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**Comments of Pueblo of Laguna in Response to Request for Recommendations on Defining  
“Waters of the United States”**

*Docket No. EPA-HQ-OW-2021-03281*

Dear Administrator Regan, Acting Assistant Secretary Pinkham, Director Goodin, and Acting  
Principal Deputy Stewart:

The Pueblo of Laguna writes to urge you to protect streams, washes, arroyos, wetlands, and other  
waters that are the lifeblood of the Pueblo.

First, thank you for the opportunity to provide written comment through the tribal consultation process as your agencies (“the Agencies”) initiate regulatory action to revise the definition of the “waters of the United States” under the Clean Water Act.<sup>1</sup>

As detailed below, the Pueblo was substantially harmed by the now-vacated Navigable Waters Protection Rule (“Navigable Waters Rule”), which stripped Clean Water Act (CWA) protections from most of the Pueblo’s waters, left the Pueblo exposed to upstream pollution, and did not provide or address the gap created in the Pueblo’s legal and resource capability to protect its waters.

In keeping with the Agencies’ stated intention to initiate a two-step process, the Pueblo urges the Agencies’ to first act promptly to restore and implement the regulatory framework in effect prior to the Navigable Waters Rule. (We refer to that pre-existing framework here as the pre-2015 regulations).

Second, after a straightforward restoration of the pre-2015 regulations, we urge the Agencies to promulgate a new definition of “waters of the United States” that is not only grounded in the Clean Water Act’s language, structure, and purpose—as interpreted by the courts—but that also recognizes the unique trust duties that the Agencies owe to the Pueblo and other American Indian Tribes.

In support of these recommendations, the Pueblo offers comments below in response to several issues upon which the Agencies have solicited input. In particular, the Pueblo provides comments:

- Identifying the ways in which the 2019 repeal of the Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule were unlawful, as detailed in a lawsuit filed by the Pueblo, including the ways in which the definition adopted in the Navigable Waters Rule was impermissible under statute and case law, and the ways in which the Agencies failed to adequately support the rule in the record, failed to respond to the Pueblo’s comments and breached their trust duty to the Pueblo;
- Identifying the ways in which the Pueblo was harmed by the Navigable Waters Rule, including by stripping CWA protections from a majority of its streams and exposing the Pueblo to upstream pollution;
- Responding to questions about the jurisdictionality of tributaries by making clear that the science prohibits a categorical exclusion of ephemeral streams under the significant nexus test, and urging the Agencies to ensure jurisdictionality of any stream that meets this test;
- Responding to questions about the role of environmental justice considerations by making clear that the Navigable Waters Rule resulted in disparate harms to the Pueblo

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<sup>1</sup> Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 41,911, 41,913 (Aug. 4, 2021) [hereinafter Preproposal Notice].

and other Southwestern Native communities and that any future rule must actively consider and prevent such harms;

- Articulating the Agencies' trust duty to meaningfully consult with the Pueblo and other American Indian tribes, consider how any proposed redefinition of the waters of the United States will affect tribal rights and resources, and that it also requires resolution of any statutory ambiguities in the statute in favor of protecting Tribal waters; and
- Providing input on issues related to climate change and regional approaches.

**Background: The Pueblo of Laguna<sup>2</sup>**

The Pueblo of Laguna is a federally recognized American Indian tribe with a government-to-government relationship with the United States.

Unlike many other Indian tribes in the United States, the Pueblo was never removed from the land it has held since time immemorial and has retained property rights to the lands. 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.

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

The Pueblo of Laguna is located within both the Rio Puerco and Rio San José watersheds. The people of Laguna have been residing within these watersheds and using water from both rivers for irrigation and domestic purposes hundreds of years before European contact.

Ephemeral and intermittent streams are a significant source of surface water for the Pueblo of Laguna. Laguna's most significant waters are the Rio San José, the Rio Puerco, Encinal Creek, and the Rio Paguete, all of which are fed by ephemeral streams. Each of these four rivers is ephemeral or intermittent yet are essential to the Pueblo of Laguna. Many use the waters for drinking, ceremonial purposes, and farming, including harvesting plants from the banks of significant waterways.

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. Because of this consumption and use, members of the Pueblo of Laguna are directly affected by upstream water activities that occur on privately-held lands beyond the exterior boundaries of the Pueblo and on other federal lands.

**Pueblo's Challenge of the 2019 Repeal Rule and**

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<sup>2</sup> This information is largely reproduced from the complaint filed by the Pueblo in *Jemez v. Regan*, 21-cv-277-WJ-KK (D.N.M. Mar. 26, 2021), and by the Declaration of Erin "Nikki" Woodward filed in the same case. Both are attached to these comments.

***the 2020 Navigable Waters Protection Rule***

The 2019 repeal of the Clean Water Rule (“Repeal Rule”) and the 2020 promulgation of the Navigable Waters Protection Rule (“Navigable Waters Rule”) by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (“The Agencies”) had the effect of stripping the Pueblo’s waters of Clean Water Act protections without regard as to how this would affect the Pueblo or lead to pollution of downstream, traditionally navigable waters. The Pueblo, together with the Pueblo of Jemez, therefore challenged these actions in the U.S. District Court for the District of New Mexico in *Pueblo of Jemez v. Regan*.<sup>3</sup>

In its complaint, the Pueblo laid out the ways in which both the repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule were unlawful.<sup>4</sup> In short:

- The 2020 Navigable Waters Rule adopted a definition of “the waters of the United States” that is unlawful under both the text of the CWA and under applicable case law, including under *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985); *Solid Waste Agency of Northern Cook County. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 166 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006).
- The promulgation of both the 2019 Repeal Rule and 2020 Navigable Waters Rule was unlawful under the Administrative Procedure Act because the actions were not adequately supported by the record. In particular, the Agencies failed to provide a detailed explanation of what science supported the Agencies’ radical changes; did not acknowledge, assess, or consider how this reversal of policy would harm the Pueblos’ longstanding reliance on federal CWA protections of their waterbodies; and also failed to abide by executive branch policies with regards to environmental justice, including consultation with regards to tribes.
- The promulgation of the 2020 Navigable Waters Rule was unlawful because the Agencies did not meaningfully consider and address significant comments from the Pueblo. In particular, the Agencies failed to address how the Pueblo was supposed to fill in gaps in enforcement created by the rule, how the rule satisfied the Agencies’ trust responsibility to the Pueblos, and proposals that the Agencies maintain broader federal CWA jurisdiction for the Pueblos.
- The promulgation of the 2020 Navigable Waters Rule was unlawful because it violated the federal government’s trust responsibilities to tribes. In particular, the Agencies breached their trust responsibility by failing to protect tribes and tribal resources, by not considering or addressing how their actions would adversely affect tribal resources, and by failing to follow their own tribal consultation policies and therefore failing to conduct meaningful consultation.

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<sup>3</sup> No. 1:21-cv-277-WJ-KK (D.N.M. Mar. 26, 2021).

<sup>4</sup> See complaint in attachment.

The Navigable Waters Rule has now been vacated by two federal courts—the District of Arizona and the District of New Mexico—and the judge in District of New Mexico hearing the Pueblo’s challenge recognized this vacatur in the case filed by the Pueblos.<sup>5</sup>

The Pueblo submits its complaint and its response in partial opposition to the Agencies’ motion for voluntary remand of the Navigable Water Rule without vacatur in *Jemez v. Regan* as appendices to this comment, as well as declarations filed in this case.

The Pueblo urges the Agencies to promptly enact a straightforward rescission of the Navigable Waters Rule, followed by a substantive revision of the rule that is consistent with the statute’s purpose and obligation of the Agencies to protect Pueblo water resources for all of the reasons summarized above and detailed in the attached complaint.

***The NWPR harmed the Pueblo by exposing it to unregulated upstream pollution and leaving it without the means to protect itself from such pollution*<sup>6</sup>**

The EPA’s pre-proposal Notice solicits input on “co-regulator experiences with implementing various regulatory regimes,” and says that the Agencies “are committed to listening to specific tribal interests that should be considered in any revised definition” of the waters of the United States.<sup>7</sup> The Pueblo here provides its experience with the Navigable Waters Rule.

The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule harmed 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 harmed 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.

According to an analysis by the Pueblo’s water quality analyst using data from the U.S. Geological Survey’s National Hydrology Dataset, there are 1,416 stream miles in the Pueblo of Laguna, of which are 79% ephemeral, 18% intermittent, and 3% perennial.

The understanding of the Pueblo’s Water Quality Department is that nearly all of the Pueblo’s waters were jurisdictional under the 2015 Clean Water Rule. Similarly, the Department’s understanding is that most of these stream miles were jurisdictional under the Pre-2015 regulations, including through case-by-case analysis.

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<sup>5</sup> *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021) (vacating Navigable Waters Rule); *Navajo Nation v. Regan*, No. 20-CV-602-MV (D.N.M. Sept. 27, 2021) (vacating Navigable Waters Rule); *Jemez v. Regan*, 21-cv-277-WJ-KK (D.N.M. Mar. 26, 2021) (finding vacatur moot in light of *Pasqua Yaqui Tribe*).

<sup>6</sup> This information is largely reproduced from the Declaration of Erin “Nikki” Woodward in *Jemez v. Regan*, attached to these comments.

<sup>7</sup> Preproposal Notice, 86 Fed. Reg. at 41,913.

Because the 2020 Navigable Waters Rule categorically excluded ephemeral streams without regard to their impact on water quality, and because the Rule defined ephemeral streams broadly, the rule had the effect of stripping CWA coverage from most of the Pueblo's waters.

The analysis of the Pueblo's Water Quality Department ("Department") is that the Navigable Waters Rule stripped CWA protections from 79% to 97% of stream miles in the Pueblo.

This outcome has left the Pueblo exposed to water pollution, especially from upstream polluters.

The Pueblo sits downstream of several past uranium mining operations in the Rio San José and Rio Puerco watersheds. This includes the Mount Taylor Rio Grande Resources, L-Bar, Homestake, and Bluewater mines, which are all upstream of the Pueblo but within the Pueblo's watershed. Pollution discharges at these mines affect surface waters within the Pueblo. The Homestake and Bluewater mines are of particular concern because there is documented contamination on these sites. In addition, the Roca Honda uranium mine is also upstream and is seeking a new CWA permit related to planned uranium mining.

One particular concern is pollution that could have flowed into the Rio Puerco under the Navigable Waters Rule. Two mines, the Rio Grande Resources Mount Taylor mine, and Lee Ranch coal mine, discharge into the Arroyo Chico, an ephemeral stream that flows into the Rio Puerco. The Rio Puerco is already classified as "impaired" for mercury starting at this confluence between the Rio Puerco and Arroyo Chico, meaning that it is not meeting state water quality standards. In the Pueblo's analysis, the Arroyo Chico was likely not jurisdictional under the Navigable Waters Rule. The Pueblo was concerned that under the Navigable Waters Rule, these mines could have been found to no longer need CWA permits. The impaired sections of the Rio Puerco run through the Laguna Pueblo's two biggest cattle grazing areas. The Pueblo is concerned that pollution from these two mines may increase if no CWA permit is required, leading to increased pollution in the Rio Puerco and increased risk to the Pueblo's beef production.

Another concern of the Pueblo is that several existing facilities discharge pollution into or upstream of the Pueblos' waters that were previously required to have CWA permits, and that would be scheduled to renew their CWA permits in the next several years, but that would potentially not be required to have permits under the Navigable Waters Rule. Based on the Department's review of CWA permits on EPA's website, this includes the Rio Grande Resources uranium mine, whose current CWA permit expired on September 30, 2021, and the Lee Ranch surface coal mine, whose current CWA permit expires on May 31, 2023. The Pueblo is concerned that under the Navigable Water Rule, these large mines would no longer be required to have permits limiting their pollution discharges into waters that flow into the Pueblo.

A second harm is that the Navigable Waters Rule effectively stripped the Pueblo of its rights under the Congressionally enacted Treatment-in-a-similar-manner-to-States (TAS) provisions of the Clean Water Act. 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.<sup>8</sup> 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.<sup>9</sup>

The Pueblo of Laguna currently administers a water quality standards program under CWA Section 303(c), a water quality certification program under CWA Section 401, a water pollution control program under Section CWA 106, and a nonpoint source pollution control program under Section CWA 319. The Pueblo has set water quality standards under CWA Section 303(c), which include identifying “designated uses” for specific water bodies. The two most significant designated uses in the Pueblo’s water quality standards are Primary Human Contact/Ceremonial use and Secondary Human Contact use. Primary Human Contact/Ceremonial designated use protects water that is used for religious, traditional and cultural purposes by members of the Pueblo of Laguna. Secondary Human Contact designated use protects water that is used for activities, such as recreation, that may cause the water to come into direct contact with human skin.

Because the Pueblo also has TAS status under Section 401, the water quality certification program, the Pueblo must be notified and consulted on all upstream CWA federal permits. This is particularly important to the Pueblo in part because the City of Grants is upstream, and the Pueblo is concerned about any changes to Grants’ wastewater systems, specifically, septic systems and open sewer lagoons, that could contaminate the Pueblo’s downstream waters. This notification is also important because the Pueblo of Acoma, also upstream, has some sewer lagoons within the Rio San José floodplain, so in high rain events, overflow is possible.

Under the Navigable Waters Rule, however, activities that previously required federal permitting would not necessarily require such permits. Because of that outcome, the Pueblo would no longer have notice or consultation on changes in activities that could result in contamination of Pueblos waters, impairment of the Pueblos waters, and that would go on to add pollution to traditionally navigable waters. These harms are exacerbated by the fact that the Pueblo does not have the resources or capacity to implement its own water quality program, separate from the CWA, to protect the water quality of waters that are determined not to be “jurisdictional” under the CWA. The Pueblo’s water quality program consists of one employee who collects and analyzes data, and some managerial staff who review the employee’s work.

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<sup>8</sup> 33 U.S.C. § 1377.

<sup>9</sup> 40 C.F.R. §§ 123.32, 130.16, 131.8, 233.60, 501.23.

In sum, the promulgation of the 2019 Repeal Rule and the 2020 Navigable Waters Rule profoundly harmed the Pueblo by exposing it to unregulated upstream pollution and leaving the Pueblo unable to fill the gap in water quality protection.

**Intermittent and ephemeral waters must be jurisdictional when they affect the chemical, physical, and biological integrity of downstream waters**

In their Preproposal Notice, the Agencies request comment on “the scope of jurisdictional tributaries,” including intermittent and ephemeral streams, and “exclusions from the definition” of the waters of the United States.<sup>10</sup>

The 2020 Navigable Waters Rule unlawfully and profoundly harmed the Pueblo in large part because it categorically exempted ephemeral streams from CWA jurisdiction and broadly defined such streams.<sup>11</sup> This is despite ample evidence in the record that ephemeral streams often meet the required “significant nexus” that determines CWA jurisdictionality. In *Rapanos*—a 4-1-4 plurality opinion—Justice Kennedy held in his controlling concurrence that jurisdictionality under the Clean Water Act should be controlled by a determination of whether there was a physical, biological, and chemical linkage between the water in question and a traditionally navigable water.<sup>12</sup> After the decision, the agencies applied this “significant nexus” test to determine the jurisdictionality of these streams on a case-by-case basis.<sup>13</sup> Subsequent to *Rapanos*, multiple scientific reports and bodies demonstrated that in many cases, intermittent and ephemeral streams met the significant nexus test.<sup>14</sup> Subsequently, the 2015 Clean Water Rule categorically included as “waters of the United States” intermittent and ephemeral tributaries that “have the presence of physical indicators of flow including a bed, bank, and ordinary high water mark” and “contribute[] flow ... to a traditional navigable water.”<sup>15</sup>

Ephemeral streams are defined by scientists as a “stream or portion of a stream which flows briefly in direct response to precipitation in the immediate vicinity, and whose channel is at all times above the ground-water reservoir.” An intermittent stream is “a stream where portions flow continuously only at certain times of the year, for example when it receives water from a spring, ground-water source or from a surface source, such as melting snow (i.e. seasonal).”<sup>16</sup>

In the arid West, and for the Pueblo, ephemeral streams may be dry for much of the year. But these streams still perform critical ecological and hydrological functions by conveying water downstream after precipitation events, and may also convey subsurface water, down the

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<sup>10</sup> Preproposal Notice, 86 Fed. Reg. at 41,914.

<sup>11</sup> The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,338 (Apr. 21, 2020).

<sup>12</sup> *Rapanos* at 766-767 (citing *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Riverside Bayview Homes, Inc.*, 474 U.S. at 121 (1985)).

<sup>13</sup> EPA and Corps Memorandum, CWA Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* 3, 8 (Dec. 8, 2008).

<sup>14</sup> See, e.g., THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST, ENVIRONMENTAL PROTECTION AGENCY (2008) [https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral\\_streams\\_report\\_final\\_508-kepner.pdf](https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf)

<sup>15</sup> 80 Fed. Reg. 37,053, 68, 75-76 (June 29, 2015) [Hereinafter EPA SOUTHWEST STREAMS REPORT].

<sup>16</sup> EPA SOUTHWEST STREAMS REPORT at 6.



watershed and into aquifers.<sup>17</sup> Ephemeral waters “provide the same ecological and hydrological functions as perennial streams by moving water, nutrients, and sediment throughout the watershed.”<sup>18</sup>

Additionally, high temperatures, low humidity, and vegetation water demands during the day make streams in arid lands extremely dynamic, losing tremendous amounts of water during the day while resurging during the night when ecosystem water use is less.<sup>19</sup> This dynamic nature of an arid landscape stream makes it hard to classify a stream as ephemeral because a stream may flow most of the time with breaks only at the hottest point of the afternoon. Even though ephemeral streams do not contribute surface water to larger waters year-round, they perform the same major functions as perennial streams including water, nutrient, and sediment transport.<sup>20</sup> In flood events, the sediment and nutrient load discharged from an ephemeral stream to a perennial stream can be tremendous, impacting the substrate, geochemistry, and biotic communities of waters far downstream, often into navigable waters.<sup>21</sup>

The American Southwest, as well as the Pueblo, is impacted by the North American Monsoon season. In the North American monsoon season, ephemeral streams in the American Southwest periodically flood after heavy rain events and connect to perennial and intermittent water bodies.<sup>22</sup> The extent of the impact monsoon floods have is uncertain, largely because of the brief opportunity to study an ephemeral stream flash-flood after a monsoon event.<sup>23</sup> Still, limited analysis suggests that monsoon floods from ephemeral streams can have dramatic impacts on the hydrology of larger mainstem and navigable rivers.<sup>24</sup>

Categorically exempting ephemeral streams as Waters of the United States ignores the obvious—that ephemeral streams regularly provide connection to perennial waters, and that contaminants, nutrients, sediments, and surface flow from ephemeral stream beds feed into these perennial waters. In the desert Southwest, over 80% of streams are intermittent or ephemeral.<sup>25</sup> Categorical exclusion of these streams removes protections for most of the water sources in the region. As noted above, the connection between ephemeral waters and perennial surface waters is significant.

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<sup>17</sup> *Id.* at 3, 22.

<sup>18</sup> *Id.* at iii.

<sup>19</sup> *Id.* at 16.

<sup>20</sup> *Id.* at 26.

<sup>21</sup> *Id.*

<sup>22</sup> Enrique R. Vivoni, *Analysis of a monsoon flood event in an ephemeral tributary and its downstream hydrologic effects*, 42 WATER RESOURCES RESEARCH ISSUE 3 (March 7, 2006).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Leibowitz et al., *Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework*, J. AMER. WATER RES. ASS'N, 304 (Apr. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6071435/> (citing to L. Levick et al., U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, *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 (2008)).

EPA must therefore immediately return to the case-by-case significant nexus analysis of intermittent and ephemeral streams that it conducted under the pre-2015 regulations, and in the longer term, develop a definition of the waters of the United States that reflects the scientific understanding of the significant physical, biological, and chemical linkages between these streams and perennial waters.

***The jurisdictional status of waters is an environmental justice issue***

In their Preproposal Notice, the Agencies solicit information about how the “jurisdictional status of waters affect communities that are overburdened with environmental pollution?”; “How is the implementation of NWPR impacting low-income communities, and other disadvantaged communities?”; and “Can the jurisdictional status of waters be linked to environmental justice concerns, and, if so, what is the basis?”<sup>26</sup>

According to the EPA, environmental justice means “equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”<sup>27</sup> This definition has a procedural and a substantive component. Procedurally, environmental justice means making sure marginalized communities have a seat at the table, an opportunity to meaningfully participate in decisions that affect their future. Substantively, it means shaping policy in conversation with affected communities to correct historic injustices that have ensured marginalized communities were exposed to the worst effects of environmental devastation.

EPA studies have shown that polluters are more likely to operate in communities of color, making race a greater indicator of pollution exposure than poverty.<sup>28</sup> Race, not socioeconomic status, is the determinative factor.<sup>29</sup> When race increases someone’s chances of exposure more than socioeconomic status, the cause must be race-based, not a mere concentration of people of color in poverty. This means that the government grants permits for high-pollution industries in communities of color far more often than in merely low-income communities that are predominately white. “[A]lmost anywhere researchers look,” they find deep racial disparities in who is exposed to environmental hazards.<sup>30</sup> An environmental justice focus is necessary because, in the words of EPA’s own study, “a focus on poverty to the exclusion of race may be insufficient to meet the needs of all burdened populations.”<sup>31</sup>

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<sup>26</sup> Preproposal Notice, 86 Fed. Reg. at 41,913.

<sup>27</sup> EPA, Environmental Justice (Last accessed 9/24/21) <https://www.epa.gov/environmentaljustice>

<sup>28</sup> Mikati, et al. *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AMER. J. PUB. HEALTH 480 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844406/>

<sup>29</sup> Id.

<sup>30</sup> Vann R. Newkirk II, *Trump’s EPA Concludes Environmental Racism Is Real*, The Atlantic (Feb. 28, 2018), (“results at national, state and county scales all indicate that non-Whites tend to be burdened disproportionately to Whites.”) <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>

<sup>31</sup> Mikati, et al. *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AMER. J. PUB. HEALTH 480 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844406/>

In New Mexico, Native American communities have been subject to significant environmental injustice. This includes a history of disregarding the Pueblo claims and rights to ancestral territories,<sup>32</sup> a history of disparate pollution related to uranium mining,<sup>33</sup> and other examples.<sup>34</sup>

The Navigable Waters Rule stripped nearly all of the Pueblo's waters of CWA protections and exposed the Pueblo to unregulated pollution. This was consistent with the impact of the Navigable Waters Rule on the arid Southwest as a whole. As the Agencies have noted, the Navigable Waters Rule disproportionately stripped CWA protections from waters in the region in comparison to the rest of the country, particularly in Arizona and New Mexico.<sup>35</sup> New Mexico and Arizona both also have some of the highest per-capita percentages of Native American residents. New Mexico ranks third in Native Americans as a percentage of all residents, and Arizona ranks seventh.<sup>36</sup>

The combination of these factors—desert hydrology and the geographic location of Native communities—means that the Navigable Waters Rule had the effect of disparately stripping Clean Water Act protections from areas with higher Native populations. This means that the Rule disproportionately harmed Native American communities. This discriminatory impact violates the principles of environmental justice. It also violates the directive in Exec. Order 12,898, which directs every federal agency to “conduct its programs, policies, and activities . . . in a manner that ensures that such programs, policies, and activities do not have the effect of . . . denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities because of their race, color, or national origin.”<sup>37</sup>

The Pueblo believes that there are additional legal bases for prohibiting such discrimination, and intends to provide additional information on these bases in future communications.

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<sup>32</sup> See e.g., *Pueblo of Jemez v. United States*, 430 F. Supp. 3d 943, 953 (D.N.M. 2019), *amended on reconsideration*, 483 F. Supp. 3d 1024 (D.N.M. 2020) (Pueblo of Jemez seeking to validate aboriginal title to ancestral lands in Valles Caldera)

<sup>33</sup> See Eric Jantz, *Environmental Racism with a Faint Green Glow*, 68 NAT. RESOURCES J. 247, 251-252 (2017).

<sup>34</sup> See generally, ATRI, FINAL REPORT: A REPORT ON ENVIRONMENTAL JUSTICE IN NEW MEXICO (2004); CLIFFORD J. VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 302 (3<sup>rd</sup> Ed. 2020).

<sup>35</sup> See Declaration of Rhadika Fox, ECF No. 28-1, *Jemez v. Regan*. “In New Mexico and Arizona . . . of over 1,500 streams assessed . . . under the [Navigable Waters Rule], *nearly every one* has been found to be a non-jurisdictional ephemeral resource, which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.”

<sup>36</sup> See *Native Americans and the US Census: How the count has changed*, USAFacts.org <https://usafacts.org/articles/native-americans-and-us-census-how-count-has-changed/> (last visited Oct. 1, 2021).

<sup>37</sup> Exec. Orders, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at Sec. 2-2 (Feb. 16, 1994).

**The definition of the waters of the United States must reflect the Agencies trust responsibilities to the Pueblo and other American Indian Tribes**

The United States' trust responsibility is one of the oldest and most foundational doctrines of federal Indian law.<sup>38</sup> 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.<sup>39</sup> 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.”<sup>40</sup> As dependent Indian communities, Pueblos are considered Indian Country for which the United States has a “duty of exercising a fostering care and protection.”<sup>41</sup>

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.<sup>42</sup> In addition, Congress recognized and preserved the priority of Pueblos’ water rights in Section 9 of the Pueblo Lands Act of 1933.<sup>43</sup>

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.<sup>44</sup>

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<sup>38</sup> *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 . . .”).

<sup>39</sup> 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 225§ *cf.* *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. 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.”).

<sup>40</sup> *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

<sup>41</sup> *Id.* at 46; see also 18 U.S.C. § 1151.

<sup>42</sup> See Claims Resolution Act of 2010, Aamodt Litigation Settlement Act, Pub. L. No. 111-291, § 613(c), 124 Stat. 3064, 3141-42 (2010).

<sup>43</sup> 48 Stat. 108.

<sup>44</sup> 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.”).

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.<sup>45</sup> 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.<sup>46</sup>

The federal trust duty also alters the standard deference afforded to federal lawmaking, in that statutes are to be construed in a way that favors protecting and advancing tribal interests.<sup>47</sup> The Tenth Circuit has also held the trust duty and the Indian law canons of construction to be extended to executive agency actions.<sup>48</sup> The canons of construction regarding federal Indian law apply even when an executive official implements a statute of general applicability.<sup>49</sup> Under the Indian canons of construction, the Agencies must resolve any ambiguities in the statute in favor of protecting Tribal waters.

In short, the Agencies have a trust duty to protect the Pueblo’s waters, and this trust duty requires meaningfully consultation with the Pueblo and other American Indian tribes and consideration of how any proposed redefinition of the waters of the United States will affect tribal rights and resources.

**Other Input: Climate Change. Regional Approaches.**

The Agencies request input on whether there are “particular types of waters that are especially important in protecting the nation’s waters in the face of a changing climate.” The best science available makes clear that water in the southwest is likely to become more scarce due to climate change. For example, both snowpack and flows in rivers are expected to continue to decline.<sup>50</sup> In

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<sup>45</sup> *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (quoting Felix S. Cohen, Handbook of Federal Indian Law 225 (1982 ed.)).

<sup>46</sup> 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.

<sup>47</sup> *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.”).

<sup>48</sup> *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).

<sup>49</sup> *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).

<sup>50</sup> GREG GARFINN ET AL., ASSESSMENT OF CLIMATE CHANGE IN THE SOUTHWEST UNITED STATES 6 (2009).

this climate-impacted future, the state’s need for clean water will put additional strains on water resources.<sup>51</sup> As a result, in developing a new definition of the waters of the United States, the agencies must take into account the increased importance of protecting the water quality resources in the Southwest, particularly given the unique hydrology of the region and the projected impacts of climate change on water resources.

The Agencies also request input on whether “there are certain waters that could be addressed by regionalized approaches.”<sup>52</sup> The Pueblo notes that because of the Agencies’ trust duty to American Indian tribes, because of the environmental justice concerns about disparate harms to the Tribal communities, and because of the unique hydrology and scarcity of water in the arid Southwest, it may be valuable for the Agencies to consider heightened protections for regions and watersheds where the Pueblo and similarly-situated tribes are present.

**Conclusion**

The Pueblo thanks the Agencies for the opportunity to offer preproposal written comments as a component of tribal consultation. Because of the harms that the now-vacated Navigable Waters Rule inflicted on the Pueblo, the Pueblo urges the Agencies to *promptly* restore and implement the pre-2015 regulations as the first step of the revision of the definition of the “waters of the United States.”

Second, after a straightforward restoration of the pre-2015 regulations, we urge the Agencies to promulgate a new definition of “waters of the United States” that is not only grounded in the Clean Water Act’s language, structure, and purpose—as interpreted by the courts—but that also recognizes the unique trust duties that the Agencies owe to the Pueblo and other American Indian Tribes.



Martin Kowemy, Jr., Governor

Pueblo of Laguna

Oct. 4, 2021

*Prepared with the assistance of Pueblo of Laguna Environment and Natural Resources Department, the Pueblo’s Government Affairs Office, and clinical law students Jeffrey Hoagland and Stuart Wilkins, working under the supervision of Prof. Gabriel Pacyniak, University of New Mexico Natural Resources and Environmental Law Clinic.*

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<sup>51</sup> See Letter of James Kenney, N.M. Env’t Dep’t, Comments on Proposed Navigable Waters Protection Rule 5 (Apr.15, 2019)

<sup>52</sup> Preproposal Notice, 86 Fed. Reg. at 41,913.