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September 30, 2021

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Re: Federalism Consultation Comment Period for Revising the Definition of “Waters of the United States”

Dear Assistant Administrator Fox and Acting Assistant Secretary Pinkham,

On behalf of the New Mexico Environment Department (NMED), enclosed please find our pre-proposal comments on efforts by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) to develop a revised definition of “waters of the United States” (WOTUS).

NMED appreciates the efforts your agencies are making to act with the urgency this topic demands, while also providing meaningful opportunities to hear critical input from states, tribes and stakeholders. We support your commitment to develop a durable rule grounded in sound science and informed by strong public engagement.

Thank you for the opportunity to provide this early input through the federalism consultation process.

Sincerely,

James C. Kenney  
Cabinet Secretary

Attachment

cc: Casey Katims, Deputy Assistant Administrator, Intergovernmental Relations  
John Goodin, Director of the Office of Wetlands, Oceans and Watersheds, EPA  
Courtney Kerster, Director of Federal Affairs, Office of Governor Michelle Lujan Grisham  
Rebecca Roose, Deputy Secretary of Administration, NMED  
John Rhoderick, Acting Water Protection Division Director, NMED  
Shelly Lemon, Surface Water Quality Bureau Chief, NMED  
Don Welsh, Executive Director, Environmental Council of States  
Julia Anastasio, Executive Director and General Counsel, Association of Clean Water Administrators

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**Attachment:**  
**NMED Comments during Federalism Consultation for**  
**Revising the Definition of Waters of the United States (WOTUS)**  
**September 30, 2021**

**Comment 1: Maintain urgency to develop a durable rule.**

In light of the recent decision from the U.S. District Court for the District of Arizona, NMED applauds EPA and USACE (agencies) for quickly announcing a return to the pre-2015 definition of Clean Water Act (CWA) jurisdiction for ongoing implementation nationwide. New Mexico urges the agencies to proceed with the rulemaking with the same sense of urgency demonstrated by the federal government since January 2021.

The Navigable Waters Protection Rule (NWPR) that went into effect in New Mexico on June 22, 2020, left approximately 93% of the state's surface waters without federal protection. The NWPR also created uncertainty for the regulated community in New Mexico. The details of these harms are perhaps best articulated in the written and verbal testimony of Rebecca Roose, Deputy Secretary of the New Mexico Environment Department, before the Senate Committee on Environment and Public Works (September 16, 2020), available at <https://www.epw.senate.gov/public/index.cfm/2020/9/stakeholder-reactions-the-navigable-waters-protection-rule-under-the-clean-water-act>. For the reasons summarized above and detailed in that testimony, New Mexico urges the agencies to proceed expeditiously to promulgate a durable rule that will increase protections for surface waters, meet the growing challenges of climate change, and provide regulatory certainty beyond the current administration's term.

**Comment 2: EPA and USACE must genuinely consult states and tribes.**

The agencies are off to a great start by providing federalism consultation early in the process and extending the comment period in response to multiple intergovernmental association requests. The CWA embodies federalism principles, demonstrating Congress' intent to protect the primary rights and responsibilities of states over water quality and the allocation and protection of land and water resources. CWA section 101(g) states "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." As EPA and USACE have heard many, many times from states and tribes, co-regulators expect a seat at the table alongside federal subject matter experts, independent scientists and economists, local community members, affected business owners and environmental advocates.

Federal rulemaking outcomes are more beneficial and likely to withstand the test of time when the rule writers take time to listen to the unique experiences and expertise at the state, tribal and local level. Besides the obvious beneficial uses such as aquatic life and recreation, New Mexico's surface waters also play an important cultural role in the State. Many tribes, nations and pueblos in New Mexico use and protect their surface waters for cultural uses. Cultural uses may relate to a wide range of connections, including spiritual relationships, language, songs, stories, sacred places, the plants and animals associated with water, drinking water, and recreational or ceremonial purposes. Additionally, in northern New Mexico, acequias – or community-operated irrigation ditches – have been operating for centuries. Acequia water use and acequia-related cultural values are at risk due to increasing urbanization pressures and impacts from land use change on actual water use, water quality, and riparian vegetation.<sup>1</sup> At least one state's highest court has recognized the importance of cultural practices involving water.<sup>2</sup>

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<sup>1</sup> See <https://lasacequias.org/>.

<sup>2</sup> See *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 318–19, 35 P.3d 68, 79–80 (2001).

To truly take into account the unique expertise, values and experiences of states and tribes, the agencies must continue to consult with co-regulators at each step of the process leading to a durable rule that redefines CWA jurisdiction. NMED urges the agencies to use the feedback provided here as a starting point for dialogue with New Mexico as the proposed rule takes shape.

**Comment 3: Implementation of pre-2015 WOTUS definition should be consistent with the Kennedy concurring opinion.**

New Mexico urges the agencies in restoring the regulations in place prior to the 2015 Clean Water Rule to incorporate the Kennedy concurring opinion to *Rapanos v. United States*, 547 U.S. 715 (2006), which articulates what has come to be known as the “significant nexus” test. The Kennedy concurring opinion is the opinion most often cited in significant WOTUS cases since *Rapanos*. Essentially the Kennedy concurring opinion was the law as far as courts were concerned from 2006 until 2015. Prior to promulgating a final rule with a new, durable WOTUS definition, the agencies must restore the definition in place prior to the 2015 Clean Water Rule, consistent with the Kennedy concurring opinion.

**Comment 4: Upcoming proposed rule must be based on the best available science.**

To meet EPA’s clear intention of developing a durable rule, it is absolutely essential that any new proposal must be grounded in science. The Agencies should address and revise (as appropriate) the scientific conclusions reached in the 2015 reports *Economic Analysis of the EPA-Army Clean Water Rule* and *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States*. In addition, the agencies should carefully consider allegations that the NWPR, and/or the process to develop it, violated principles of scientific integrity. Comments 5 through 9 below provide more specific comments regarding the essential scientific underpinnings of the agencies’ future rule.

**Comment 5: Upcoming proposed rule must reflect the significance of ephemeral waters in the hydrologic cycle and their relevance to the objectives of the CWA.**

In New Mexico, and the Southwest in general, ephemeral and intermittent streams are fundamental to maintaining water quality and overall watershed function in lakes, wetlands and perennial rivers. In the arid Southwest, ephemeral streams are estimated to constitute up to 90 percent of all surface waters and are ecologically and hydrologically significant in arid and semi-arid watersheds. Ephemeral waters feed into traditionally navigable waters (TNWs) and other jurisdictional waters, carrying water, nutrients and sediment throughout watersheds and providing important ecological and hydrologic connections, when functioning properly.<sup>3</sup> Furthermore, individual ephemeral or intermittent streams cannot be scientifically isolated because the cumulative effects of these streams impact the hydrological, biogeochemical and ecological functioning of a watershed. Simply stated, the NWPR’s categorical exclusion of ephemeral streams is clearly at odds with hydrologic science.

Without adequate CWA protections for ephemeral waters, TNWs will be negatively impacted by uncontrolled sediment, nutrients, industrial and other pollutants from upstream ephemeral sources. A revised, durable WOTUS definition must recognize and maintain the jurisdictional status of ephemeral waters that have a nexus to a downstream TNW. In New Mexico and other arid states, all waters are precious resources that must be protected, regardless of when or how long they flow.

**Comment 6: Upcoming proposed rule must account for impacts of climate change on the hydrologic cycle.**

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<sup>3</sup> Levick, L., J. Fonesca, D. Goodrich, M. Hernandez, D. Semmens, J. Stromberg, R. Leidy, M. Scianni, D.P. Guertin, M. Tluczek, and W. Kepner. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

Adding to the requisite sense of urgency for the agencies' rulemaking initiative, available science indicates the NWPR is less protective of the hydrologic cycle and therefore less protective of public health and the environment as we face more frequent and intense droughts due to climate change. Even though the NWPR is no longer regarded by the agencies as the applicable WOTUS definition, states have lost critical time in pollution prevention efforts and many approved projects of the past 18 months are already causing irreversible harm to fragile watersheds.

In the southwestern United States, clean water, wildlife habitat, and local economies are being adversely impacted due to drought and wildfire caused by climate change.<sup>4,5,6</sup>

With a warming climate, more and more of New Mexico's waters are drying up. As waters become stressed by drought, overuse, and groundwater mining, many perennial and intermittent streams and springs will fade. Currently, many major "rivers" and "tributaries" in the State are not entirely perennial (e.g., the Rio Grande, Canadian River, Rio Puerco, Rio Galisteo, Dry Cimarron, Ute Creek, Rio Hondo, etc.).

Today across New Mexico, climate change is stressing already depleted or mined groundwater systems resulting in decreased groundwater recharge. More severe or sustained droughts are and will stress water resources and force increasing competition for water resources among the agricultural, energy, metropolitan, and ecological sectors. Climate change is contributing to water scarcity in the Southwest, but it is also impacting *water quality* in the region. As temperature and precipitation patterns affect the abundance, type, and distribution of water, vegetation cover, and wildfire in watersheds — all of which alter water chemistry — changes in flood magnitude and duration, sediment and other pollutant loads, physical habitat and biological communities will likely occur.

NMED requests the agencies review and include in the record a new draft report from an esteemed team of New Mexico climate and water resource scientists, *Climate Change in New Mexico over the Next 50 Years: Impacts on Water Resources*, which includes a focus on water quality impacts.<sup>7</sup>

**Comment 7: Upcoming proposed rule must account for the cumulative, scientifically demonstrated impacts on downstream TNWs.**

One of the many important findings of EPA's 2015 report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* is that "the scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function." In New Mexico, ephemeral tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream waters. The cumulative impact of these ephemeral stormflows is undoubtedly detrimental to downstream water quality.

One of many examples in New Mexico where cumulative effects are tangible is on the Pajarito Plateau, near the town of Los Alamos. Many ephemeral streams that run through and adjacent to the Los Alamos

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<sup>4</sup> See <https://www.demos.org/sites/default/files/publications/UpdatedNMFullReport.pdf>.

<sup>5</sup> See <https://aces.nmsu.edu/pubs/research/economics/TR45/welcome.html>.

<sup>6</sup> Climate Change-related online resources:

- NOAA Fourth National Climate Assessment: Chapter 25, Southwest, available at <https://nca2018.globalchange.gov/chapter/25/>.
- Assessment of Climate Change in the Southwest United States (2013), available at <https://climas.arizona.edu/sites/default/files/pdf2013sw-nca-color-finalweb.pdf>.
- National Park Service Series: Climate Change in the Southwest, available at <https://www.nps.gov/articles/climate-change-in-the-southwest-potential-impacts.htm>.
- EPA: Climate Impacts in the Southwest, available at <https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-southwest.html>.

<sup>7</sup> Allen, C., D. DuBois, P. King, L. McFadden, B. Thomson, and A. Tillery. 2021. New Mexico Bureau of Geology and Mineral Resources. Draft for Public Comment, available at <https://geoinfo.nmt.edu/ClimatePanel/report/>.

National Laboratory (LANL) on the Pajarito Plateau are contaminated with pre-CWA ("legacy") pollutants from federal government activities dating back to the Manhattan Project. These ephemeral streams flow directly to the Rio Grande adjacent to the Buckman Direct Diversion, the surface water intake for the City of Santa Fe and Santa Fe County's drinking water supply. The cumulative impact from these drainages on the Rio Grande and downstream water supplies could be significant and threaten human health and the environment. Any eventual proposed rule must take a watershed approach to protecting water quality to account for cumulative impacts, including cumulative impacts from ephemerals, on downstream waters.

**Comment 8: Upcoming proposed rule must consider its effects on wetlands.**

Saint Mary's University of Minnesota's Geospatial Services, with input from the New Mexico Environment Department (NMED), created a model to evaluate the extent of federally protected wetlands and other surface waters.<sup>8</sup>

The model uses three different analysis scenarios from "most restrictive" to "very restrictive" to "less restrictive." The most restrictive scenario limits CWA protections to directly adjacent and perennial (i.e., permanent) surface waters. The very restrictive scenario limits protections to adjacent and perennial/intermittent waters. The less restrictive scenario offers protections to adjacent wetlands, perennial, intermittent and ephemeral waters, and ditches or channelized streams. The model analyzed three different watersheds in the United States, one of which was the Cimarron River watershed in New Mexico. The Cimarron River Watershed drains approximately 1,049 square miles in northwestern New Mexico and flows into the Canadian River, a jurisdictional waterbody. Annual precipitation ranges from 30 inches in the higher elevation alpine forests to 15 inches in the semiarid grasslands at lower elevations.

The results of this case study show that by narrowing the scope of federal jurisdiction under the "most" and "very" restrictive scenarios, the number of wetlands protected by the CWA are *substantially* decreased, leading to a potential loss of benefits provided by wetlands such as flood control and attenuation, pollution control, wildlife habitat, and recreation. The Cimarron Watershed model looked at 5,200 wetlands covering 20,000 acres. Model results indicate that the very restrictive scenario would remove protections from 3,600 acres and the most restrictive scenario would remove protections from 14,000 acres, approximately 70 percent of total wetland acreage. Beyond this modeling exercise, the Ute Park Fire severely burned approximately 58 square miles in the Cimarron Watershed and through the Cimarron River valley in June 2018. The wildfire burned through this special trout water and clogged drinking water intakes for several downstream communities. In addition, post-fire flooding and debris flows wreaked havoc in several rural communities and individual households. It can be concluded that the most restrictive scenario will have deleterious effects to watershed protection and restoration efforts in this watershed, and similar watersheds.

Adjacent wetlands have a strong influence on the chemical, physical, and biological integrity of nearby waters. "Adjacent" should be defined as "bordering, continuous, or neighboring" (this could be further defined by distance or connection). Wetlands that are separated by dikes, barriers, or similar structures should be considered adjacent and jurisdictional. In western states such as New Mexico, these "separated" wetlands are certainly not isolated and profoundly influence nearby waters and downstream tributaries and TNWs.

**Comment 9: Accurate and complete data are integral to any proposal to revise the scope of the CWA.**

Without accurate data, the impacts of any eventual proposed rule would be unknown and likely underestimated, especially in an arid state like New Mexico. The Agencies must ensure accurate and complete data are available before proposing any new rule.

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<sup>8</sup> See <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>.

Sufficient data were not available to implement the NWPR, and available U.S. Geological Survey National Hydrography Dataset (NHD) geospatial datasets are inaccurate and therefore misleading. For New Mexico, there is no accurate dataset that distinguishes between ephemeral and intermittent waters, and most waters shown as intermittent in the NHD are actually determined to be ephemeral when a site evaluation is conducted. Therefore, any discussion of the impact of any eventual proposed rule based on the NHD drastically underestimates the number of miles of ephemeral waters in New Mexico that lost jurisdiction under the NWPR.

An example of a watershed where this condition exists is the Rio Puerco watershed, the largest tributary to the Rio Grande in central New Mexico. In the NHD, the Rio Puerco is characterized as perennial in its upper portion and intermittent in its lower portion; however, the flow regime based on gage data for the Rio Puerco downstream of the perennial segment alternates between ephemeral and intermittent conditions.

The Rio Puerco basin drains portions of seven counties, encompassing approximately 7,350 square miles (4.7 million acres). While the Rio Puerco watershed contributes less than 10 percent of the total water flow to the Rio Grande, it is a primary source of sediment, contributing up to 80 percent of the sediment load including potential contaminants carried with the sediment.

**Comment 10: Upcoming proposed rule must include interstate waters in the definition of WOTUS.**

Federal jurisdiction of interstate waters is critical because of the agencies' function as federal partners who can help mitigate and manage water quality impacts from upstream states. The agencies' role as co-regulators is critical to water quality issues that cross state and tribal boundaries and provides consistency to help resolve conflicts or water quality issues that may arise between states and/or tribes.

An example of an interstate water in New Mexico that could be impacted by this change is the Gila River. The Gila River is a desert river, flowing 649 miles from southwestern New Mexico to Yuma, Arizona where it joins the Colorado River. The Gila River originates in the Nation's first designated wilderness area, the Gila Wilderness, and is rich in biological diversity and cultural history.

Although the Gila is one of the longest rivers in the West, it typically goes dry before it gets to the Colorado River due to large irrigation diversions, groundwater mining, and sustained drought. Some segments of the Gila River in Arizona have been designated as TNWs, however continuous surface connection is difficult to demonstrate along many segments of the river. Any eventual proposed rule should include interstate waters as a separate jurisdictional category of WOTUS to provide consistency and help resolve conflicts and water quality issues that may arise between states and/or tribes.

**Comment 11: Clarifying CWA funding and ensuring long-term federal support for state and tribal programs.**

States and tribes are a critical part of achieving our nation's environmental and public health goals in an effective and efficient way. EPA should provide assurance that funding will go directly to states and tribes with a demonstrated financial need in order to successfully implement water quality management and pollution control programs. Financial support for pollution control programs has been steadily weakened and funding has been repeatedly reduced to the detriment of these programs and consequently to the detriment of our nation's waters. This issue must be addressed in the financial impact report for any eventual proposed rule.

As described in the CWA, appropriated funds are allotted among the state and interstate water pollution

control agencies on the basis of the extent of the pollution problems in the respective states. The six components in the Section 106 State allotment formula selected to reflect the extent of the water pollution control problems in the United States are: (1) surface water area; (2) ground water use; (3) water quality impairment; (4) point sources; (5) non-point sources; and (6) population of urbanized areas. This raises the question of whether states with a larger number of jurisdictional waters will receive a greater percentage of EPA grant funds as a result of any eventual proposed rule. Through Section 106, the State of New Mexico currently receives federal grants for water pollution control programs, such as water quality monitoring, assessment, watershed management (TMDLs), water quality standards, inspections, point source control, database management, quality assurance, and reporting. New Mexico currently receives funding under CWA Sections 104(b)(3), 106, 319, and 604(b) for various pollution control and water quality management programs. Any further reductions to grant funding will significantly reduce the effectiveness and success of these CWA programs in New Mexico.

New Mexico urges EPA to take the time necessary to fully understand the potential financial and programmatic consequences to state and tribal CWA programs before proposing any new rule. Many states and tribes cannot implement a robust and successful water quality program without significant federal assistance. The funding impacts for EPA grants to states and tribes should be clearly explained in the Preamble to any eventual proposed rule, thereby remedying a shortcoming of the NWPR. The agencies could consider opportunities for the revised WOTUS rule to be a strong foundation for long-term ample federal investments in state and tribal programs.

**Comment 12: The economic analysis of the upcoming proposed rule must estimate the costs and benefits to states, tribes, municipalities and industry.**

Economic benefits of clean water and healthy watersheds are extensive. While evaluating the costs to industry associated with compliance across all CWA-regulated activities affecting jurisdictional waters, the agencies must also analyze the full range of economic benefits.

Ranching and farming are huge industries that depend on high quality rivers, lakes and wetlands. Municipalities face near and long-term infrastructure upgrade and maintenance costs to roads, bridges and water infrastructure when surface waters are not fully protected. In addition, the outdoor recreation economy in western states is becoming a larger economic driver at the state and local levels, which depends on thriving aquatic ecosystems. The Outdoor Industry Association, a trade organization, says that in New Mexico the sector supports 99,000 jobs, creates nearly \$10 billion in consumer spending every year and contributes \$623 million in state and local tax revenue. The state Department of Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending \$268 million, and 87,600 hunters, who spend \$345 million, on their activities annually.