October 9, 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: Comments of the State of New Mexico on the U.S. Army Corps of Engineer and Environmental Protection Agency's Updated Definition of "Waters of the United States" (Docket ID No. EPA-HQ-OW-2025-0322)

Dear Administrator Zeldin and Lieutenant General Graham,

The New Mexico Environment Department (NMED) and the New Mexico Department of Wildlife (NMDOW) appreciate the opportunity to provide comments on the Agencies' supplemental notice of proposed rulemaking revising the definition of "waters of the United States," Docket ID No. EPA-HQ-OW-2025-0322. New Mexico respectfully requests that the EPA and Army Corps incorporate New Mexico's comments and recommendations into the final rule.

Sincerely,

James C. Kenney
Cabinet Secretary

Cc: Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
Michael B. Sloane, Director, New Mexico Department of Wildlife
Benita Best-Wong, Deputy Assistant Administrator, U.S., EPA Office of Water
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New Mexico Comments to the U.S. Army Corps of Engineer and Environmental Protection Agency's Updated Definition of "Waters of the United States" (Docket ID No. EPA-HQ-OW-2025-0322)

Background: On September 9, 2026, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (together, the "Agencies") published a Supplemental Notice of Proposed Rulemaking to seek public input on updated regulatory options defining "waters of the United States" (WOTUS) under the Clean Water Act (CWA). Building on an initial proposal from November 20, 2025, and responding to approximately 220,000 public comments, this supplemental notice adjusts definitions to align federal regulations with the U.S. Supreme Court's *Sackett v. EPA* decision.

Specifically, the proposed revisions introduce narrowed definitions for "relatively permanent" waters and "continuous surface connection," generally limiting federal jurisdiction to perennial bodies of water—those with standing or continuously flowing water year-round under ordinary conditions—and adjacent wetlands with continuous perennial surface water connections. The rule accounts for limited exceptions during temporary interruptions caused by anomalous events like drought or non-anomalous events like low tides or dry spells lasting up to 30 consecutive days in a given year. The revised definitions are expected to reduce federal jurisdiction—particularly over intermittent streams and non-perennial wetlands—thereby shifting greater regulatory authority over these non-jurisdictional water features to state and tribal governments.

Water management is complex. Providing some certainty and transparency is important 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, sustain an amazing variety of wildlife and aquatic life, maintain drinking water resources, and also help support a thriving agricultural economy by providing vital irrigation water. Water in the arid West not only attracts millions of people who live, work, and recreate near these waters, 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 again 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 EPA's goal of providing clean water for every American (Pillar 1). New Mexico disagrees with the Agencies' assertion that this rule is not subject to EPA's Children's Health Policy (p. 57298). While a definitional rule does not directly authorize discharges into waters of the United States (WOTUS), it will remove the discharge permit requirements for waterbodies that are no longer jurisdictional. Unregulated discharges of pollutants into these waters, which are used as public drinking water supplies, will threaten human health and the environment.

> **Proposing to define "perennial" to mean "having standing or continuously flowing water every day of the year during ordinary conditions" or, alternatively, to mean "surface water flowing continuously year-round," consistent with the 2020 Navigable Waters Protection Rule.**

Comment 1. A one-size-fits-all definition does not recognize specific conditions in different regions of the United States, especially the arid and semi-arid West.

New Mexico disagrees with the Agencies' narrow interpretation and proposed definition of perennial, which will exclude a significant number of waters in Western states from federal Clean Water Act protections. The definition should support the primary objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's surface waters. A one-size-fits-all national

definition in federal regulations, guidance, and programs does not recognize specific conditions and needs in the West, where water and precipitation can be scarce and where many economically and ecologically important streams, rivers, lakes, and wetlands will go dry, in-part or in-whole, during the year. As they gain or lose water, water quality connections migrate between the surface and the shallow subsurface (e.g., hyporheic zone, saturated soils, etc.). Intermittent and ephemeral streams in the arid West represent critical zones of recharge to groundwater aquifers, yet each would lose CWA protections despite acknowledgment of both interconnective functions and the prevalence of such water resources in the West (pp. 57287 and 57297). The Agencies must recognize that water resource functionalities do not stop simply because streambeds do not exhibit year-round, continuous flow.

As we all know, water flows downhill. Therefore, any pollution that enters a waterbody will be transported to downstream ecosystems, communities, and states. 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, tributaries (including intermittent and ephemeral tributaries) are the primary pathway that carry sediment, nutrients, bacteria, and other pollutants to downstream waters. The cumulative impact of these tributaries can be detrimental to downstream water quality.

A definition built around a one-size-fits-all definition of "perennial" is especially burdensome for arid and semi-arid states with low rainfall and limited water availability because it results in most waters being non-jurisdictional, which causes an automatic gap in protection that did not exist before. New Mexico urges the Agencies to embrace cooperative federalism by balancing definitional clarity with implementation flexibility to ensure that the Nation's diverse landscapes, flow regimes, climates, and legal frameworks are recognized and clean water is maintained and protected for all communities.

> **Defining "relatively permanent" to focus on those waters that are perennial bodies of water, except during anomalous events such as drought or dry spell or due to a non-anomalous event resulting in temporary interruption for no more than 30 consecutive days in any given year such as low tide or a regularly occurring dry spell.**

Comment 2. The proposed definition does not reflect regional hydrology and pollutant transport. The United States Department of Agriculture and the United States Geological Survey define drought as periods of unusually persistent dry weather that persists long enough to cause serious water-related problems. The 30-consecutive-day threshold for non-anomalous interruptions in the supplemental "relatively permanent" definition does not accurately reflect the hydrology of the intermountain West.

In New Mexico, dry periods routinely exceed 30 consecutive days as part of the natural annual regime, especially outside the summer monsoon and spring snowmelt windows. These waterbodies are not hydrologically marginal; they are the primary pathway by which sediment, nutrients, bacteria, and other pollutants reach downstream waters. Removing jurisdiction from tributaries that carry most of their annual pollutant load during a handful of high-flow events, rather than through continuous perennial flow, ignores how these systems function and how impairments in downstream waters develop.

The rule's proposed drought accommodation compounds this problem. It limits anomalous-event relief to D3-D4 droughts of no more than five continuous years, after which drought conditions become the new "ordinary" baseline. In a region where prolonged dry conditions and multi-year drought are

increasingly common, not outliers, a five-year cutoff risks reclassifying persistent Southwestern drought as "ordinary." This would permanently disqualify streams that were clearly jurisdictional before the drought began, based on a definitional cutoff rather than any real change in the stream's ecological or water quality function. At a minimum, parameters such as watershed location of drought conditions, precipitation and snowpack patterns, temperature trends, and soil moisture should also be considered.

Over one million New Mexicans are served by public water systems regulated under the Safe Drinking Water Act that are partially or wholly sourced by surface water. An additional 65,000 New Mexicans will be supplied by surface water upon completion of the Eastern New Mexico Water Utility Authority's Ute Pipeline Project in the coming years. And, over half of all New Mexicans rely on surface waters for their domestic needs. The Rio Grande provides a stark example of the potential for the proposed rulemaking to adversely impact public drinking water supplies. Much of the reach of the Rio Grande flowing through the Albuquerque metropolitan area ran completely dry for approximately 3 months this summer (USGS Gage 08330000: Rio Grande at Albuquerque, NM). However, the Rio Grande did experience intervals of flow following either storm events or releases from upstream reservoirs. The supplemental option to maintain their jurisdictional status despite anomalous periods of no flow (p. 57288) would not have applied to the Rio Grande in Summer 2026 because of flow events, however brief, that occurred in late June, late July, and mid-September.

The Rio Grande example is not a hypothetical exercise; it is a real-life circumstance on a river that provides domestic water to nearly 700,000 people. Any further narrowing of the CWA's scope will leave drinking water resources, like the Rio Grande, vulnerable to pollution and consumers vulnerable to rate increases associated with the cost of additional treatment. The Agencies must account for the variable spectrum of hydrologic conditions observed across the United States. Therefore, New Mexico supports a definition of "relatively permanent" flow that represents regional hydrology and includes seasonal, or intermittent, streams because seasonal flow can be observed on a permanent basis (i.e., reoccurring year after year).

Comment 3. The Agencies should use biotic indicators of flow in addition to physical indicators of flow. The Clean Water Act's primary objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and Section 101(a)(2) of the CWA established an interim national goal that water quality should provide for the "protection and propagation of fish, shellfish, and wildlife" and allow for "recreation in and on the water" wherever attainable. Aquatic and riparian ecosystems in New Mexico are essential to the life histories of approximately 75% of the known vertebrate fish and wildlife in the state (NMDOW 2026). Water quality is an important aspect of the value of these areas for many species, especially those that are fully aquatic. Thus, protection of as many of these ecosystems as possible under the Clean Water Act is essential to the success of fish and wildlife conservation and management actions in the state.

Given the significant changes that are occurring in the hydrology of New Mexico's rivers in response to persistent drying conditions (e.g., Dunbar et al. 2022), the proposed definition of "relatively permanent" will exclude many waters in the state, including portions of the Rio Grande, a major river system of the United States that helps to support at least 450 animal species (NMDOW 2026). In 2026, the Rio Grande was dry for roughly three months in the Albuquerque area (Dix 2026) and reached the highest number of dry miles between the Cochiti and Elephant Butte Reservoirs since 2007 (112 miles) (Lohmann 2026). While this level of drying is hopefully an "anomalous" occurrence, there is evidence that drying events in the Rio Grande are happening earlier and further north than before and at unprecedented levels (Deines 2025). In fact, there is a categorical consensus among earth scientists that New Mexico and the

Southwestern United States have been experiencing an ongoing megadrought for most of the early 21st century.

Drying that results from changes in flow associated with how reservoirs are managed, which is relevant to many waterbodies that should be considered "perennial" in New Mexico, also may not meet the provided definition of anomalous (i.e., "something that is unusual or caused by unforeseen circumstances or conditions"). Management of a reservoir is done with careful preparation and based on legal frameworks, numerous environmental projections, and consideration of a multitude of factors; this drying is not an "unforeseen" outcome. Further, the suggestion of limiting the period over which "extreme" and "exceptional" drought can occur in an area before effects on local hydrology are considered "non-anomalous" to five years (p. 57290) is troubling for New Mexico; over 80% of the state has experienced "extreme" drought conditions in the last five years (SONM 2026).

New Mexico recommends the Agencies consider biotic indicators of flow, as opposed to strictly using the physical indicators of flow referenced on page 57286 of DOD and EPA (2026a), specifically the type of vegetation and aquatic species present along bodies of water in the definition of "perennial." Vegetation along what should be included in the definition of "perennial bodies of water" in New Mexico supports a high diversity of wildlife at various life stages and is composed of riparian, rather than upland, species. Woody vegetation in particular takes much longer to change in response to varying environmental conditions than hydrologic variables such as flow and water depth, especially in systems where these variables are controlled by anthropogenic actions such as water releases from reservoirs. Thus, vegetation is a better representation of the longer-term hydrological and climatological conditions of a river, stream, lake, wetland, or other waterbody. Riparian vegetation has been carefully mapped in New Mexico (e.g., Muldavin, et al. 2023) and thus associated "perennial bodies of water" can be relatively easily identified. Further, presence of aquatic species, such as fish or other vertebrates and macroinvertebrates, that require residency in water for "extended periods" are indicators of the local hydrological condition and used in characterizing streams as "ephemeral", "intermittent", or "perennial" (NMWQCC 2020). In addition, streams and other waterbodies that contain and are managed for fish populations have been well described in New Mexico (e.g., NMDOW 2022).

Comment 4. Accurate and complete data are integral to any new definition(s).
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, EPA's Streamflow Duration Assessment Methods (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, EPA 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. In addition, USACE developed ten Regional Supplements to the Corps Wetland Delineation Manual, including the Arid West Regional Supplement, 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.

A flow-duration threshold set at the national level, without input from regional low-flow data, will systematically misclassify Western streams as non-jurisdictional. Regional low-flow regression methodologies, such as Bell and Tillery (USGS 2023), are already used to characterize low-flow

conditions in the arid Southwest and could inform a more accurate approach. The Agencies should take advantage of available tools and methodologies 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 can be used by the Agencies, state co-regulators, and other decision-makers to gather additional stream information without much effort.

New Mexico urges the Agencies to adopt a regionally differentiated flow-duration standard, or at minimum to seek input from state and tribal co-regulators in arid and semi-arid states before finalizing any brightline threshold. New Mexico also urges the Agencies to 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 wetlands.

> **Defining "continuous surface connection" to mean perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins, with an exception for temporary interruptions in the surface water connection as the result of anomalous events such as drought or dry spell or a temporary interruption in the surface water connection lasting no more than 30 consecutive days in any given year as a result of non-anomalous events such as low tide or a regularly occurring dry spell.**

Comment 5. Wetlands that act as "drains" should be jurisdictional, as Congress intended.
The Clean Water Act itself defines the Lake Champlain Drainage Basin to include wetlands "that drain into Lake Champlain" giving us an understanding of the scope of the CWA intended by Congress. Using a definition that requires a wetland to have a continuous and perennial surface connection is not consistent with the Clean Water Act and will ignore many wetlands with subsurface connections. The transport of contaminants is not limited by continuous surface connections. Congress explicitly wrote the Clean Water Act to include wetlands that may act like a "drain." Therefore, wetlands that act like a drain and have a subsurface connection to a jurisdictional water should be jurisdictional.

The proposed rule says, "this supplemental option would provide transparency and regulatory certainty for landowners, is easy to understand, and responds to comments that requested a bright line approach." However, the supplemental option ignores wetland science and oversimplifies hydrological processes. In so doing, it may no longer be possible to meet the CWA's statutory objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" because the proposed definitions ignore ecologically connected and economically important intermittent and ephemeral streams and adjacent wetlands. The supplemental notice goes on to say, "States and Tribes would be free to address rivers, lakes, streams, ponds, and other features that do not meet the supplemental option for the definition of ''relatively permanent'' and that otherwise do not meet the definition of ''waters of the United States'' as ''waters of the State'' or ''waters of the Tribe'' under their own laws to the extent they deem appropriate, as envisioned under section 101(b) of the Clean Water Act." New Mexico and other states are stepping up to fill the regulatory gap by implementing or refining their water quality programs and expanding their state permitting programs. However, the time required to draft and implement such jurisdiction through typical legislative and rulemaking procedures is sufficiently long and a regulatory gap will be created for all waters no longer covered by CWA. In addition, many states and tribal nations cannot implement a successful and effective water quality program without federal assistance and leadership, which will result in a patchwork of protections and leave many Americans without access to safe and clean water.

New Mexico strongly urges the Agencies 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 hydrologic functions, ecosystem services, and climate benefits provided by intermittent (and ephemeral) tributaries, wetlands, and other waters that influence the water quality of traditionally navigable waters.

> **As an alternative, revising the current category of jurisdictional waters for adjacent wetlands to include only wetlands that are indistinguishably part of a traditional navigable water, the territorial seas, a jurisdictional impoundment, or a jurisdictional tributary (i.e., when surface water in a wetland is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins). This alternative would also result in deleting the definition of "adjacent."**

Comment 6. Adjacent wetlands should be jurisdictional, and the entire delineated wetland should be jurisdictional if a portion of the wetland is deemed jurisdictional.
The U.S. Fish and Wildlife Service's 2009-2019 Wetlands Status and Trends Report to Congress found wetland loss increased by more than 50% since the previous study – in total, the lower 48 states have lost more than half of their historic wetlands (USFWS 2024). Wetlands play a critical role in achieving the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Unfortunately, only 28% of the Nation's waters are estimated to be in good biological condition with almost half in poor condition (EPA 2026). There is a direct correlation between the poor condition of half of the Nation's waters and the historical loss of half of the Nation's wetlands. The supplemental proposal substantially narrows jurisdiction and reduces federal protections for the Nation's remaining wetlands.

Slide 21 on DOD and EPA's (2026b) Supplemental Proposed Rule Overview Presentation depicts how the Agencies intend to determine whether a wetland is jurisdictional, resulting in wetland being cut in half (i.e., half jurisdictional, half non-jurisdictional) when the entire delineated wetland area does not have a continuous surface connection. However, the portion of the wetland that has the continuous surface connection may only have that connection because it is supported by the entire delineated wetland area. If the non-jurisdictional half of the wetland is filled in, that most likely will impact the function and ecological health of the jurisdictional half because the two halves are functionally connected. The wetlands depicted on slide 21 are "adjacent" and should be fully protected under the Clean Water Act as intended by Congress when they wrote the CWA and specifically used the word "adjacent." Therefore, the Agencies should not delete the definition of "adjacent." Further, since a wetland acts as a functional unit, the entire delineated wetland should be jurisdictional if a portion of the delineated wetland is determined to be jurisdictional (USACE 1987, 2007-2012). Wetlands are interconnected functional units. Splitting a wetland into two or more regulatory jurisdictions based on temporary dry periods ignores the science. In addition, it complicates the regulatory landscape because a project proponent may need multiple permits (Federal and State) if they have a project in a split-jurisdiction wetland, which will likely lead to more litigation when issues arise.

New Mexico strongly urges the Agencies 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 hydrologic functions, ecosystem services, and economic benefits provided by wetlands.

General Comments

Comment 7. The Agencies must 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 cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

States require timely, coordinated implementation support in response to a new rule. 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 EPA 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 state 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 8. States should be adequately funded to effectively implement federal CWA programs.
There is no doubt that the narrow interpretation of federal CWA jurisdiction will disproportionately reduce the number of waters that are jurisdictional in New Mexico. It is unclear whether New Mexico will receive significantly less federal CWA funding to support water quality protection and improvement for the citizens of New Mexico *because* there are significantly fewer jurisdictional waters in the State. It is also unclear whether a reduction in funding would apply to all CWA programs. 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 EPA'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 9. A narrower scope and fewer federal permits does not necessarily equate to cost savings.
The Agencies anticipate that fewer Clean Water Act permits will be required, which will result in cost savings and reduced regulatory burden. However, fewer federal permits does not equate to reduced regulatory burden or cost savings. The costs and regulatory burden of protecting water quality will not

be reduced, rather the cost and regulatory burden will shift to local and state governments to ensure adequate protections for state waters no longer receiving federal protection. Unlike federal permits which 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 will 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 disproportionally 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.

Ultimately, 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. A narrower interpretation of Clean Water Act jurisdiction may result in short-term cost savings but it will also result in long-term 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.

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