MICHELLE LUJAN GRISHAM
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CABINET SECRETARY

Original Submitted via the Federal eRulemaking Portal

April 23, 2025

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW, WJC Building North/South Room: 1448K
Washington, D.C. 20460

The Honorable William H. Graham, Jr.
Lieutenant General
Army Corps of Engineers
441 G Street NW
Washington, D.C. 20001

Re: Docket ID No. EPA–HQ–OW–2025–0093

Dear Administrator Zeldin and Lieutenant General Graham,

On behalf of the New Mexico Environment Department, New Mexico Department of Game and Fish, New Mexico Interstate Stream Commission, and New Mexico Energy, Minerals and Natural Resources Department, enclosed please find our recommendation on implementing the definition of ''waters of the United States'' consistent with the Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency* for interpreting the scope of Clean Water Act jurisdiction, Docket ID No. EPA–HQ–OW–2025–0093. *See* 90 FR 13428 (March 24, 2025).

Thank you for considering our comments and recommendations.

Sincerely,

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James C. Kenney
Cabinet Secretary, Environment Department

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Michael Sloane
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Cc: Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
Benita Best-Wong, Deputy Assistant Administrator, EPA Office of Water
Robyn S. Colosimo, Senior Official, Department of the Army
Stacey Jensen, Oceans, Wetlands and Communities Division, EPA Office of Water
Milton Boyd, Office of the Asst. Secretary of the Army for Civil Works, Department of the Army

Attachment:
New Mexico Comments and Recommendations (April 23, 2025)
Waters of the United States (WOTUS)
Docket ID No. EPA–HQ–OW–2025–0093

Related to "relatively permanent" and its interpretation:

Comment 1: Relatively permanent features should include perennial streams, intermittent streams, prominent ephemeral streams, and wetlands. New Mexico recommends that the U.S. Environmental Protection Agency (USEPA) and the U.S. Army Corps of Engineers ("USACE"; collectively, "the Agencies") *not* interpret seasonality as lasting "typically three months" as provided as an example in the Federal Register, because seasonality is not consistent across the United States and the phrase "*typically* three months" is ambiguous. Seasonality can vary significantly across regions and years, especially in severe drought, and can be much shorter or longer than three months (e.g., deserts, temperate rainforests, high altitudes/latitudes, etc.). New Mexico recommends that the Agencies keep it simple by defining the scope of "relatively permanent" as perennial waters, intermittent waters, and wetlands, as there is broad understanding of these terms. New Mexico supports a clear federal definition that establishes "relatively permanent" as flowing seasonally (e.g., wet or snowmelt seasons), except during periods of extended drought, without the need to clarify nor identify the duration or sources of intermittent flow. Alternatively (or additionally), the Agencies could define *temporary/non-permanent/non-jurisdictional* waters as those water features that contain flow only in response to precipitation. The Agencies do not need to define flow classifications as some states and Tribes have these definitions in their own regulations and it may further complicate the issue.

In New Mexico, roughly 97% of the streams are characterized as either ephemeral or intermittent (National Hydrology Dataset, U.S. EPA/U.S. Geological Survey) but many often deliver large quantities of water, sediment, nutrients, and woody debris to jurisdictional waters such as the Rio Grande. In addition, wildlife species such as the federally Threatened Chiricahua leopard frog (*Lithobates chiricahuensis*) rely on ephemeral and intermittent waters for dispersal and breeding habitat. Both ephemeral and intermittent streams may have an outsized impact on jurisdictional waters especially in the southwestern United States and should be included as "relatively permanent" waters for Clean Water Act (CWA) jurisdictional purposes in regions where it makes sense to do so. New Mexico recommends using a different test for these ephemeral waters (e.g., watershed area, stream order, sediment load, etc.) since they can strongly influence the chemical, physical, and biological integrity of the southwestern traditional navigable waters into which they flow.

As noted above, a one-size-fits-all national approach does not recognize specific conditions or needs, or unique waters or watersheds. New Mexico supports a rule and definitions that take into consideration variations in regional hydrology, including the hydrology of arid systems, or that allow flexibility in implementation. For the southwestern U.S., New Mexico recommends that this definition should, at a minimum, include intermittent waters and prominent, or major, ephemeral waters. Alternatively, the Agencies could codify the importance of recognizing regional differences in "waters of the United States" determinations and definitions to signal an intent to work through these approaches in collaboration with state and tribal co-regulators.

Comment 2: The Agencies must use the best available scientific evidence to identify "relatively permanent" tributaries, including wetlands, in the field, which includes the evaluation of biological, geomorphological, and hydrological indicators of relative permanence. There are existing tools available to evaluate biological, geomorphological, and hydrological indicators to identify different flow regimes and durations. Utilizing these tools ensures consistent and scientifically grounded

determinations across diverse landscapes and hydrologic regimes. For example, USEPA's Streamflow Duration Assessment Methods[1] (SDAMs) are rapid field assessment methods that use hydrological, geomorphological, and/or biological indicators, observable in a single site visit, with or without geospatial indicators to classify streamflow duration as perennial, intermittent, or ephemeral at the stream reach scale. Furthermore, USEPA developed Regional SDAMs that take into consideration regional differences in streamflow duration and seasonality. New Mexico has a similar method specific to New Mexico stream conditions known as the Hydrology Protocol.[2] In addition, USACE developed ten Regional Supplements to the Corps Wetland Delineation Manual,[3] including the Arid West Regional Supplement,[4] to address regional wetland characteristics and improve the accuracy and efficiency of wetland delineation procedures. The delineation manual and regional supplements provide technical guidance and procedures for identifying and delineating wetlands that are jurisdictional. Remote sensing and imagery, GIS data and mapping, and other available water data could be used by the Agencies, States, and other decision-makers to gather additional stream information without much effort. Any guidance or procedures that the Agencies develop for distinguishing the relatively permanent requirement should follow a peer review process with robust public participation. Finally, to be able to identify "relatively permanent" tributaries in the field and assist with efficient and predictable implementation and minimize or avoid permitting delays, the federal workforce must have an adequate number of trained employees to conduct and oversee the work.

Related to "continuous surface connection" and its interpretation:

Comment 3: The definition of "continuous surface connection" should include surface and shallow subsurface connections, and connections that would exist under natural conditions. Under the Supreme Court's decision in *Sackett v. Environmental Protection Agency*, CWA jurisdiction extends to "adjacent" wetlands that have a continuous surface connection to a requisite covered water.[5] The *Sackett* Court recognized, however, that it may be difficult to discern whether this connection to covered waters exists in some instances.[6]

Many rivers, streams, and wetlands expand and contract during different seasons and during wet or dry periods. As they gain or lose water, connections to downstream waters could be on the surface or could migrate to the shallow subsurface (i.e., hyporheic zone). Shallow subsurface connections play a critical role in the exchange of water, nutrients, and organic matter, which are essential to the health of the stream system, and support fish spawning and moderate water temperatures among other vital ecosystem services. In addition, natural landforms and topography may provide evidence of a continuous surface connection.

The Agencies should not use natural features like sediment plugs, log jams, and debris blockages from floods, fires, and other natural disasters, or artificial features like flood gates, pumps, or other features to determine that a water is not jurisdictional – natural or artificial disruptions do not sever connectivity.

1 https://www.epa.gov/streamflow-duration-assessment/learn-about-regional-sdams
2 https://www.env.nm.gov/wp-content/uploads/sites/25/2019/11/WQMP-CPP-Appendix-C-Hydrology-Protocol-20201023-APPROVED.pdf
3 https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4530
4 https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/7627
5 *Sackett v. Environmental Protection Agency*, 598 U.S. at 651, 684 (2023); Slip Opinion at 22.
6 *Id*. at 684; Slip Opinion at 21]. *See also* Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" under the Definition of "Waters of the United States" under the Clean Water Act (March 12, 2025), at 5-6.

Jurisdictional determinations should be based on connections that would exist under natural, undisturbed conditions, and should recognize that in arid environments or during periods of prolonged and extreme drought those surface connections may temporarily go dry, or migrate to the shallow subsurface, thus maintaining ecological and hydrological connectivity. The definitions of "adjacent" and "abut" should consider surface and shallow subsurface connections that exist or would exist under natural conditions.

For example, wetland habitats including high-elevation montane wetlands and spring-fed freshwater wetlands called "ciénegas" are crucial to the wildlife of New Mexico. Species reliant on these habitats include the boreal toad (*Anaxyrus boreas*) and the Pecos gambusia (*Gambusia nobilis*).[7] These wetlands are hydrologically connected to, and significantly affect, downstream waters via subterranean conduits (i.e., groundwater flow). Furthermore, there are many streams in New Mexico, referred to as closed-basin waters, that are perennial but have no natural outlet and thus no continuous surface connection to jurisdictional waters. Approximately 20% of New Mexico's land area is in a closed basin. These streams provide important habitats and a source of water for numerous wildlife species, including the federally listed Chihuahuan chub (*Gila nigrescens*) in the Mimbres River and the state-listed White Sands pupfish (*Cyprinodon tularosa*) in Salt Creek.

Comment 4: The Agencies should use the best available scientific evidence to determine the scope of "connection to." The Gila River provides a good example. Although the Gila River is one of the longest rivers in the West, it typically goes dry before it reaches the Colorado River due to large irrigation diversions, groundwater mining, and sustained drought. Some segments of the Gila River in Arizona and New Mexico have been determined to be jurisdictional or have been designated as "traditionally navigable waters"; however, continuous surface connection is difficult to demonstrate along many segments of the Gila River. New Mexico recommends the scope of ''connection to'' be based upon the best available scientific evidence.[8,9] The existing tools described above in the "relatively permanent" comments as well as hydrologic maps (e.g., USGS NHDPlus HR, USGS 3DHP, USFWS NWI, etc.) could also be used to evaluate "continuous surface connection" and "adjacent."

Comment 5: Any proposed definitions or rule must consider the benefits wetlands provide to communities and the economy. Saint Mary's University of Minnesota's Geospatial Services, with input from the New Mexico Environment Department, created a model to evaluate the extent of federally protected wetlands and other surface waters.[10] The model uses three different analysis scenarios from "most restrictive" to "very restrictive" to "less restrictive," in terms of levels of protections. The most restrictive scenario limits CWA protections to directly adjacent and perennial 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.

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7 *See* https://wildlife.dgf.nm.gov/conservation/state-wildlife-action-plan/.
8 U.S. EPA. Connectivity of Streams and Wetlands To Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-14/475F, 2015.
9 Manning, A., Julian, J.P. and Doyle, M.W., 2020. Riparian vegetation as an indicator of stream channel presence and connectivity in arid environments. *Journal of Arid Environments*, 178, p.104167.
10 *See* https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33.

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 Clean Water Act are noticeably decreased, leading to a potential loss of benefits provided by wetlands such as flood control and attenuation, pollution control, resistance to wildfires, wildlife habitat, and recreation. The Cimarron River 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, which is approximately 70 percent of total wetland acreage in the watershed.

New Mexico could support the very restrictive scenario (includes adjacent and perennial/intermittent waters) but does *not* support a proposed rule or definitions that represent the most restrictive scenario (only includes directly adjacent and perennial surface waters), because 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, levees, roads, or other barriers should be considered adjacent and jurisdictional. In western states such as New Mexico, these “separated” wetlands are certainly not isolated and are functionally linked to nearby waters and downstream tributaries and traditionally navigable waters (TNWs). A broader definition of adjacency in arid regions ensures comprehensive protection of aquatic resources.

Comment 6: Recommendations for implementation. The existing tools described above in the “relatively permanent” comments as well as hydrologic maps (e.g., USGS NHDPlus HR, USGS 3DHP, USFWS NWI, etc.) should be used to evaluate “continuous surface connection” and “adjacent.”

In addition, a “dry spell” or drought should be considered a temporary interruption and a surface or shallow subsurface connection should be interpreted under “normal” conditions even when “normal” conditions include regular dry spells. The Agencies should consider historical records or data for guidance given the current megadrought occurring since 2000 in southwestern North America.[11] Any guidance or procedures that the Agencies develop for distinguishing the continuous surface connection requirement should follow a peer review process with robust public participation.

Related to “ditches” and jurisdictional considerations

Comment 7: Ditches are used to convey water and must be considered jurisdictional if they meet certain conditions. New Mexico recommends the Agencies consider flow regime, physical features, locational information (e.g., constructed in upland or dry land, altered or relocated a natural water feature, etc.), and biological indicators like presence of fish *or other aquatic life* to distinguish between jurisdictional and non-jurisdictional ditches. The type or use of the ditch could also be a useful characteristic for jurisdictional determinations.

Ditches, drainages, and culturally significant, community-operated irrigation ditches called acequias that New Mexicans rely on to supply water to agricultural fields and communities are vital to aquatic wildlife such as fish, turtles, and beavers (*Castor canadensis*). Many of these ditches are directly connected to jurisdictional waters, including the Rio Grande and the Rio Chama, and aquatic species enter and use them as habitat.

11 Williams, A. P., Cook, E. R., Smerdon, J. E., Cook, B. I., Abatzoglou, J. T., Bolles, K., Baek, S. H., Badger, A. M., & Livneh, B. (2020). Large contribution from anthropogenic warming to an emerging North American megadrought. *Science*, *368*(6488), 314–318. https://doi.org/10.1126/science.aaz9600.

For example, ditches that were constructed in or alter natural water features, ditches that drain or intersect jurisdictional wetlands, and ditches that carry relatively permanent flows should be considered jurisdictional. In addition, drainage ditches and ditches used for wildlife habitat should be jurisdictional. Conversely, irrigation ditches that deliver water to crops or gardens, ditches excavated wholly in dry land that do not carry permanent flows, including roadside ditches, and ditches that do not flow into or through a jurisdictional water (tributary, wetland, TNW) should be considered non-jurisdictional. Biological indicators like the presence of fish or other aquatic life could be used to support jurisdictional determinations but should not be required to make jurisdictional determinations.

Many ditches in arid regions of the West that convey water for irrigation and other beneficial uses divert from and are directly connected to wet areas, and aquatic species may enter and use them as habitat and as extensions of the jurisdictional waters. New Mexico supports the current scope of jurisdiction over these ditches, recognizing that CWA provisions may exempt certain maintenance, repair and improvement activities related to them from CWA permitting requirements.

Overarching comments and recommendations

Comment 8. There is value in considering a regional approach to CWA implementation. The CWA provides for regional differences through the application of different beneficial uses and different water quality standards in different parts of the country. This results in frequent differences among states that reflect the variety of natural landscapes and climates, natural differences in hydrology and ecology, and different priorities and uses of waterbodies. Having only one overarching definition of terms such as "relatively permanent" and "continuous surface connection" that are applied nationwide fails to acknowledge the diversity of hydrological conditions and systems present within the United States. Thus, New Mexico recommends that the Agencies implement regionally appropriate definitions of these terms to provide clarity regarding their scope in areas with fundamentally different aquatic environments.

Nobody debates the need for a durable rule, and it is presumed that a rule that results in less litigation would be more durable. A regional approach could reduce litigation risk by allowing for regionally specific attributes of different types of waters around the country. There may be some risk that definitions in guidance instead of rule would reduce durability because guidance documents are easier to change. However, it should be noted that the USACE Regional Supplements to the Corps Wetland Delineation Manual (i.e., guidance document) have not changed substantially since they were developed nearly two decades ago. In addition, regional numeric thresholds and methods could provide pragmatic, reasonable, and clear processes to determine "bright lines" and answer jurisdictional questions at the regional scale.

Comment 9: USEPA and USACE must genuinely consult states and tribes. 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 cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Federal rulemaking outcomes are more beneficial at a national level 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 levels. 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 pressures from urbanization and impacts from land use change on actual water use, water quality, and riparian vegetation.[12] At least one state's highest court has recognized the importance of cultural practices involving water.[13]

To truly consider 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. New Mexico strongly encourages the Agencies to reach out to the States as co-regulators in the development and implementation of any rules. New Mexico urges the Agencies to use the feedback provided here as a starting point for dialogue with the state as the proposed rule takes shape.

Comment 10: To ensure every American has access to clean water, the Agencies should consider any eventual proposed rule as an opportunity to provide a strong foundation for sufficient long-term federal investments in 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. The Agencies 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 and public access to clean water.

New Mexico urges the Agencies 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, which will leave many Americans without access to safe and clean water and put public health at risk if the programs are not adequately funded and staffed.

Comment 11: New Mexico urges the Agencies to proceed with thoughtful action to advance the Clean Water Act's statutory objective to "restore the chemical, physical, and biological integrity of the Nation's waters" by considering the best available science, including the hydrologic and ecosystem services provided by tributaries and wetlands that influence the water quality of downstream "traditionally navigable waters." Overall, the change in the definition of WOTUS following the 2023 *Sackett* decision severely reduced the number of waterways and wetlands that would have otherwise received federal protection under the CWA in New Mexico. The State strongly recommends continuing to protect as many waters as possible that feed and influence the chemical, physical, and biological character of TNWs to ensure clean water for all Americans.

12 *See* https://lasacequias.org/
13 *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).