



April 15, 2019

The Honorable Andrew Wheeler
Acting Administrator
U.S Environmental Protection Agency
EPA Docket Center
Office of Water Docket
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1200 Pennsylvania Avenue NW
Washington, D.C. 20460
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The Honorable R.D. James
Assistant Secretary of the Army
Department of the Army, Civil Works

Re: Comments on Proposed Revised Definition of "Waters of the United States"
Docket ID No. EPA-HQ-OW-2018-0149

Dear Acting Administrator Wheeler and Assistant Secretary James:

Amigos Bravos and the New Mexico Environmental Law Center hereby submit the following comments on the proposed *Revised Definition of "Waters of the United States"* that the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) published on February 14, 2019.¹ We appreciate the opportunity to comment on the proposed rule. However, we are very concerned that the proposed rule, if adopted, would have serious detrimental consequences on water quality in New Mexico, and throughout the country. We believe that the proposed rule is contrary to the purpose of the Clean Water Act,² and inconsistent with its terms. The proposed rule would eliminate Clean Water Act jurisdiction over a large portion of New Mexico's surface waters and wetlands, as well as those of other states. The proposed rule is a major departure from the way that EPA and the Corps have interpreted and implemented the Clean Water Act for decades. We strongly oppose many elements of the proposed rule, and we decry the severe rollback of protections that the Clean Water Act was intended to afford to the nation's waters that the proposed rule would entail.

¹ 84 Fed. Reg. 4154 (Feb. 14, 2019).

² 33 U.S.C. §§ 1251 to 1387. Congress enacted the modern Clean Water Act in 1972, 86 Stat. at 816-903 (Oct. 18, 1972), overriding the veto of then President Richard Nixon. 186 Stat. at 903-904 (Oct. 18, 1972); 18 CONG. REC. 37054-061 (1972), *reprinted in* 1 S. COMM. ON PUBLIC WORKS, 93D CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 95-136, (1973) [hereinafter A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1972].

INTRODUCTION

Amigos Bravos is a state-wide, non-profit, water conservation organization based in Taos, New Mexico. Formed in 1988, Amigos Bravos is guided by social justice principles and dedicated to preserving and restoring the ecological and cultural integrity of New Mexico's water and the communities that depend on it. Amigos Bravos has 2,000 supporters.

The New Mexico Environmental Law Center is a non-profit public interest law firm that represents environmental and community organizations on a wide variety of environmental issues including, especially, issues related to water. The Law Center has 730 members.

Amigos Bravos and the Environmental Law Center believe that adoption of the proposed rule would have tremendous adverse consequences for water quality in New Mexico, and nationwide. The New Mexico Environment Department estimates that under the proposed rule, if adopted, 96% of New Mexico's waters would not be subject to Clean Water Act jurisdiction or protections.³ We vigorously oppose the proposed rule.

The proposed rule, if adopted, would eliminate Clean Water Act jurisdiction – and the associated regulatory protections – over many streams, wetlands, and other waters that flow directly or indirectly into traditionally navigable waters and that significantly influence those waters. The proposed rule would eliminate jurisdiction over all ephemeral streams. The preamble to the proposed rule even suggests eliminating jurisdiction over all *intermittent* streams; it requests public comment on this approach. The proposed rule would eliminate jurisdiction over all wetlands that are not directly adjacent – having a direct hydrologic surface connection – to traditionally navigable waters or their continuously flowing tributaries. And the proposed rule would eliminate jurisdiction over interstate waters that are not otherwise subject to jurisdiction. Yet these waters – ephemeral (and intermittent) tributary streams, remote but connected wetlands, and interstate waters – are critical to the chemical, physical, and biological integrity of the nation's navigable waters. These waters need to be protected. Furthermore, the proposed rule would be particularly detrimental to the protection of water quality in the arid western United States, where water resources are in short supply and especially vulnerable to pollution.

The adverse effects of the proposed rule would be compounded in New Mexico because the State does not implement the permitting programs under the Clean Water Act.⁴ New Mexico does not have primacy for the National Pollutant Discharge Elimination System (NPDES) permitting program under section 402 of the Act,⁵ nor does it have primacy for the permitting program for the discharge of dredged or fill material under section 404 of the Act.⁶ EPA and the Corps implement these programs in New Mexico under the Clean Water Act. If the agencies roll

³ N.M. Environment Dep't, Press Release (March 21, 2019).

⁴ See 84 Fed. Reg. at 4157, n.5 (“Three states (Massachusetts, New Hampshire, and New Mexico) do not currently administer any part of the CWA section 402 program.”).

⁵ 33 U.S.C. § 1342.

⁶ 33 U.S.C. § 1344.

back Clean Water Act jurisdiction – as the proposed rule would do – there would be no State program to fill in the regulatory void. Large expanses of surface water – ephemeral streams, wetlands that are hydrologically connected to, but not adjacent to, jurisdictional waters, interstate streams, and other newly excluded waters throughout New Mexico – would no longer receive the protection of Clean Water Act permitting programs and enforcement. EPA and the Corps are therefore incorrect, at least as to New Mexico, in stating that they are determining “where to draw the line between Federal and State waters.”⁷ In truth, they are drawing the line between regulated and unregulated waters.

EPA and the Corps also implement and enforce Clean Water Act permit programs on most Tribal lands in New Mexico. Tribal lands in the State comprise some 5 million acres. Many ephemeral streams and wetlands on Tribal lands would similarly lose Clean Water Act protections.

COMMENTS

Our specific comments on major elements of the proposed rule follow.

1. Legal Interpretations

In the preamble, EPA and the Corps present an overview of the “legal construct of the proposed rule.”⁸ They present their views on the Clean Water Act and their interpretation of the U.S. Supreme Court jurisprudence on navigable waters. The proposed rule solicits comment on such questions as whether the proposed rule would strike the proper balance between federal and state regulatory authority, whether it would provide adequate notice to the regulated community, and whether it would adhere to the overall structure and function of the Clean Water Act by protecting the Nation’s waters.⁹

In our view the proposed rule, and the preamble that precedes and attempts to justify it, places too much emphasis on ceding federal authority to the states and on protecting the interests of the “regulated community.” On the other hand, the proposed rule gives far too little consideration to fulfilling the stated objective of the Clean Water Act and to protecting the interests of the general public – the people who enjoy, rely on, and benefit from clean water for drinking, agriculture, recreation, aesthetics, and countless other uses. In these respects, the proposed rule does not “strike the proper balance.”

⁷ 84 Fed. Reg. at 4168.

⁸ *Id.* at 4163-69.

⁹ *Id.* at 4169.

a. Clean Water Act

EPA and the Corps begin the overview with their construction of the provisions of the Clean Water Act.¹⁰ As the agencies recognize,¹¹ the express objective of the Clean Water Act – stated in the first sentence of the statute – “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹² To achieve this objective, the Act set the goal of eliminating the discharge of pollutants into navigable waters by 1985. It set an interim goal of attaining water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water by 1983. The Act also established a national policy of prohibiting the discharge of toxic pollutants in toxic amounts.¹³ Although these goals have not been met, neither have they been repealed.

Additionally, the Act states that it is “the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.”¹⁴ EPA and the Corps place great reliance on this provision of the Act, asserting that Congress intended “to carefully balance the traditional power of the States to regulate land and water resources within their borders with the need for national water quality regulation.”¹⁵ The agencies cite this provision repeatedly throughout the preamble to justify the rollback of Clean Water Act jurisdiction and protection in a variety of contexts. The agencies go so far as to imply that the stated objective of the Clean Water Act – to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters – is somehow secondary to the “specific ‘policy’ directives from Congress to . . . recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” In doing so, the agencies overtly and cavalierly downplay the Act’s express objective, which they incorrectly conflate with the secondary “goal” of eliminating discharges by 1985, as merely “aspirational.”

In contrast to their emphasis on the policy to preserve the “primary responsibilities and rights” of the states to prevent pollution, EPA and the Corps fail to mention, let alone adhere to, Congress’ stated intention that the definition of “waters of the United States” be interpreted broadly. Congress expressed this intention repeatedly in the legislative history of the 1972 enactment. For example, the House report on H.R. 11896, the bill that eventually became the Clean Water Act, stated:

One term the Committee was reluctant to define was the term “navigable waters.” The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully

¹⁰ *Id.* at 4163-64.

¹¹ *Id.* at 4156.

¹² Clean Water Act § 101(a), 33 U.S.C. § 1251(a).

¹³ *Id.* § 101(a)(1)-(3), 33 U.S.C. § 1251(a)(1)-(3).

¹⁴ *Id.* § 101(b), 33 U.S.C. § 1251(b).

¹⁵ 84 Fed. Reg. at 4163.

intends 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.¹⁶

In discussing the definition of “waters of the United States,” the Senate report on S. 2770, the companion Senate bill, lamented that “[T]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 act was severely limited.”¹⁷ The conference report echoes the House admonition: “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.”¹⁸

We completely disagree with the agencies’ construction of the objective, goals, and policies of the Clean Water Act; their elevation in prominence of the Act’s policy to preserve the responsibilities of the states to prevent pollution; their belittling of the Act’s only stated objective to protect the integrity of the Nation’s waters; and their disregard of Congress’ intent that the definition of “waters of the United States” be given the “broadest possible constitutional interpretation.” As stated at the outset, the objective of the Clean Water Act “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁹ This should be the agencies’ primary consideration.

b. Supreme Court Opinions

EPA and the Corps also present their views on the three most significant U.S. Supreme Court cases interpreting the phrase “waters of the United States.” In the first case, *United States v. Riverside Bayview Homes, Inc.*,²⁰ the Court held that Clean Water Act jurisdiction extended to wetlands adjacent to navigable waters or their tributaries. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,²¹ the Court took a different tack, holding that Clean Water Act jurisdiction did not cover an isolated gravel pit with no hydrologic connection to navigable waters, despite its use by migratory birds. In *Rapanos v. United States*,²² the Court held that Clean Water Act jurisdiction did not extend to several wetlands, although the Corps had concluded that the wetlands all had a hydrological connection to traditionally navigable waters. The decision in *Rapanos* was “fractured,”²³ with a 5 to 4 majority

¹⁶ H.R. REP. NO. 92-911 at 131 (1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1972 at 753, 818.

¹⁷ S. REP. NO. 92-414 at 77 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, *and in* 2 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1972 at 1415, 1495.

¹⁸ S. REP. NO. 92-1236 at 144 (1972) (Conf. Rep.), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1972 at 281, 327.

¹⁹ Clean Water Act § 101(a), 33 U.S.C. § 1251(a).

²⁰ 474 U. S. 121 (1985).

²¹ 531 U.S. 159 (2001).

²² 547 U.S. 715 (2006).

²³ 84 Fed. Reg. at 4166.

concurring only in the result – namely, to reverse the lower court decision and remand the case. Yet the majority justices were unable to agree on a rationale.

Justice Scalia wrote the “plurality” opinion, which was joined by Chief Justice Roberts, and Justices Thomas and Alito. According to Justice Scalia’s opinion, “the phrase ‘waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, and lakes.”²⁴ Excluded from the phrase, according to Justice Scalia’s opinion, are “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”²⁵ Justice Scalia’s opinion acknowledged that Clean Water Act jurisdiction extended over some ephemeral or intermittent streams: “[w]e do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.” And “we also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.”²⁶ But he gave little guidance on how to distinguish those ephemeral or intermittent streams that are included and those that are excluded, merely stating that “[c]ommon sense and common usage distinguish between a wash and seasonal river.”²⁷ As to adjacent wetlands, Justice Scalia concluded that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right . . . are ‘adjacent to’ such waters and covered by the Act.”²⁸

Justice Kennedy wrote an opinion concurring in the result, but expressly rejecting Justice Scalia’s rationale.²⁹ According to Justice Kennedy, to be a “water of the United States,” a non-navigable water or wetland “must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”³⁰ In other words, according to Justice Kennedy, “[a]bsent a significant nexus, jurisdiction under the Act is lacking.”³¹ Wetlands have the requisite nexus, “and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of” navigable waters.³² A wetland would not satisfy Justice Kennedy’s test if its effect on water quality were speculative or insubstantial.³³ Justice Kennedy also concluded that if the wetland is adjacent to navigable-in-fact waters, then the Corps “may rely on adjacency to establish its jurisdiction.”³⁴

²⁴ 547 U.S. at 739 (internal quotations omitted).

²⁵ *Id.*

²⁶ *Id.* at 733, n.5 (emphasis in original).

²⁷ *Id.*

²⁸ *Id.* at 742.

²⁹ *Id.* at 768 (Kennedy, J., concurring) (describing the limited scope of Clean Water Act jurisdiction expressed in Justice Scalia’s opinion as “without support in the language or purposes of the Act or in our cases interpreting it.”).

³⁰ *Id.* at 759.

³¹ *Id.* at 767.

³² *Id.* at 780.

³³ *Id.*

³⁴ *Id.* at 782.

Thus, the *Rapanos* case produced two quite different – and in many cases inconsistent – judge-made tests for determining whether a water body is a “water of the United States.” The first test, formulated in Justice Scalia’s opinion, is whether the water body is “relatively permanent [and] standing or continuously flowing.” If a wetland is at issue, the first test is formulated somewhat differently: whether the wetland is “adjacent” to either a navigable water or a continuously flowing tributary to a navigable water. A wetland is “adjacent” to a water body if it has “a direct surface connection” to the water body. The second test, formulated in Justice Kennedy’s opinion, is whether the water body has a “significant nexus” to a navigable water.

In a dissenting opinion, Justice Stevens (joined by Justices Souter, Breyer, and Ginsburg) suggested a way to resolve the dilemma of two competing minority opinions. He observed that “all four Justices who have joined this [dissenting] opinion would uphold the Corps’ jurisdiction in [any case] in which either . . . test is satisfied.”³⁵ Thus, he concluded, “in these and future cases the United States may elect to prove jurisdiction under either test.”³⁶

Several courts of appeals have followed Justice Stevens’ suggestion. The First Circuit, in *United States v. Johnson*, reasoned:

Following Justice Stevens’s instruction ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding. If Justice Kennedy’s test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality’s test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.³⁷

The Eighth Circuit, in *United States v. Baily*, found this reasoning persuasive and thus “join[ed] the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy’s test” in *Rapanos*.³⁸ The Third Circuit likewise noted that “each of the tests for Corps jurisdiction laid out in *Rapanos* received the explicit endorsement of a majority of the Justices,” and thus held “that federal jurisdiction to regulate wetlands under the [Clean Water Act] exists if the wetlands meet either the plurality’s test or Justice Kennedy’s test from *Rapanos*.”³⁹

EPA and the Corps themselves have followed Justice Steven’s suggestion. In their “*Rapanos* Guidance,” issued initially in June 2007 and revised in December 2008, the agencies noted that “[w]hen there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.”⁴⁰ The

³⁵ *Id.* at 810 (Stevens, J. dissenting).

³⁶ *Id.* at 810, n.14.

³⁷ 467 F.3d 56, 64 (1st Cir. 2006).

³⁸ 571 F.3d 791, 799 (8th Cir. 2009).

³⁹ 661 F.3d 174, 14 (3d Cir. 2011).

⁴⁰ U.S. Env’tl. Prot. Agency & U.S. Dep’t of the Army, Clean Water Act Jurisdiction Following the Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* 3 (Dec. 2, 2008) (hereinafter “*Rapanos*”).

agencies thus concluded that “regulatory jurisdiction under the [Clean Water Act] exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.”⁴¹ The agencies also noted that the United States had “filed pleadings in a number of cases interpreting the decision in this manner.”⁴²

Moreover, three other appeals courts have concluded that the “significant nexus” test, enunciated by Justice Kennedy in *Rapanos*, is the appropriate test for determining Clean Water Act jurisdiction.⁴³ To our knowledge, every federal appeals court that has considered the scope of Clean Water Act jurisdiction since *Rapanos* has found Justice Kennedy’s concurring opinion to be controlling precedent.

Finally, EPA and the Corps themselves relied on and generally followed the concurring opinion of Justice Kennedy in their 2015 rule defining “waters of the United States.”⁴⁴

EPA and the Corps request public comment on their interpretation of the opinions of Justice Scalia and Justice Kennedy in *Rapanos*.⁴⁵ In our view, EPA and the Corps rely excessively on the opinion of Justice Scalia in *Rapanos* – a *minority* opinion – particularly its limited view of Clean Water Act jurisdiction over intermittent and ephemeral streams and adjacent wetlands. By contrast, the agencies place much too little weight on the concurring opinion of Justice Kennedy. Justice Kennedy, together with the four dissenting Justices – a *majority* of the Court – would find Clean Water Act jurisdiction in many circumstances where the proposed rule would not.

EPA and the Corps also solicit comment on their prior interpretations of *SWANCC* and of Justice Kennedy’s concurring opinion in *Rapanos*, which they now suggest has been inconsistent.⁴⁶ *SWANCC*, they posit, has been interpreted narrowly to its facts, while Justice Kennedy’s *Rapanos* opinion has been interpreted broadly.⁴⁷ We see nothing inconsistent in those interpretations. In *SWANCC*, the Court held that Clean Water Act jurisdiction did not extend to isolated, intrastate wetlands having no hydrologic connection to navigable waters. Thus, for example, since *SWANCC* was decided, neither EPA nor the Corps has issued permits for isolated playa lakes in New Mexico, despite their ecological importance. In *Rapanos*, Justice

Guidance”); *see also* Env’tl. Prot. Agency & U.S. Dep’t of the Army, Clean Water Act Jurisdiction Following the Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* 3 (June 5, 2007); U.S. Env’tl. Prot. Agency & U.S. Dep’t of the Army, Draft Guidance on Identifying Waters Protected by the Clean Water Act 2 (May 2, 2011).

⁴¹ *Rapanos* Guidance at 3.

⁴² *Id.*

⁴³ *United States v. Robison*, 505 F.3d 1209, 1222 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (Justice Kennedy’s opinion “provides the controlling rule of law for our case”); *United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006).

⁴⁴ 80 Fed. Reg. 37054 (June 29, 2015).

⁴⁵ 84 Fed. Reg. at 4177.

⁴⁶ *Id.* at 4167.

⁴⁷ *Id.*

Kennedy's concurring opinion, read together with Justice Steven's dissenting opinion, effectively held that Clean Water Act jurisdiction extends to wetlands and tributaries that have a "significant nexus" to navigable waters. Thus, since *Rapanos*, neither EPA nor the Corps has issued permits unless such a nexus is demonstrated. Despite the questionable characterization of one respective interpretation as narrow and the other as broad, we view the interpretations as consistent and, in most instances, appropriate.

2. Ephemeral Streams

The proposed rule would exclude from Clean Water Act jurisdiction all ephemeral streams. It would define a jurisdictional "tributary" to mean "a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to" a navigable water.⁴⁸ Absent from this definition is an ephemeral stream. As if to emphasize the point, the proposed rule would also expressly exclude ephemeral tributary streams.⁴⁹ Ephemeral streams would be excluded under the proposed rule regardless whether they have a "significant nexus" to a navigable water. This element of the proposed rule is, of course, derived mainly from Justice Scalia's opinion in *Rapanos*. It all but abandons Justice Kennedy's opinion.⁵⁰ Moreover, it would be a dramatic departure from the agencies' longstanding interpretation of the term "waters of the United States," which EPA and the Corps have followed and implemented for decades.⁵¹

We strongly oppose this element of the proposed rule, which would inappropriately and unlawfully constrict Clean Water Act jurisdiction and protection. We respectfully request that EPA and the Corps abandon it.

Ephemeral streams help sustain the chemical, physical, and biological integrity of downstream perennial streams and, ultimately, navigable waters of the United States. As Justice Kennedy recognized, the Clean Water Act "is a statute concerned with downstream water quality."⁵² According to EPA's 2015 *Connectivity Study*, "[s]ubstantial evidence supports physical, chemical, and biological connections from headwater streams – including those with ephemeral, intermittent, and perennial flows – to waters immediately downstream through transport of water and associated materials, movement of organisms and their products, and bidirectional geomorphic adjustments."⁵³ Ephemeral tributaries contribute fresh water to larger

⁴⁸ *Id.* at 4173-79, 4204 (proposed 40 C.F.R. § 328.3(c)(11) definitions of "tributary"); *see also id.* at 4204 (proposed 40 C.F.R. § 328.3(c)(3), (5) definitions of "ephemeral" and "intermittent"). Throughout these comments, citations to the proposed definition of "waters of the United States" will only reference 40 C.F.R. § 328.3, although other proposed provisions of the regulations contain the identical definition.

⁴⁹ 84 Fed. Reg. at 4193, 4204 (proposed 40 C.F.R. § 328.3(b)(3) excluding "ephemeral features").

⁵⁰ *See id.* at 4175 ("The agencies are proposing to eliminate [the] case-specific 'significant nexus' analysis.").

⁵¹ *Id.* at 4175 ("The agencies recognize that this is a departure from prior positions of the federal government.").

⁵² *Rapanos*, 547 U.S. at (Kennedy, J. concurring).

⁵³ U.S. Evtl. Prot. Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence* at 3-1 (Jan. 2015) (hereinafter "*Connectivity Study*").

streams and rivers,⁵⁴ filter pollutants,⁵⁵ capture excess nutrients (such as nitrogen and phosphorus),⁵⁶ and provide critical habitat for aquatic wildlife that migrate up and downstream.⁵⁷ Ephemeral streams can also transport pollutants, such as acid mine drainage, heavy metals, and radionuclides,⁵⁸ or sediments and debris from man-made disturbances,⁵⁹ downstream.

Ephemeral streams are also very important in and of themselves. They provide fresh water for drinking, irrigation, wildlife habitat, tribal cultural practices, and industrial uses. Protecting ephemeral streams will thus have additional benefits.

In an arid state like New Mexico, ephemeral streams are of particular importance. The New Mexico Environment Department estimates that 93.3% of the waters in the State, as a percentage of stream miles, are ephemeral or intermittent.⁶⁰ These ephemeral streams serve all of the functions described above.⁶¹ They are critical to the physical, chemical, biological, and radiological integrity of the State's rivers, such as the Rio Grande, the Pecos River, the San Juan River, the Canadian River, and the Gila River, as well as their perennial and intermittent tributaries.

In New Mexico, EPA has issued individual and general NPDES permits to myriad facilities that discharge pollutants into ephemeral streams. According to the Environment Department, some 40% of the NPDES permits that EPA has issued in New Mexico discharge into ephemeral waters. This figure includes 47.5% of all individual permits and 73% of all general permits for concentrated animal feeding operation.⁶² These facilities include, for

⁵⁴ *Id.* at 3-5 to 3-13.

⁵⁵ Lainie R. Levick, et al., U.S. Env'tl. Prot. Agency, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* (EPA/600/R-08/134, ARS/233046) 37-38 (2008) (hereinafter "*Ephemeral & Intermittent Streams*").

⁵⁶ *Connectivity* at 3-25 to 3-28; *Ephemeral & Intermittent Streams* at 37-38.

⁵⁷ *Connectivity Study* at 3-37 to 3-45; *Ephemeral & Intermittent Streams* at 40-64.

⁵⁸ *Connectivity Study* at 3-33 to 3-37.

⁵⁹ *Id.* at 3-14.

⁶⁰ N.M. Environment Dep't, 2018-2020 State of New Mexico Clean Water Act Section 303(d)/Section 305(b) Integrated Report 11 (Nov. 1, 2018). This report does not distinguish ephemeral from intermittent streams.

⁶¹ See *Connectivity Study* at 3-1 to 3-45; *Ephemeral & Intermittent Streams* at 37-64.

⁶² Personal communication with staff of the New Mexico Environment Department, Surface Water Quality Bureau (Apr. 3, 2019).

example, hardrock mines,⁶³ coal mines,⁶⁴ national nuclear research laboratories,⁶⁵ municipal wastewater treatment plants,⁶⁶ electric generating stations,⁶⁷ and ski resorts.⁶⁸ Without Clean Water Act jurisdiction over the receiving waters, these discharges will be unregulated, and water quality across the State would be seriously imperiled.

Of particular significance are the NPDES permits that EPA has issued for Los Alamos National Laboratory, a 40-square mile federal facility located on the Pajarito Plateau northwest of the City of Santa Fe. The Pajarito Plateau is incised by a series of canyons; the canyons contain streams that are fed by storm events and occasional spring snowmelt from the Jemez Mountains to the west and drain into the Rio Grande to the east. Most of these canyon streams are ephemeral or have ephemeral segments before reaching the Rio Grande. The NPDES permits contain essential conditions to protect the integrity and water quality of the Rio Grande. These permits include an industrial wastewater discharge permit that regulates 11 separate outfalls;⁶⁹ an Individual Stormwater Permit that regulates discharges from over 400 hazardous and radioactive waste disposal sites;⁷⁰ the Multi-Sector Industrial Permit that regulates multiple industrial stormwater discharges;⁷¹ and the Construction General Permit that regulates multiple

⁶³ *E.g.*, EPA Region 6, NPDES Permit No. NM0028711 issued to LAC Minerals (USA) LLC (Sept. 30, 2016) (authorizes discharges from the Cunningham Hill Mine into Cunningham Gulch, thence to Galisteo Creek, an intermittent tributary to the Rio Grande); EPA Region 6, NPDES Permit No. NM0030180 issued to Chevron Mining, Inc. (July 29, 2014) (authorizes discharges from Ancho Mine into several unnamed ephemeral tributaries to the Vermejo River, thence to the Canadian River).

⁶⁴ *E.g.*, EPA Region 6, NPDES Permit No. NM002958 issued to Lee Ranch Coal Co. (Apr. 5, 2018) (authorizes discharges from the Lee Ranch Mine into Mulatto Canyon, Arroyo Tinaja, and San Isidro Arroyo, ephemeral streams, thence to Rio Chico, thence to Rio Puerco, thence to the Rio Grande); Region 6, NPDES Permit No. NM0029386 issued to Chevron Mining, Inc. (June 9, 2017) (authorizing discharges from Chevron McKinley mine into Defiance Draw, Coal Mine Wash, and Tse Bonita Wash, thence to the Puerco River).

⁶⁵ *E.g.*, EPA Region 6, NPDES Permit No. NM0028355 issued to Los Alamos National Security, LLC and the U.S. Department of Energy (Mar. 27, 2015) (authorizes discharges from Los Alamos National Laboratory into Mortandad Canyon, Cañada de Buey, and Los Alamos Canyon, intermittent tributaries to the Rio Grande, and into ephemeral portions of Sandia Canyon, Ten Site Canyon, and Cañon de Valle, thence to the Rio Grande).

⁶⁶ *E.g.*, EPA Region 6, NPDES Permit No. NM0030813 issued to Oshara Village LLC (Aug. 7, 2017) (authorizes discharges from a water reclamation facility into an unnamed ephemeral tributary to Arroyo Hondo, thence to the Rio Grande); EPA Region 6, NPDES Permit No. NM0029724 issued to Paa-Ko Communities Sewer Association (May 23, 2018) (authorizes discharges from a treatment facility into an unnamed ephemeral arroyo, thence to San Pedro Creek, thence to the Rio Grande).

⁶⁷ *E.g.*, EPA Region 6, NPDES Permit No. NM0030376 issued to Public Service Co. of New Mexico (Apr. 8, 2016) (authorizes discharges from Rio Bravo Generating Station into unnamed ephemeral arroyo, thence to Albuquerque Metro Arroyo Flood Control Authority South Diversion Channel, thence to the Rio Grande).

⁶⁸ *E.g.*, EPA Region 6, NPDES Permit No. NM0027863 issued to Sandia Peak Ski and Tramway Company (Apr. 28, 2016) (authorizes discharges from Sandia Ski Area into Cañon de Domingo Baca, thence to Arroyo de Domingo Baca, thence to the Rio Grande).

⁶⁹ EPA Region 6, NPDES Permit No. NM0028355 issued to Los Alamos National Security, LLC and the U.S. Department of Energy (Mar. 27, 2015).

⁷⁰ EPA Region 6, NPDES Permit No. NM0030759 issued to Los Alamos National Security, LLC and the U.S. Department of Energy (Sept. 30, 2010).

⁷¹ EPA, NPDES Permit No. NMR050000 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (June 4, 2015).

discharges from construction sites.⁷² If these permits are cancelled due to lack of jurisdiction, water quality in the canyons and downstream in the Rio Grande would certainly be degraded. Moreover, the Buckman Diversion structure, a primary source of drinking water for the City of Santa Fe, is located on the Rio Grande just downstream from several of these canyons. Without these NPDES permits in place, the municipal water supply for the City of Santa Fe could be put in jeopardy.

The agencies should abandon their proposal to exclude ephemeral streams from Clean Water Act jurisdiction. All streams, whether perennial, intermittent, or ephemeral, having a discernable channel that flow directly or indirectly to a navigable water should remain subject to Clean Water Act jurisdiction and protection.

3. Intermittent Streams

As written, the proposed rule would continue to include intermittent streams within the jurisdiction of the Clean Water Act.⁷³ However, the proposal requests public comment on including only perennial streams in the definition of “waters of the United States,” and thus excluding intermittent streams.⁷⁴

For much the same reasons that we oppose excluding ephemeral streams from Clean Water Act jurisdiction, we also strongly oppose excluding intermittent streams from jurisdiction. Indeed, the Clean Water Act would have little applicability in New Mexico if intermittent streams were excluded from the Act’s jurisdiction. Most rivers and streams in New Mexico are intermittent or have intermittent segments. Even some segments of the Rio Grande in central New Mexico have run dry every year for the past 20 years.⁷⁵ Below El Paso, Texas, the Rio Grande is nearly always dry. The United States Supreme Court, moreover, has held that the Rio Grande is not navigable in fact.⁷⁶

4. Distinction Between Intermittent and Ephemeral Streams

In the preamble, EPA and the Corps repeatedly assert that the proposed rule, including its definition of “tributary” and related terms, is “simple,” “clear” “understandable,” “predictable,”

⁷² EPA, NPDES Permit No. NMR100000 General Permit for Discharges from Construction Activities (Jan. 11, 2017).

⁷³ 84 Fed. Reg. at 4173, 4204 (proposed 40 C.F.R. § 328.3(c)(11) definition of “tributary”).

⁷⁴ *Id.* at 4177 (“The agencies also solicit comment on whether the definition of ‘tributary’ should be limited to perennial waters only.”).

⁷⁵ See WildEarth Guardians, *The Rio Grande: Rethinking the Rivers in the 21st Century* (2019), available at: <http://www.rethinkingtherio.org/problem>

⁷⁶ *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) (“the Rio Grande within the limits of New Mexico is not navigable”); see also *United States v. Rio Grande Dam & Irrigation Co.*, 1898-NMSC-001, ¶¶ 5, 9 N.M. 292, 301, 51 P. 674, 676 (“It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used.”).

and “implementable.”⁷⁷ However, the distinction that the agencies make between intermittent and ephemeral streams – which in many cases will determine Clean Water Act jurisdiction – is far from clear or predictable.

The proposed rule would define “intermittent” to mean “surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts).”⁷⁸ It would define “ephemeral” to mean “surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall).”⁷⁹ And it would define “typical year” as “within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.”⁸⁰ But these definitions of “ephemeral” and “intermittent” are not necessarily mutually exclusive or easily distinguishable. The meteorological, hydrological, and anthropological conditions that define whether a stream, or a stream segment, is “intermittent” or “ephemeral” are myriad and highly variable.

Precipitation in New Mexico can be highly variable from year to year, and from decade to decade. In some years, snowpack in our many mountain ranges might be heavy; in other years almost non-existent. For example, maximum snow depth at the Santa Fe Ski Basin in the Sangre de Cristo Mountains in northern New Mexico has varied from 27 inches to 147 inches over the last ten years.⁸¹ In some years parts of New Mexico might experience violent storms and heavy rainfall during the so-called “monsoon” season in late summer; other years might be dry. Consequently, depending on snowpack, many streams might flow in response to snowmelt during the late winter or early spring, or they might not. Depending on rainfall, they might flow in response to precipitation events in spring or late summer, or they might not. Any of these possibilities might be “within the normal range of precipitation” over the past thirty years. And data might not be available to determine a thirty-year average, or even a three-year average.

These complex meteorological variables are further complicated by another consideration: most of New Mexico has suffered from drought conditions for the past ten years. According to Justice Scalia’s opinion, exceptional conditions such as drought should not be considered in determining the jurisdictional status of a tributary stream. But drought conditions in New Mexico, rather than being exceptional, are increasingly becoming “normal.”

⁷⁷ *E.g.*, *id.* at 4163 (“The agencies today are proposing to establish a regulation that would define ‘waters of the United States’ in simple, understandable, and implementable terms”); *id.* at 4174-75 (“The agencies . . . have crafted proposed regulatory definitions designed . . . [to] provid[e] a predictable, implementable regulatory framework”); *id.* at 4175 (“The agencies are proposing to eliminate [the] case-specific ‘significant nexus’ analysis by providing a clear definition of ‘tributary’ that is easier to implement.”); *id.* (“But the agencies believe the proposed definition incorporates the important aspects of Justice Kennedy’s opinion, together with the plurality, to craft a clear and implementable definition.”).

⁷⁸ *Id.* at 4204 (proposed 40 C.F.R. § 328.3(c)(5)).

⁷⁹ *Id.* (proposed 40 C.F.R. § 328.3(c)(3)).

⁸⁰ *Id.* at 4204 (proposed 40 C.F.R. § 328.3(c)(12)).

⁸¹ On the Snow, available at: <https://www.onthesnow.com/new-mexico/ski-santa-fe/historical-snowfall.html?y=0&q=top>.

Moreover, a single stream might vary along its course. A stream might be perennial at its headwaters, intermittent in a downstream reach, and ephemeral in a reach farther downstream before it joins a navigable water or tributary. Water loss might be due to evaporation, infiltration, or diversion (or in many cases, all three). The rate at which the stream might lose water in some reaches, and gain water in other reaches, can vary tremendously from year to year. This variation can result from, among other things, the level, location, and timing of precipitation; the effects of temperature, humidity, and wind on evaporation; fluctuations in the water table, and the intensity of farming activity.

Even the Pecos River, a tributary to the Rio Grande and one of New Mexico's primary river systems, which supplies water for municipal, agricultural, and industrial uses, might be "ephemeral" along part of its course. With its headwaters on the eastern slope of the Sangre de Cristo Mountains in northern New Mexico, it flows southward through the hills and plains of the east-central part of the state to the Texas state line, and it ultimately joins the Rio Grande in Texas. It is perennial for most of its course. In southern New Mexico, however, much of its flow is diverted for agriculture – it supplies the Carlsbad Irrigation District – and to a lesser extent for oil and gas operations. Much of the river's perennial flow is taken. In some sections it is a losing stream due largely to pumping of groundwater. In some years it runs dry below these diversions for several miles. Also in some sections, in some years, the large part of the river flow is from late summer rainstorms feeding ephemeral tributaries to the river.

Furthermore, current stream flow regimes are bound to shift significantly due to climate change. Based on modeling, climate scientists predict that the southwestern United States will become warmer (more evaporation)⁸² and drier (less precipitation).⁸³ Moreover, a larger proportion of annual precipitation will fall in summer rainstorms, and a lesser proportion will fall in winter snow. Mountain snowpack, the source of most perennial streams, will decline.⁸⁴ These shifts in climate will increasingly cause currently perennial streams to become intermittent, and currently intermittent streams to become ephemeral. Fewer and fewer streams and stream segments, under the proposed rule, would be subject to Clean Water Act jurisdiction and protection. Thus, at a time when climate changes will be shrinking our finite water resources, and we should be strengthening and expanding the protection of those resources, we would instead be weakening and contracting that protection. The proposed rule, inexplicably and inexcusably, makes no mention of the effects of climate change.

All of these shifting variables would, in many instances, render the labels "intermittent" and "ephemeral" at best arbitrary and at worst utterly meaningless. Any attempt to survey the 88,810 stream miles in New Mexico to determine which ones are perennial or intermittent and which ones are ephemeral would be so time consuming and expensive as to be impractical. We believe this distinction would be unworkable in New Mexico, and no doubt in many other states, as well. Again, all discernable streams, whether perennial, intermittent, or ephemeral, if they

⁸² Gregg Garfin et al., eds., U.S. Nat'l Climate Assessment, *Assessment of Climate Change in the Southwest United States* 104-07 (2013).

⁸³ *Id.* at 110.

⁸⁴ Jerry M. Melillo et al., eds., U.S. Nat'l Climate Assessment, *Climate Change Impacts in the United States* 465 (2014).

have a significant hydrological connection to navigable or other jurisdictional waters, should be subject to Clean Water Act jurisdiction and protection.

5. Perennial and Intermittent Stream Segments Upstream of an Ephemeral Segment

The proposed rule would eliminate Clean Water Act jurisdiction over the portion of a tributary upstream of a feature – probably including a stream segment – that conveys only ephemeral flow to a downstream navigable water. We oppose this element of the proposed rule, which would apply to many streams in New Mexico.

The proposed rule is somewhat ambiguous on whether a perennial or intermittent tributary stream segment upstream of an ephemeral stream segment would be subject to Clean Water Act jurisdiction. The proposed rule defines “tributary” as “a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to” a navigable water. If a tributary contains an ephemeral segment, the portion of the tributary upstream of that ephemeral segment, arguably, would not “contribute perennial or intermittent flow” to a downstream navigable water. The ephemeral segment would effectively “sever” jurisdiction from the upstream perennial or intermittent segment. But the agencies, in the preamble to the proposed rule, request comment “on whether less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flow and under what conditions that may happen.”⁸⁵

The proposed rule is clearer that a perennial or intermittent tributary stream segment upstream of an ephemeral ditch, impoundment, pond, lake, wetland, or other “feature” would not be subject to Clean Water Act jurisdiction. It states that “a perennial or intermittent stream that flows into a non-jurisdictional ephemeral feature would not meet the definition of ‘tributary’ if the perennial or intermittent flow does not reach a traditional navigable water or territorial sea.”⁸⁶ The “feature” would thus seem to sever jurisdiction.

The proposed rule is quite clear that a perennial or intermittent tributary stream segment upstream of a natural or artificial “break” that conveys only ephemeral flow to a downstream navigable water is not subject to Clean Water Act jurisdiction. The proposed rule generally describes such “break” to potentially include a bridge, dam, culvert, debris pile, boulder field, or “similar break” in the stream channel, although the term is not defined in the proposed regulation and is remarkably unclear. Would a beaver dam be a “natural break”? A logjam? A tamarisk (salt cedar) thicket? How many boulders comprise a boulder field? If any ephemeral segment or feature in an otherwise perennial or intermittent tributary stream severs jurisdiction from the upstream portion of the tributary, then perhaps the answers to these questions do not matter. But the proposed rule is fuzzy on these points.

These provisions of the proposed rule would exclude many important stream segments in New Mexico from Clean Water Act jurisdiction and protection. The Environment Department

⁸⁵ 84 Fed. Reg. at 4177.

⁸⁶ *Id.* at 4174.

estimates that 57% of New Mexico's perennial and intermittent waters would be excluded under these provisions,⁸⁷ likely including the following four examples.

(a) Santa Fe River

The proposed rule would likely eliminate jurisdiction over more than half of Santa Fe River, a direct tributary to the Rio Grande in northern New Mexico. For thousands of years people have lived along the Santa Fe River, and the river has been a lifeline for the City of Santa Fe since the 1600s and for native communities for time immemorial. The river provides approximately 40 percent of the City's water supply, and water for wildlife habitat, irrigation, recreation, and cultural uses.

The Santa Fe River watershed covers approximately 285 square miles. The river itself is 46 miles long from its headwaters to its confluence with the Rio Grande. The river starts high in the Sangre de Cristo Mountains, in the Santa Fe National Forest. Below its headwaters, it is impounded by two municipal water supply reservoirs. The river flows eastward, perennially for 11 miles, and then it becomes intermittent for another 4 miles. The river then passes through the state capital, Santa Fe. For a 10-mile stretch, mostly through the city, the river is ephemeral,⁸⁸ and it passes several bridges, culverts, concrete embankments, debris piles, and other possible "breaks" (depending on how this term is defined). The river then becomes perennial once again as it flows west of the city to the Rio Grande.

(b) Tijeras Arroyo

The Tijeras Arroyo, also known as Tijeras Creek, is located in eastern Bernalillo County, New Mexico and is one of the largest arroyos in the Albuquerque area. Tijeras Arroyo originates from springs in the Sandia and Manzano Mountains that flow westward through Tijeras Canyon, then through developed areas of Albuquerque, before entering the Rio Grande. From its headwaters, Tijeras Arroyo is ephemeral for about 15 miles. It then becomes ephemeral for the next 11 miles to its confluence with the Rio Grande, according to the New Mexico Environment Department.⁸⁹ EPA and the Environment Department determined that Tijeras Arroyo is subject to Clean Water Act jurisdiction under the 1988 regulations and *Rapanos* Guidance, and has a documented significant nexus to the Rio Grande. Under the proposed rule, however, the entire Tijeras Arroyo would lose jurisdiction even though the arroyo has 15 miles of perennial stream.

⁸⁷ Personal communications with New Mexico Environment Department Staff, Surface Water Quality Bureau (Apr. 10, 2019).

⁸⁸ N.M. Environment Dep't, 2018-2020 State of New Mexico Clean Water Act Section 303(d)/Section 305(b) Integrated Report, Appendix A at 195.

⁸⁹ *Id.*

(c) Las Huertas Creek

Las Huertas Creek has its headwaters at Sandia Crest above the City of Albuquerque. It flows down the northeastern portion of Sandia Mountain into the Placitas area and then into Santa Ana Pueblo where it enters the Rio Grande. Las Huertas Creek is used by residents of Albuquerque, Rio Rancho, Placitas, and Bernalillo for recreation, and it feeds irrigation canals serving the Placitas area. Its lower stretches, as it approaches the Rio Grande, are ephemeral. While the Las Huertas Creek has 14 miles of perennial stream,⁹⁰ jurisdiction over the entire creek would likely be severed by the ephemeral segment.

(d) Rio Fernando de Taos

The Rio Fernando is the major stream running through the town of Taos from east to west. It plays a key part in sustaining wildlife, recreation, and agriculture in the Taos area. For generations, Taos Valley community members have enjoyed the public lands of its upper watershed in Taos Canyon for recreation. In the lower watershed, the Rio Fernando feeds a system of six acequias and approximately 1,280 acres of irrigable fields. It flows through the Town of Taos and past public spaces, like Fred Baca Park, where people congregate along its bank. It then flows into Rio Pueblo a perennial tributary of the Rio Grande. While the upper and lower segments of the Rio Fernando are consistently perennial, the middle stretch which runs for several miles, typically flows only during storm events and, if there is sufficient snowpack, for up to a few weeks during spring runoff. This dry segment flow is below the agricultural diversion points and most of the recreational trails and access points. If the proposed rule were to be adopted, the middle and upper segments of the Rio Fernando, and all the designated uses that depend on these segments of the river, would be threatened.

Hundreds of other streams and rivers across New Mexico have flow regimes that are interrupted by ephemeral stretches or by natural or artificial “breaks,” as are the Santa Fe River, Tijeras Arroyo, Las Huertas Creek, and Rio Fernando de Taos. These streams would also be excluded from Clean Water Act jurisdiction and protection, at least in part, under the proposed rule. These elements of the proposed rule are also remarkably unclear. We strongly oppose these elements of the proposed rule.

6. Wetlands

The proposed rule would exclude from Clean Water Act jurisdiction wetlands that are not adjacent to a navigable water or other jurisdictional waters.⁹¹ It would thus exclude many wetlands that have a “significant nexus” to navigable waters or their tributaries, but are not adjacent. Again, this element of the proposed rule represents a stark departure from the prior long-standing interpretation of the Clean Water Act by EPA and the Corps. We oppose this element of the proposed rule. All wetlands that eventually drain into navigable waters should

⁹⁰ *Id.* at 184.

⁹¹ 84 Fed. Reg. at 4184-90, 4204 (proposed 40 C.F.R. § 328.3(a)(6)).

remain within Clean Water Act jurisdiction regardless of whether they are adjacent to perennial or intermittent segments.

Wetlands are critical to maintaining the chemical, physical, and biological integrity of adjacent or downstream, hydrologically connected, navigable waters. As explained in EPA's *Connectivity Study*, "wetlands can have important, long-lasting effects on streams and rivers."⁹² Riparian wetlands help mitigate flood pulses in streams and rivers by capturing overflows and storing excess water.⁹³ Riparian wetlands capture sediments eroded from upland areas, thus buffering stream channels against excessive sedimentation.⁹⁴ Riparian wetlands also serve as a sink, capturing pollutants, such as pesticides and mercury,⁹⁵ and excess nutrients, such as nitrogen and phosphorus,⁹⁶ thus improving water quality in rivers and streams. Riparian wetlands also serve as a habitat for many aquatic species, mainly fish, amphibians, and invertebrates, that move between wetland and stream environments.⁹⁷ Wetlands can provide important foraging, hunting, and breeding sites for fish, and the aquatic stage habitat for amphibians.⁹⁸ Non-riparian wetlands, though usually farther away from stream channels, often serve these same functions through hydrological connections.⁹⁹

In New Mexico, many of our wetlands would no longer be subject to Clean Water Act jurisdiction and protection under the proposed rule. A recent modeling study looked at three watersheds across the United States: the Cottonwood River watershed in Minnesota, the South Platte River (headwaters) watershed in Colorado, and the Cimarron watershed in New Mexico. The Cimarron River is a tributary to the Canadian River, which flows from northeastern New Mexico into Texas, where it joins the Red River. The study found that large swaths of wetlands would lose coverage under a scenario roughly identical to the proposed rule. This scenario assumed that only wetlands adjacent to perennial or intermittent streams were covered (although the scenario did not take into account jurisdiction being "severed" by downstream ephemeral stretches or "breaks"). The study found that 18% of the wetlands in the Cimarron watershed would not be protected under this scenario. In addition, the study found that 26% of the wetlands that provide flood protection, 21% of the wetlands that enhance water quality, 18% of the wetlands that provide wildlife habitat, and 9% of the wetlands that provide fish habitat in the Cimarron watershed would not be protected under this scenario. Moreover, in a scenario assuming that only wetlands adjacent to perennial (but not intermittent) waters were covered – an

⁹² *Connectivity Study* at 4-1.

⁹³ *Id.* at 4-7.

⁹⁴ *Id.* at 4-8.

⁹⁵ *Id.* at 4-14.

⁹⁶ *Id.* at 4-11 to 4-13.

⁹⁷ *Id.* at 4-15 to 4-20.

⁹⁸ *Id.* at 4-15.

⁹⁹ *Id.* at 4-20 to 4-35.

approach the agencies have suggested and requested comment on – some 69% of wetlands in the Cimarron watershed would not be protected.¹⁰⁰

The Comanche Creek wetlands are among the New Mexico wetlands that would lose Clean Water Act jurisdictional status under the proposed rule. These wetlands lie in the Valle Vidal, a spectacular 100,000-acre mountain basin in the Carson National Forest in northern New Mexico. Waters in the Valle Vidal have been designated, under section 303 of the Clean Water Act,¹⁰¹ as Outstanding National Resource Waters.¹⁰² Federal, State, and private interests have spent millions of dollars to restore the Comanche wetlands, including grants under section 319 of the Clean Water Act.¹⁰³ The Valle Vidal is a destination for tourists, hunters, anglers, birders, hikers, and mountain bikers, as well as hundreds of boy scouts from the nearby Philmont Scout Ranch. The Comanche wetlands provide crucial forage for the largest elk herd in New Mexico and habitat for numerous other species of wildlife. The Valle Vidal Grazing Association uses the area for grazing livestock.

Yet the Comanche wetlands would not appear to be adjacent to jurisdictional waters under the proposed rule. Comanche Creek, which adjoins the wetlands, is a tributary of the Rio Costilla (an “interstate water” discussed below). Rio Costilla then flows generally to the west for several miles through New Mexico and Colorado and enters the Rio Grande. Just upstream of its confluence with the Rio Grande, Rio Costilla runs dry and becomes an ephemeral stream for several miles. Thus, Clean Water Act jurisdiction over the Rio Costilla, its tributary Comanche Creek, and the Comanche wetlands adjacent to the creek would be severed under the proposed rule, despite all having a “significant nexus” to the Rio Grande.

7. Interstate Waters

The proposed rule would remove interstate waters as a separate category of waters of the United States.¹⁰⁴ As EPA and the Corps recognize, “this proposal marks a shift away from prior agency positions.”¹⁰⁵ Indeed, they acknowledge that “interstate waters” has been a category of waters of the United States since the first regulations were adopted under the Clean Water Act in 1973, continuing up through and including the 2015 regulations.¹⁰⁶ The agencies request comment on the proposed change.¹⁰⁷

We disagree with this proposal. Dropping interstate waters is not in any way mandated – or even hinted at – in any of the *Rapanos* opinions or in *SWANCC*. On the other hand, the

¹⁰⁰ Saint Mary’s University of Minnesota, *Modeling Federally Protected Waters and Wetlands* (2017), available at: <http://smumn.maps.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>

¹⁰¹ N.M. ADMIN. CODE § 20.6.4.9.D(2).

¹⁰² 33 U.S.C. § 1313; *see* 40 C.F.R. § 131.12(a)(3).

¹⁰³ 33 U.S.C. § 1329.

¹⁰⁴ 84 Fed. Reg. 4171-72.

¹⁰⁵ *Id.* at 4172.

¹⁰⁶ *Id.* at 4171.

¹⁰⁷ *Id.* at 4172.

Supreme Court has “long recognized that interstate water pollution is controlled by *federal* law.”¹⁰⁸ Moreover, as a practical matter, retaining “interstate waters” as part of the statute’s jurisdiction provides a simple way to delineate certain jurisdictional waters – much simpler indeed than trying to distinguish intermittent streams from ephemeral streams.

New Mexico shares with its neighboring states several streams that apparently have no continuous connection to traditional navigable waters. But they are interstate streams. Under this proposal, Clean Water Act jurisdiction would likely no longer apply to these streams, which include the following examples.

(a) Gila River

The Gila River is one of the world’s longest desert rivers at 649 miles. The Gila River reaches from southwestern New Mexico to Yuma, Arizona, where it joins the Colorado River. The Gila River originates in America’s first designated wilderness area, the Gila Wilderness, and is rich in biological diversity and cultural history. The Gila River and several of its tributaries have been designated as Outstanding National Resource Waters¹⁰⁹ under section 303 of the Clean Water Act.¹¹⁰

The Gila River typically goes dry before it gets to the Colorado River due to large irrigation diversions. While the Corps has attempted to designate the entire stretch of the Gila River that flows through New Mexico as a navigable water, this designation has been challenged and to date remains unresolved. Thus, given the ephemeral nature of the lower segments of the Gila River, the upper segments of the river are likely to be severed under the proposed rule; the river would no longer be a jurisdictional tributary. If not a jurisdictional interstate water, the Gila River would have no jurisdictional basis. The Gila River would no longer be a “water of the United States” under the Clean Water Act.

(b) Rio Costilla

The Rio Costilla (or Costilla Creek) is an interstate stream that flows generally to the west in northern New Mexico and southern Colorado. It is subject to an interstate compact.¹¹¹ The watershed begins in the Sangre de Cristo Mountains in southern Colorado. The Rio Costilla then flows southward across the state line into New Mexico where it is impounded by in the Costilla Reservoir on the Vermejo Park Ranch. It then flows southwest, receiving the waters of its tributary Comanche Creek at the north end of Valle Vidal. Rio Costilla leaves the mountains after passing through a diversion dam – the beginning of the Acequia Madre irrigation ditch – and flows through the town of Costilla, New Mexico. Flowing north from Costilla, the creek enters Colorado again and

¹⁰⁸ *Arkansas v. Oklahoma*, 503 U.S. 91, 109 (1992) (emphasis by the Court).

¹⁰⁹ N.M. ADMIN. CODE § 20.6.4.9.D(3)(c)(2).

¹¹⁰ 33 U.S.C. § 1313; *see* 40 C.F.R. § 131.12(a)(3).

¹¹¹ Amended Costilla Creek Compact between the State of Colorado and the State of New Mexico (Feb. 7, 1963).

flows southwest. It crosses the state line once again just west of Jaroso, Colorado. It then flows to the Rio Grande to the northwest of Ute Mountain in New Mexico.

The Rio Costilla typically runs dry – and becomes ephemeral – in its lower segments near the confluence with the Rio Grande. Again, the ephemeral segments will sever jurisdiction under the proposed rule. Without an “interstate water” designation, the Rio Costilla and its tributaries, including Comanche Creek, would no longer be subject to Clean Water Act jurisdiction and protection.

8. Groundwater

The proposed rule would expressly exclude “groundwater” from the definition of “waters of the United States.”¹¹² The agencies seek comment on all the exclusions, and on the clarity of the groundwater exclusion.¹¹³ We oppose the groundwater exclusion in the proposed rule.

Groundwater often forms a hydrologic link between water bodies that are not visibly connected at the surface.¹¹⁴ Although Justice Scalia opined in his *Rapanos* opinion that for a water body to be jurisdictional, it must have a “continuous surface connection” to a navigable water,¹¹⁵ Justice Kennedy did not articulate a similar requirement in his opinion. In some cases, groundwater could establish the “significant nexus.” Neither *Riverside Bayview Homes* nor *SWANCC* addressed groundwater. Thus, a majority of the Supreme Court has never rejected the notion that a non-navigable tributary or wetland could be a “water of the United States” based on a groundwater connection to a navigable water. Prior to *Rapanos*, several federal courts accepted Clean Water Act jurisdiction over groundwater in limited circumstances.¹¹⁶

CONCLUSION

We urge EPA and the Corps to withdraw this proposed rule, which would eliminate Clean Water Act jurisdiction and protections for many New Mexico rivers, streams, wetlands, and other water bodies. We appreciate your consideration of our comments.

¹¹² 84 Fed. Reg. at 4190, 4193, 4204 (proposed 40 C.F.R. § 328.3(b)(2)).

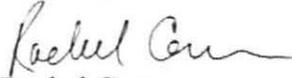
¹¹³ *Id.* at 4195.

¹¹⁴ See, e.g., *Connectivity Report* at 4-22 to 4-24.

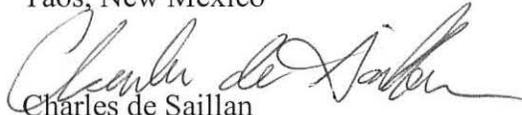
¹¹⁵ 547 U.S. at 742.

¹¹⁶ *Wash. Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 989-91 (E.D. Wash. 1994) (jurisdiction extends to discharge to ground waters which migrates into surface waters of the United States); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (jurisdiction extends to “discharge which reaches navigable waters through groundwater”); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Calif. 1988) (same), *vacated on other grounds sub. nom McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995). *Contra Vill. of Oconomowoc v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.) (jurisdiction does not extend to ground waters, even if “hydrologically connected with surface waters”), *cert. denied*, 513 U.S. 930 (1994).

Sincerely,



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cc: The Honorable Senator Tom Udall
The Honorable Senator Martin Heinrich
The Honorable Representative Ben Ray Luján
The Honorable Representative Debra Haaland
The Honorable Representative Xocitl Torres Small
James Kenney, Secretary, New Mexico Environment Department
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