



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

January 5, 2026

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

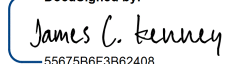
The Honorable William H. Graham, Jr.
Lieutenant General
Army Corps of Engineers
441 G Street NW
Washington, D.C. 20001

Re: Docket ID No. EPA-HQ-OW-2025-0322

Dear Administrator Zeldin and Lieutenant General Graham,

The New Mexico Environment Department (NMED), the New Mexico Office of the State Engineer and Interstate Stream Commission (OSE/ISC), and the New Mexico Department of Game and Fish (NMDGF) appreciate the opportunity to provide comments on the Agencies' proposed rule revising the definition of "waters of the United States", as published in the *Federal Register*, Docket ID No. EPA-HQ-OW-2025-0322 (Vol. 90, No. 220, Thursday, November 20, 2025).

Sincerely,

DocuSigned by:

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James C. Kenney
Cabinet Secretary

Cc: Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
Hannah Riseley-White, Director, New Mexico Interstate Stream Commission
Michael B. Sloane, Director, New Mexico Department of Game and Fish
Ben Shelton, Deputy Secretary, New Mexico Energy, Minerals and Natural Resources Department
Benita Best-Wong, Deputy Assistant Administrator, U.S., EPA Office of Water
Robyn S. Colosimo, Senior Official, U.S. Department of the Army
Stacey Jensen, Oceans, Wetlands and Communities Division, U.S. EPA Office of Water
Milton Boyd, Office of the Asst. Secretary of the Army for Civil Works, U.S. Department of the Army

Attachment:**New Mexico Comments and Recommendations (January 5, 2026)****Waters of the United States (WOTUS) Proposed Rule****Docket ID No. EPA-HQ-OW-2025-0322**

New Mexico appreciates the opportunity to comment on the proposed rule from U.S. Environmental Protection Agency (USEPA) and U.S. Army Corps of Engineers (USACE; collectively “the Agencies”), which purports to clarify and simplify the definition of “waters of the United States” (WOTUS) and associated terminology to interpret the scope of Clean Water Act (CWA) jurisdiction. Water management is complex and the 20-year history of litigation and federal rule changes on CWA jurisdiction have undermined certainty and transparency that is needed to maintain and improve water quality and support municipalities, industries, and communities. New Mexico’s diverse waters collect rainwater and snowmelt, recharge aquifers, provide important ecological and hydrological connections, support an amazing variety of wildlife and aquatic life, provide drinking water, and also help promote agriculture by providing vital irrigation water. Water in the arid West not only attracts millions of people who live, work, and recreate near these waters, but it also supports thriving economies and diverse aquatic and wildlife communities, and maintains drinking water resources for millions of people – *when the water is clean*.

New Mexico urges the Agencies to implement the CWA as broadly as possible to achieve the Act’s primary objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to ensure USEPA’s goal of providing clean water for every American (Pillar 1).

Comment 1: Provide clear and reasonable implementation guidance and implementation policies that reflect regional differences in hydrology.

The proposed rule defines “relatively permanent” waters as those that are standing or continuously flowing year-round or, at minimum, during a predictable “wet season”— described as when the average monthly precipitation exceeds average monthly evapotranspiration. The proposed definition has significant implications for hydrologically variable regions and will require clear, technically workable criteria for conducting “wet season” analyses. It appears the Agencies will consider variations in ecoregional or watershed hydrology, including the hydrology of arid systems, that allow flexibility in implementation. The Agencies should work with state co-regulators to provide additional detail on regional criteria and hydrologic indicators used to conduct a “wet season” analysis, including predictable or seasonal (i.e., relatively permanent) streamflow related to snowmelt. Alternatively, the Agencies could simply define the scope of “relatively permanent” as perennial and intermittent waters and wetlands, as there is broad understanding of these terms. 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 also should implement a broader definition of adjacency in arid regions to provide protection of essential aquatic resources. New Mexico is concerned with the Agencies’ jurisdictional exclusion of wetlands without semipermanent surface hydrology, including wetlands with only saturated soil conditions supported by groundwater. Many streams, rivers, lakes, ponds, and wetlands in arid regions are not 100% perennial and will go dry, in-part or in-whole, seasonally or during periods of drought. As they gain or lose water, connections to jurisdictional waters could be on the surface or they could migrate to the shallow subsurface (e.g., hyporheic zone, saturated soils, etc.) potentially causing breaks in a “continuous surface connection.” Natural landforms and topography should provide evidence of a continuous surface connection even when no water is present. The Agencies should incorporate this science-based understanding into implementation guidance to ensure clean water for every American (EPA Pillar 1).

New Mexico is also concerned that only those portions of a wetland with continuous surface hydrology, at least during the wet season, and that are abutting, would be jurisdictional as adjacent wetlands, *no matter*

the full delineated scope of the wetland. New Mexico urges the Agencies to include the entire, fully delineated wetland as WOTUS if portions of the wetland have continuous surface water hydrology at least during the wet season, and that are abutting, regardless of whether the portion with continuous surface hydrology is the portion that is abutting. A delineated wetland should not be segmented into jurisdictional and non-jurisdictional units based solely on continuous surface hydrology because a wetland is a collective unit with a continuous functional area. Segmentation of a wetland (based on surface hydrology) is like taking one or two wheels off a vehicle and expecting it to function the same way. You need all the parts to make the whole. Segmenting a wetland could also lead to dual regulation and dual permitting if a state has a wetland permitting program, which would likely cause confusion and additional financial and regulatory burdens.

New Mexico and other state regulators would benefit from clear parameters for identifying extended periods of predictable, continuous surface water hydrology within the same watershed or ecoregion over multiple years. In addition, the Agencies should identify and prioritize the hydrologic and geomorphic criteria most relevant to the tributary analysis and share these criteria with states for discussion prior to finalizing the rule. Regional numeric thresholds and methods could provide pragmatic, reasonable, and clear processes to determine “bright lines” and answer jurisdictional questions at the regional scale.

Any guidance, procedures, or tools that the Agencies develop for distinguishing the relatively permanent, continuous surface connection and hydrology, tributary, adjacency, or other requirements should be discussed and coordinated with states and Tribes and follow a peer review process with robust public participation. Such engagement will help ensure the definition is implementable and scientifically defensible.

Comment 2: The “default” determination should not be non-jurisdictional.

Section V of the preamble says that “[u]nder any definition of ‘waters of the United States,’ the Agencies will rely on a weight of evidence approach when determining whether a water meets the regulatory requirements for asserting federal jurisdiction. This means that if the Agencies do not have adequate information to demonstrate that a water meets the jurisdictional standards to be a ‘water of the United States,’ the Agencies would find such a water to be non-jurisdictional.”

New Mexico agrees with using a weight-of-evidence approach for jurisdictional determinations. However, New Mexico recommends that the Agencies reconsider this regulatory change or, in the alternative, identify informational deficiencies and, in cooperation with state co-regulators and applicants or project proponents, gather the information and collect necessary data, particularly in data-limited settings, to make a jurisdictional determination and ensure water quality and water resources are not unnecessarily polluted or damaged. The “default” determination when there are limited (i.e., inadequate) data should not be that a water is non-jurisdictional. The Agencies are responsible for regulating discharges of pollutants to our nation’s waters and they should endeavor to actually make jurisdictional determinations based on the best available data and information (see Comment 3) and should not rely on “default” determinations that are not validated and substantiated. This includes gathering and collecting adequate data and information, if needed, to make an informed jurisdictional determination. Clear expectations will support consistency across regions and between state and federal regulators.

Comment 3: Accurate and complete data are integral to any new WOTUS definition that revises the scope of the Clean Water Act.

Without accurate data, the impacts of the proposed rule are unknown and likely underestimated, especially in an arid state like New Mexico. 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 Methods¹ (SDAMs) are rapid field assessment methods that use hydrological, geomorphological, and/or biological indicators, which are 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. The Agencies should take advantage of available tools to ensure consistent and scientifically grounded determinations across diverse landscapes and hydrologic regimes. Remote sensing and imagery, GIS data and mapping, and other available water data could be used by the Agencies, state co-regulators, and other decision-makers to gather additional stream information without much effort.

The Agencies should also update and/or merge existing hydrologic maps (e.g., USGS NHDPlus HR, USGS 3DHP, USFWS NWI, etc.) to provide state co-regulators and the public with a mapping tool that identifies not only traditionally navigable waters across the country but other jurisdictional waters, tributaries, and adjacent wetlands.

Comment 4: Consider specifying additional criteria that may warrant categorical *inclusion* of interstate waters.

The proposed rule removes interstate waters as an independent category of jurisdictional waters. Interstate waters would now be jurisdictional only if they meet another WOTUS category, such as being a traditional navigable water, a relatively permanent tributary, or an adjacent wetland. New Mexico urges the Agencies to further explain how they intend to ensure national consistency in these determinations. Rather than removing interstate waters from categorical jurisdiction solely to reflect the *Sackett* decision, the Agencies should consider specifying additional criteria that may warrant categorical inclusion. This clarification would help ensure national consistency while recognizing statutory and judicial constraints.

Waters that cross state boundaries are by nature "susceptible to use in interstate or foreign commerce." Such waters should not be regulated differently on the different sides of a state boundary, creating a patchwork of regulation that may not be sufficient to prevent pollution from crossing state lines. The categorical exclusion and, therefore, subjecting a stream to different rules in different states will create confusion and complications for the regulated community and will lead to more litigation. For instance, a downstream state with more stringent rules than an upstream state is likely to seek a remedy in court. In addition, removing interstate waters from the definition of WOTUS may have consequences related to interstate compacts, and could thus increase the amount of interstate litigation that the U.S. Supreme Court will need to consider.

On a related matter, New Mexico notes that the proposed rule is silent on the status of rivers that have an international component to their flow. For example, the Rio Grande, the Colorado River, and the Columbia River flow in other countries in addition to the United States. These rivers should be considered WOTUS to continue to comply with international treaties and other accords with neighboring countries. New Mexico

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/utis/getfile/collection/p266001coll1/id/7627>

recommends the Agencies specifically identify these waters in 120.2(a) as WOTUS.

Comment 5: Timing, duration, and seasonal water flow through ditches should not be conditions of excluding ditches from federal jurisdiction.

The proposed rule revises and clarifies the ditch exclusion. Non-navigable ditches excavated entirely in dry land are excluded from WOTUS, even when they exhibit relatively permanent flow and connect to jurisdictional waters. Conversely, ditches excavated in wetlands or other jurisdictional waters are not categorically excluded. New Mexico recommends additional guidance regarding how to evaluate ditches where historical construction conditions are uncertain or where physical evidence has been altered by maintenance, erosion, or longstanding land use.

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. In addition, New Mexico believes that the timing, duration, and seasonal water flow through ditches should not be conditions of excluding ditches from WOTUS.

The Agencies should address, in the preamble to the final rule, the circumstances and examples under which certain ditches may require further analysis or could be considered jurisdictional. This will help states apply the rule consistently, particularly in agricultural and transportation contexts.

Comment 6: Reconsider shifting the burden of proof for jurisdictional determinations for ditches.

The proposed rule shifts the burden of proof from project proponents to the Agencies to demonstrate that a ditch was not constructed or excavated in dry land. Where historical evidence is insufficient to resolve construction conditions, the proposed rule would default to treating the ditch as non-jurisdictional. New Mexico recommends that the Agencies reconsider this regulatory change or, in the alternative, clarify in the preamble how the burden of proof should be applied when making jurisdictional determinations under the proposed framework, particularly in data-limited settings. Clear expectations will support consistency across regions and between state and federal regulators.

Comment 7: Provide additional clarity on the prior converted cropland exclusion.

The proposed rule preserves the longstanding exclusion for prior converted cropland (PCC) and returns to a simplified definition intended to provide greater predictability for landowners and producers. Under the proposal, land retains its PCC status unless it has been abandoned for agricultural use for more than five years and has reverted to a wetland that meets the WOTUS definition.

New Mexico generally supports the continued exclusion for prior converted cropland and greater definitional clarity for PCC. Since conservation practices are essential to the success of agricultural operations, the Agencies should encourage agricultural producers to participate in local, State, and Federal land stewardship programs. The Agencies should provide illustrative examples for each exclusion to clarify their intent and facilitate consistent implementation among the states and Tribes.

Comment 8: Continue to consult with states at each step of the process.

While New Mexico recognizes and appreciates the Agencies' emphasis on the rights and responsibilities of states, Section 101(b) of the CWA also states that it is a policy of Congress "to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution." Section 101(g) further 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.”

States will require timely, coordinated implementation support in response to a new WOTUS definition. While the narrowed scope of federal jurisdiction does not restrict a state’s independent authority to regulate discharges to state waters, states request clarification regarding how USEPA intends to address regulatory coordination, technical support, and compliance assistance activities that may involve both state and federal interests.

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 work closely with states, as co-regulators, to develop:

- Technical guidance, field methods, and decision tools;
- Training for state and federal field staff; and
- Clear processes for resolving jurisdictional questions early and consistently.

Early collaboration will help prevent inconsistent interpretations and reduce regulatory uncertainty.

Comment 9: States should be adequately funded to effectively implement federal CWA programs.

The accelerated comment period and unfortunate timing during three federal holidays made it difficult for New Mexico to fully evaluate and understand the potential consequences of the new proposal on existing State CWA programs. Nevertheless, 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.

New Mexico currently receives funding from CWA Sections 104(b)(3), 106, 319, and 604(b) for various pollution control and water quality management programs. Any further reductions to CWA grant funding will significantly reduce the effectiveness and success of these CWA programs in New Mexico and jeopardize USEPA’s goal of providing clean water for every American (Pillar 1).

States and tribal nations are a critical part of achieving our nation’s environmental and public health goals in an effective and efficient way. Many states and tribal nations cannot implement a successful and effective water quality program without federal assistance, which will leave many Americans without access to safe and clean water. States should be adequately funded by the federal government to fully implement federal CWA programs as Congress directed.

In addition, and consistent with CWA Section 101(b), New Mexico urges the Agencies to enhance and increase research and technical support to states and interstate agencies to ensure prevention, reduction, and elimination of pollution in our nation’s waters.

Comment 10: Deregulation and fewer federal permits do not necessarily equate to cost savings.

The Agencies expect the proposed rule to be deregulatory in nature, and to have cost savings and forgone benefits. However, the Agencies have not quantified cost savings and forgone benefits for the purposes of this proposed rule. Part VII.B “Unleashing Prosperity through Deregulation” of the preamble says, “the Agencies anticipate that fewer Clean Water Act permits will be required, which will result in cost savings and reduced regulatory burden.”

Fewer federal permits do not necessarily equate to reduced regulatory burden or cost savings. The regulatory burden of protecting water quality may not be reduced as a result of the proposed WOTUS rule, rather the regulatory burden will likely shift to states to ensure adequate protections for state waters no

longer receiving federal protection. Some states are stepping up to fill the regulatory gap by implementing or refining their water quality programs and expanding their state permitting programs. However, unlike federal permits that do not include a permit fee, state permitting programs will likely require fees for sustainable funding. So, any cost savings with respect to fewer federal permits may be outweighed by greater costs from state-issued permits, which may also be more stringent and impose more requirements on the permittee and project proponent.

Costs savings from deregulation may disproportionately benefit the “polluter” and shift costs away from the “polluter pays” towards the “downstream water users pay.” With significantly less federal protection for waterways, the Agencies should expect more pollutants to reach public water systems. With dirtier water entering drinking water intakes, municipalities will need to invest in water treatment infrastructure and other costly technologies, such as desalination, to provide clean, safe water to their customers. Additional infrastructure expenses will be transferred to the customers resulting in higher utility bills.

Moreover, narrowing the scope of federal jurisdiction means the number of wetlands protected by the CWA will significantly decrease, which will lead to the loss of economic and ecological services. Wetlands are nature’s infrastructure and provide flood control and attenuation, water purification, storm buffers, and wildfire resilience to communities. When wetlands are lost, or when they no longer provide these services, they become incredibly expensive to restore. Ultimate cost savings can be achieved by preventing degradation from occurring in the first place. It is much more cost effective to *maintain* the chemical, physical, and biological integrity of the Nation’s waters through an effective regulatory program than it is to *restore* the Nation’s waters that are degraded through deregulation.

Finally, many, if not all, industries depend on clean water for their businesses. Specific to New Mexico, the proposed rule also does not consider impacts to the agricultural or recreational economy associated with deregulation. According to the New Mexico Department of Agriculture’s “Feeding the Economy” report⁵, New Mexico’s food and agriculture industry generated a significant economic impact of \$45 billion in 2024-2025, supporting over 250,000 jobs, and creating \$12.9 billion in wages. Wetlands play a critical role in supporting agriculture and food production in New Mexico. They act as natural buffers against floods, droughts, and storms, and can help to recharge groundwater reserves. Wetlands also provide important ecosystem services such as nutrient cycling and water purification, improving soil fertility and crop productivity. They support pollinators and provide habitat for beneficial insects and birds that can contribute to pest control and the resilience of agricultural ecosystems. New Mexico urges the Agencies to provide financial and technical support for sustainable agriculture practices that integrate wetland conservation, such as the restoration of floodplains, which can increase crop yields and reduce production costs.

The proposed rule also does not consider the recreational economy impacts associated with poorer water quality resulting from deregulation. 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. New Mexico has relied on the Clean Water Act for over 50 years to regulate discharges to the State’s waters – without an effective regulatory program, New Mexico’s prosperous outdoor industry is also at risk.

Deregulation may result in short-term cost savings, but it will also result in long-term economic

⁵ <https://nmdeptag.nmsu.edu/new-release/2025/economic-report-states-agriculture-industry-shows-growth.html#gsc.tab=0>

consequences such as poorer water quality, reduced economic opportunities, and other economic impacts resulting from wetlands loss, including increased infrastructure damages, loss of life, and adverse watershed and aquatic resource impacts from floods, storms, and wildfires since there will be fewer wetlands to provide buffers for these disasters.