~~(c) (b) The board shall adopt rules under IC 4-22-2 and IC 13-14 not later than June 1, 2005, to govern the issuance of individual permits by the department under subsections subsection (a). and (b).~~

SECTION 9. IC 13-18-22-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 4. (a) ~~Wetland activities with minimal impact in Class I wetlands and Class II wetlands, including the activities analogous to those allowed under the nationwide permit program (as published in 67 Fed. Reg. 2077-2089 (2002)); shall be authorized by a general permit rule. The following shall be authorized by a general permit:~~

- ~~(b) (1) Wetland activities in Class I wetlands shall be authorized by a general permit rule. The maintenance of a field tile within~~



a Class II wetland. However, the maintenance described in this subdivision may be authorized only if the field tile:

(A) is necessary to restore drainage of land adjacent to the wetland; and

(B) does not have the effect of draining the wetland.

(2) The maintenance of a field tile within a Class III wetland. However, the maintenance described in this subdivision may be authorized only if:

(A) the maintenance of the field tile:

(i) is necessary to restore drainage of land adjacent to the wetland; and

(ii) does not have the effect of draining the wetland; and

(B) the applicant obtains a site-specific approval for the maintenance of the field tile under section 12 of this chapter.

(b) The maintenance of a field tile in a Class I wetland does not require a permit.

(c) The board shall adopt rules under IC 4-22-2 and IC 13-14 not later than February 1, 2005, to establish and implement the general permits described in subsections subsection (a). and (b):

SECTION 10. IC 13-18-22-6, AS AMENDED BY P.L.147-2015, SECTION 12, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 6. (a) Except as otherwise specified in subsections (b) and (c), compensatory mitigation shall be provided in accordance with the following table:

Wetland Class	Replacement Class	On-site and In-lieu Fee Ratio	Off-site Ratio
Class I	Class II or III	1 to 1	1 to 1
Class I	Class I	1.5 to 1	1.5 to 1
Class II	Class II or III	1.5 to 1	2 to 1
		Nonforested	Nonforested
		2 to 1	2.5 to 1
		Forested	Forested
Class III	Class III	2 to 1	2.5 to 1
		Nonforested	Nonforested
		2.5 to 1	3 to 1
		Forested	Forested

(b) The compensatory mitigation ratio shall be lowered to one to one (1:1) if the compensatory mitigation is completed before the initiation of the wetland activity.

(c) A wetland that is created or restored as a water of the United



States may be used, as an alternative to the creation or restoration of an isolated wetland, as compensatory mitigation for purposes of this section. The replacement class of a wetland that is a water of the United States shall be determined by applying the characteristics of a Class I, Class II, or Class III wetland, as appropriate, to the replacement wetland as if it were an isolated wetland.

(d) The off-site location of compensatory mitigation must be:

(1) within:

(A) the same eight (8) digit U.S. Geological Service hydrologic unit code; or

(B) the same county;

as the isolated wetlands subject to the authorized wetland activity; or

(2) within a designated service area established in an in lieu fee mitigation program approved by the United States Army Corps of Engineers.

(e) Exempt isolated wetlands may be used to provide compensatory mitigation for wetlands activities in state regulated wetlands. An exempt isolated wetland that is used to provide compensatory mitigation becomes a state regulated wetland.

SECTION 11. IC 13-18-22-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 7. (a) The department shall:

(1) administer the permit programs established by this chapter; and

(2) review and issue decisions on applications for permits to undertake wetland activities in state regulated wetlands in accordance with the rules issued by the board under this chapter.

~~(b) Before the adoption of rules by the board under this chapter, the department shall:~~

~~(1) issue individual permits under this chapter consistent with the general purpose of this chapter; and~~

~~(2) for wetland activities in Class I wetlands, issue permits under this subsection:~~

~~(A) that are simple, streamlined, and uniform;~~

~~(B) that do not require development of site specific provisions; and~~

~~(C) promptly upon submission by the applicant to the department of a notice of registration for a permit.~~

~~(e) (b) Not later than June 1, 2004, The department shall make available to the public (1) a form for use in applying for a permit under subsection (b)(1); and (2) a form for use in submitting a notice of~~

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registration for a permit to undertake a wetland activity in a Class I wetland under subsection (b)(2): **this chapter.**

SECTION 12. IC 13-18-22-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 8. (a) Subject to subsection (f), the department shall make a decision to issue or deny an individual permit under section 3 ~~or 7(b)(1)~~ of this chapter not later than ~~one hundred twenty (120)~~ **ninety (90)** days after receipt of the completed application. If the department fails to make a decision on a permit application by the deadline under this subsection or subsection ~~(f); (d)~~, a permit is considered to have been issued by the department in accordance with the application.

(b) A general permit under section 4 of this chapter becomes effective with respect to a proposed wetland activity that is within the scope of the general permit on the thirty-first day after the department receives a notice of intent from the person proposing the wetland activity that the wetland activity be authorized under the general permit.

~~(c) Except as provided in subsection (d), a permit to undertake a wetland activity in a Class I wetland under section 7(b)(2) of this chapter is considered to have been issued to an applicant on the thirty-first day after the department receives a notice of registration submitted under section 7(b)(2) of this chapter if the department has not previously authorized the wetland activity.~~

~~(d) The department may deny a registration for a permit for cause under subsection (c) before the period specified in subsection (c) expires.~~

~~(e) (c) The department must support a denial under subsection (a) or (d) by a written statement of reasons.~~

~~(f) (d) The department may notify the applicant that the completed application referred to in subsection (a) is deficient. If the department fails to give notice to the applicant under this subsection not later than fifteen (15) days after the department's receipt of the completed application, the application is considered not to have been deficient. After receipt of a notice under this subsection, the applicant may submit an amended application that corrects the deficiency. The department shall make a decision to issue or deny an individual permit under the amended application within a period that ends a number of days after the date the department receives the amended application equal to the remainder of:~~

- ~~(1) one hundred twenty (120) ninety (90) days; minus~~
- ~~(2) the number of days the department held the initial application before giving a notice of deficiency under this subsection.~~



SECTION 13. IC 13-18-22-12 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 12. (a) A person seeking to engage in maintenance of a field tile within a Class III wetland under section 4(a)(2) of this chapter may apply to the department for a site-specific approval for the activity in accordance with this section and the rules adopted under section 4(c) of this chapter.**

(b) An applicant for a site-specific approval under this section must provide information to the department on the need to perform the activity described in subsection (a), including the following:

- (1) Information showing the location and area needed to be disturbed within the Class III wetland.**
- (2) Lack of reasonable alternatives to the disturbance of the area referred to in subdivision (1).**

SECTION 14. IC 13-18-23-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 1. (a) The department shall do the following:**

- (1) Make a final determination on an application for a certification under Section 401 of the Clean Water Act not later than ~~one hundred twenty (120)~~ ninety (90) days after its receipt of a complete application and if the applicant meets the condition set forth in subsection (b).**
- (2) Include in its notice of the final determination to the applicant a statement of reasons for the final determination.**

(b) At least thirty (30) days before submitting an application under this section, an applicant must contact the department to request a pre-coordination meeting.

(c) A failure by the department to act within the period specified in make a final determination not later than ninety (90) days after receiving a complete application, if required under subsection (a)(1), constitutes a waiver of the certification.

SECTION 15. IC 14-12-4 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

Chapter 4. Indiana Wetlands Task Force

Sec. 1. As used in this chapter, "isolated wetland" means a wetland that:

- (1) is located in Indiana; but**
- (2) is not subject to regulation under Section 404(a) of the federal Clean Water Act.**

Sec. 2. As used in this chapter, "task force" refers to the Indiana



wetlands task force established by section 3 of this chapter.

Sec. 3. (a) There is established the Indiana wetlands task force. Subject so subsection (c), the task force consists of the following fourteen (14) members:

(1) One (1) individual appointed by the governor as chairperson of the task force.

(2) One (1) individual who is a representative of Ducks Unlimited.

(3) One (1) individual who is a representative of the Indiana Builders Association.

(4) One (1) individual who is a representative of Accelerate Indiana Municipalities.

(5) One (1) individual who is a representative of the Indiana Farm Bureau.

(6) One (1) individual who is a representative of the White River Alliance.

(7) One (1) individual who is a representative of the Indiana Society of Professional Land Surveyors and has expertise in regulated drains.

(8) One (1) individual who is a representative of the department of environmental management and has expertise in wetlands.

(9) One (1) individual who is a representative of the Purdue University Center for the Environment.

(10) One (1) individual who is a representative of the Kankakee River basin and Yellow River basin development commission established by IC 14-13-9.

(11) One (1) individual who is a representative of the St. Joseph River Basin Commission established by IC 14-30-3.

(12) One (1) individual who is a representative of the Indiana Association of Soil and Water Conservation Districts.

(13) One (1) individual who is a professional wetland delineator.

(14) One (1) individual appointed by the director of the department of natural resources who is:

(A) employed as a biologist or hydrologist for the department; and

(B) a wetland expert.

(b) The governor shall appoint the members described in subsection (a)(2) through (a)(13).

(c) Each organization or entity identified in subsection (a)(2) through (a)(12) must provide to the governor the name of at least



one (1) individual who represents the organization or entity as a candidate for appointment to the task force. If an organization or entity does not, before June 1, 2021, provide to the governor the name of at least one (1) candidate for appointment, the governor may appoint to the task force an individual who is not a representative of the organization or entity in place of a representative of the organization or entity.

(d) A vacancy in a position on the task force shall be filled by the appointment of a replacement member by the appointing authority identified for the task force position in section 3(a) of this chapter.

Sec. 4. (a) The task force shall research and develop recommendations on the following:

(1) Strategies to mitigate the costs incurred by builders to comply with the state regulation of wetland activity under IC 13-18-22 while maintaining the integrity of those environmental safeguards.

(2) The flood reduction benefits of isolated wetlands, including the use of isolated wetlands to aid in quantifying flood risk mitigation.

(3) The role of isolated wetlands in storing carbon dioxide and how to strengthen the carbon markets in Indiana.

(4) Strategies to incentivize the avoidance of isolated wetland impact during development.

(5) Strategies to incentivize the preservation of existing isolated wetlands.

(6) Improvements to the isolated wetland permitting process under IC 13-18-22.

(b) The task force shall also do the following:

(1) Review existing state isolated wetland classifications and recommend new isolated wetland classifications and nomenclature that are in alignment with those used by the United States Army Corps of Engineers.

(2) Review the current mitigation ratios set forth in IC 13-18-22-6 and provide recommendations to:

(A) improve the methodology used in applying those mitigation ratios; and

(B) possibly better align those mitigation ratios with the mitigation ratio determination methods used by the United States Army Corps of Engineers.

(3) Review the current "in lieu of" compensatory mitigation program and make recommendations on how to reduce the costs and improve the transparency of that program.



(4) Study and make recommendations concerning any other wetland related issues that the task force determines should be addressed by the general assembly.

Sec. 5. The department of natural resources shall provide staff support to the task force.

Sec. 6. The task force shall meet at the call of the chairperson.

Sec. 7. (a) A member of the task force who is not a state employee:

(1) is not entitled to the minimum salary per diem provided by IC 4-10-11-2.1(b); but

(2) is entitled to reimbursement for traveling expenses as provided under IC 4-13-1-4 and other expenses actually incurred in connection with the member's duties as provided in the state policies and procedures established by the Indiana department of administration and approved by the budget agency.

(b) A member of the task force who is a state employee is entitled to reimbursement for traveling expenses as provided under IC 4-13-1-4 and other expenses actually incurred in connection with the member's duties as provided in the state policies and procedures established by the Indiana department of administration and approved by the budget agency.

Sec. 8. (a) The members of the task force appointed under section 3(a)(2) through 3(a)(14) of this chapter are voting members.

(b) The chairperson appointed under section 3(a)(1) of this chapter is authorized to vote only when voting by the members of the task force appointed under section 3(a)(2) through 3(a)(14) of this chapter results in a tie vote.

(c) The affirmative votes of a majority of the members of the task force are required for the task force to take action on any measure, including the report required by section 9 of this chapter.

Sec. 9. The task force shall:

(1) issue a report setting forth the recommendations required or authorized by section 4 of this chapter; and

(2) not later than November 1, 2022, submit the report to the following:

(A) The executive director of the legislative services agency for distribution to the members of the general assembly.

The report submitted to the executive director of the legislative services agency under this clause must be in an electronic format under IC 5-14-6.



(B) The governor.

(C) The commissioner of the department of environmental management.

Sec. 10. This chapter expires December 31, 2022.

SECTION 16. An emergency is declared for this act.



President of the Senate

President Pro Tempore

Speaker of the House of Representatives

Governor of the State of Indiana

Date: _____ Time: _____

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General Assembly

134

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- Darrell Kick
- Bill Seitz
- Reggie Stoltzfus
- Tom Young

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DATE	CHAMBER	ACTION	COMMITTEE
3/4/21	House	Refer to Committee	Agriculture and Conservation
3/3/21	House	Introduced	

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Brett Hudson Hillyer
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COMMITTEE	DATE	STATUS	BILL TEXT
Agriculture and Conservation	March 23, 2021	1st Hearing	Download

WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT
State Representative Brett H Hillyer	Ohio House of Representative	Proponent	Download

COMMITTEE	DATE	STATUS	BILL TEXT
Agriculture and Conservation	May 4, 2021	2nd Hearing	Download

Cosponsors

REPRESENTATIVES

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- Bill Seitz
- Reggie Stoltzfus
- Tom Young

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Dr. Richard Warner	University of Kentucky	Proponent	Download
Keith B. Kimble	-	Proponent	Download
Kristin L. Watt	Vorys, Sater, Seymour and Pease LLP	Proponent	Download
Patrick Jacomet	Ohio Aggregates & Industrial Minerals Association	Proponent	Download
Andrea Ashley	Associated General Contractors of Ohio	Proponent	Download
Daniel J. Dew	Pacific Legal Foundation	Proponent	Download
Kent Scarrett	Ohio Municipal League	Proponent	Download
Vince Squillace	Ohio Home Builders Association	Proponent	Download
Stephanie Kromer	Ohio Chamber of Commerce	Proponent	Download
Chris Ventura	Consumer Energy	Proponent	Download



Agriculture and Conservation	May 19, 2021	3rd Hearing		Download
WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT	
Cody Weisbrodt	The Nature Conservancy Ohio	Opponent		Download
Carol Culbertson	-	Opponent		Download
Hope Taft	Ohio Scenic River Association	Opponent		Download
Kari Gerwin	Toledo Metropolitan Area Council of Governments	Opponent		Download
Michael C. Miller	Rivers Unlimited 501(c)3	Opponent		Download
Pete Bucher	Ohio Environmental Council Action Fund	Opponent		Download
Reece Nickol	Ducks Unlimited	Opponent		Download
Sandy Bihn	Lake Erie Waterkeeper	Opponent		Download
Tom Butch	Ohio Scenic Rivers Association	Opponent		Download
Claus Eckert	Central Ohio Watershed Council	Opponent		Download
Aubrey Helmuth Miller	Redbudsuds	Opponent		Download
Bennett Kottler	-	Opponent		Download
Brewster Rhoads	-	Opponent		Download
Crystal Davis	Alliance for the Great Lakes	Opponent		Download
David Rutter	-	Opponent		Download
Eric Sauer	Greater Dayton Partners for the Environment	Opponent		Download
Gail Hesse	National Wildlife Federation	Opponent		Download
Heather Elmer	Chagrin River Watershed Partners	Opponent		Download



Matt Misicka	Ohio Conservation Federation	Opponent	Download
David Schmitt	Mill Creek Alliance	Opponent	Download
Laurie Stevenson	Ohio Environmental Protection Agency	Opponent	Download
Ohio Wetlands Association	Ohio Wetlands Association	Opponent	Download
Peter Precario	Midwest Biodiversity Institute	Opponent	Download
Rich Cogen	Ohio River Foundation	Opponent	Download
Robert Jurick	-	Opponent	Download
Elissa Yoder Mann	Sierra Club Ohio	Opponent	Download
Susan Namei	Xavier University	Opponent	Download
Wendy Dyer	-	Opponent	Download
Anne Lyon	-	Opponent	Download

COMMITTEE	DATE	STATUS	BILL TEXT
Agriculture and Conservation	May 25, 2021	4th Hearing	Download

WITNESS	ORGANIZATION	TESTIFYING AS	DOCUMENT
Andrew J. Geisler	The Buckeye Institute	Interested Party	Download
Bill Acton	NAIOP Ohio	Interested Party	Download
Michael D. Cope	Ohio Coal Association	Interested Party	Download
Reece Nickol	Ducks Unlimited	Interested Party	Download
Anthony Sasson	Darby Creek Association	Opponent	Download
Bill Schieman	-	Opponent	Download
Dana Ohman	The Nature Conservancy Ohio	Opponent	Download
Jennifer Fish	Franklin Soil and Water	Opponent	Download



	Metropolitan Wastewater Agencies (AOMWA)		
Kathleen Mathews	Mud Run Conservancy	Opponent	Download
Robert Michaels	Environmental Law and Policy Center	Opponent	Download
Nathan D. Vaughan	Steele Hill Properties II, LLC and RHDK Investments, LLC	Proponent	Download

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As Introduced

134th General Assembly

Regular Session

2021-2022

H. B. No. 175

Representative Hillyer

Cosponsors: Representatives Seitz, Stoltzfus, Kick, Young, T.

A BILL

To amend sections 3745.114 and 6111.01 of the
Revised Code to deregulate certain ephemeral
water features under various water pollution
control laws.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 3745.114 and 6111.01 of the
Revised Code be amended to read as follows:

Sec. 3745.114. (A) A person that applies for a section 401
water quality certification under Chapter 6111. of the Revised
Code and rules adopted under it shall pay an application fee of
two hundred dollars at the time of application plus any of the
following fees, as applicable:

(1) If the water resource to be impacted is a wetland, a
review fee of five hundred dollars per acre of wetland to be
impacted;

(2) If the water resource to be impacted is a stream one
of the following fees, as applicable:

(a) ~~For an ephemeral stream, a review fee of five dollars~~

~~per linear foot of stream to be impacted, or two hundred
dollars, whichever is greater;~~ 18
19

~~(b)~~ For an intermittent stream, a review fee of ten 20
dollars per linear foot of stream to be impacted, or two hundred 21
dollars, whichever is greater; 22

~~(e)~~ (b) For a perennial stream, a review fee of fifteen 23
dollars per linear foot of stream to be impacted, or two hundred 24
dollars, whichever is greater. 25

(3) If the water resource to be impacted is a lake, a 26
review fee of three dollars per cubic yard of dredged or fill 27
material to be moved. 28

(B) One-half of all applicable review fees levied under 29
this section shall be due at the time of application for a 30
section 401 water quality certification. The remainder of the 31
fees shall be paid upon the final disposition of the application 32
for a section 401 water quality certification. The total fee to 33
be paid under this section shall not exceed twenty-five thousand 34
dollars per application. However, if the applicant is a county, 35
township, or municipal corporation in this state, the total fee 36
to be paid shall not exceed five thousand dollars per 37
application. 38

(C) All money collected under this section shall be 39
transmitted to the treasurer of state for deposit into the state 40
treasury to the credit of the surface water protection fund 41
created in section 6111.038 of the Revised Code. 42

(D) The fees established under this section do not apply 43
to any state agency as defined in section 119.01 of the Revised 44
Code or to the United States army corps of engineers. 45

(E) The fees established under this section do not apply 46

to projects that are authorized by the environmental protection 47
agency's general certifications of nationwide permits or general 48
permits issued by the United States army corps of engineers. As 49
used in this division, "general permit" and "nationwide permit" 50
have the same meanings as in rules adopted under Chapter 6111. 51
of the Revised Code. 52

(F) Coal mining and reclamation operations that are 53
authorized under Chapter 1513. of the Revised Code are exempt 54
from the fees established under this section for one year after 55
~~the effective date of this amendment~~ March 30, 2006. 56

(G) As used in this section: 57

(1) "Ephemeral ~~stream~~feature" means ~~a stream that flows~~ 58
surface water flowing or pooling only in direct response to 59
~~precipitation in the immediate watershed or in response to the~~ 60
~~melting of a cover of, such as rain or snow and ice and that has~~ 61
~~channel bottom that is always above the local water table.~~ 62

(2) "Intermittent stream" means a stream that is below the 63
local water table and flows for at least a part of each year and 64
that obtains its flow from both surface runoff and ground water 65
discharge. 66

(3) "Perennial stream" means a stream or a part of a 67
stream that flows continuously during all of the calendar year 68
as a result of ground water discharge or surface water runoff. 69
"Perennial stream" does not include an intermittent stream or an 70
ephemeral ~~stream~~feature. 71

Sec. 6111.01. As used in this chapter: 72

(A) "Pollution" means the placing of any sewage, sludge, 73
sludge materials, industrial waste, or other wastes in any 74
waters of the state. 75

(B) "Sewage" means any liquid waste containing sludge, 76
sludge materials, or animal or vegetable matter in suspension or 77
solution, and may include household wastes as commonly 78
discharged from residences and from commercial, institutional, 79
or similar facilities. 80

(C) "Industrial waste" means any liquid, gaseous, or solid 81
waste substance resulting from any process of industry, 82
manufacture, trade, or business, or from the development, 83
processing, or recovery of any natural resource, together with 84
such sewage as is present. 85

(D) "Other wastes" means garbage, refuse, decayed wood, 86
sawdust, shavings, bark, and other wood debris, lime, sand, 87
ashes, offal, night soil, oil, tar, coal dust, dredged or fill 88
material, or silt, other substances that are not sewage, sludge, 89
sludge materials, or industrial waste, and any other 90
"pollutants" or "toxic pollutants" as defined in the Federal 91
Water Pollution Control Act that are not sewage, sludge, sludge 92
materials, or industrial waste. 93

(E) "Sewerage system" means pipelines or conduits, pumping 94
stations, and force mains, and all other constructions, devices, 95
appurtenances, and facilities used for collecting or conducting 96
water-borne sewage, industrial waste, or other wastes to a point 97
of disposal or treatment, but does not include plumbing 98
fixtures, building drains and subdrains, building sewers, and 99
building storm sewers. 100

(F) "Treatment works" means any plant, disposal field, 101
lagoon, dam, pumping station, building sewer connected directly 102
to treatment works, incinerator, or other works used for the 103
purpose of treating, stabilizing, blending, composting, or 104
holding sewage, sludge, sludge materials, industrial waste, or 105

other wastes, except as otherwise defined. 106

(G) "Disposal system" means a system for disposing of 107
sewage, sludge, sludge materials, industrial waste, or other 108
wastes and includes sewerage systems and treatment works. 109

(H) "Waters of the state" means all streams, lakes, ponds, 110
marshes, watercourses, waterways, wells, springs, irrigation 111
systems, drainage systems, and other bodies or accumulations of 112
water, surface and underground, natural or artificial, 113
regardless of the depth of the strata in which underground water 114
is located, that are situated wholly or partly within, or border 115
upon, this state, or are within its jurisdiction, except those 116
private waters that do not combine or effect a junction with 117
natural surface or underground waters. "Waters of the state" 118
does not include an ephemeral feature. 119

(I) "Person" means the state, any municipal corporation, 120
any other political subdivision of the state, any person as 121
defined in section 1.59 of the Revised Code, any interstate body 122
created by compact, or the federal government or any department, 123
agency, or instrumentality thereof. 124

(J) "Industrial water pollution control facility" means 125
any disposal system or any treatment works, pretreatment works, 126
appliance, equipment, machinery, pipeline or conduit, pumping 127
station, force main, or installation constructed, used, or 128
placed in operation primarily for the purpose of collecting or 129
conducting industrial waste to a point of disposal or treatment; 130
reducing, controlling, or eliminating water pollution caused by 131
industrial waste; or reducing, controlling, or eliminating the 132
discharge into a disposal system of industrial waste or what 133
would be industrial waste if discharged into the waters of the 134
state. 135

(K) "Schedule of compliance" means a schedule of remedial 136
measures including an enforceable sequence of actions or 137
operations leading to compliance with standards and rules 138
adopted under sections 6111.041 and 6111.042 of the Revised Code 139
or compliance with terms and conditions of permits set under 140
division (J) of section 6111.03 of the Revised Code. 141

(L) "Federal Water Pollution Control Act" means the 142
"Federal Water Pollution Control Act Amendments of 1972," 86 143
Stat. 886, 33 U.S.C.A. 1251, as amended by the "Clean Water Act 144
of 1977," 91 Stat. 1566, 33 U.S.C.A. 1251, and all other 145
amendments to that act. 146

(M) "Historically channelized watercourse" means the 147
portion of a watercourse on which an improvement, as defined in 148
divisions (C)(2) to (4) of section 6131.01 of the Revised Code, 149
was constructed pursuant to Chapter 940., 6131., or 6133. of the 150
Revised Code or a similar state law that preceded any of those 151
chapters and authorized such an improvement. 152

(N) "Sludge" means sewage sludge and a solid, semi-solid, 153
or liquid residue that is generated from an industrial 154
wastewater treatment process and that is applied to land for 155
agronomic benefit. "Sludge" does not include ash generated 156
during the firing of sludge in a sludge incinerator, grit and 157
screening generated during preliminary treatment of sewage in a 158
treatment works, animal manure, residue generated during 159
treatment of animal manure, or domestic septage. 160

(O) "Sludge materials" means solid, semi-solid, or liquid 161
materials derived from sludge and includes products from a 162
treatment works that result from the treatment, blending, or 163
composting of sludge. 164

(P) "Storage of sludge" means the placement of sludge on land on which the sludge remains for not longer than two years, but does not include the placement of sludge on land for treatment.

(Q) "Sludge disposal program" means any program used by an entity that begins with the generation of sludge and includes treatment or disposal of the sludge, as "treatment" and "disposal" are defined in division (Y) of section 3745.11 of the Revised Code.

(R) "Agronomic benefit" means any process that promotes or enhances plant growth and includes, but is not limited to, a process that increases soil fertility and moisture retention.

(S) "Sludge management" means the use, storage, treatment, or disposal of, and management practices related to, sludge and sludge materials.

(T) "Sludge management permit" means a permit for sludge management that is issued under division (J) of section 6111.03 of the Revised Code.

(U) "Sewage sludge" has the same meaning as in division (Y) of section 3745.11 of the Revised Code.

(V) "Ephemeral feature" means surface water flowing or pooling only in direct response to precipitation, such as rain or snow.

Section 2. That existing sections 3745.114 and 6111.01 of the Revised Code are hereby repealed.