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Commissioner, District 1

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Commissioner, District 2

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Submitted via: [regulations.gov](https://www.regulations.gov)

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Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Stacey Jensen
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: Definition of “Waters of the United States” Preproposal Outreach Comments
Docket ID. No. EPA-HQ-OW-2021-0328

Dear Ms. Christensen and Ms. Jensen:

On August 4, 2021, the U.S. Environmental Protection Agency (“EPA”) and the Department of the Army (“Army”) (collectively, the “Agencies”) published a notice in the Federal Register of their intent to revise the definition of the term “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”) and to seek feedback from the public on several topics, including implementation of the definition; regional, state and tribal interests; environmental justice interests; and the jurisdictional tributaries and ditches. 86 FR 41911. As the elected representatives of residents who heavily rely on surface water that is directly and adversely impacted by the Navigable Waters Protection Rule (“NWPR”), the Santa Fe County Board of County Commissioners (“BCC”) seeks reversal of the NWPR, which has been vacated and we support the rule making for a new rule and submit these comments for the Agencies’ consideration.

I. New Mexico’s Unique Characteristics Mandate WOTUS Include Ephemeral Streams

The negative impact of the Trump administration’s decision to remove ephemeral streams from the definition of WOTUS cannot be overstated. New Mexico is unique in its geography and its weather patterns. Located in the arid and semi-arid Southwest, Santa Fe averages about 14.2 inches of precipitation (rainfall plus snowfall) per year, with roughly 40% of that precipitation falling during monsoon season (between June and September). During monsoon rains and other high intensity storms, ephemeral streams, arroyos, and irrigation ditches (known as acequias) carry significant amounts of stormwater throughout the watershed. None of these watercourses are currently included in the NWPR of WOTUS.

Low annual rainfall totals, coupled with much of it falling during a short window of time, leads to many reaches of the state's streams and arroyos being dry for months of the year. According to the New Mexico Environmental Department, 88,810 miles of the state's waters flow only in response to rain (ephemeral waters) or seasonally due to factors such as snow melt (intermittent waters). Only 6,362 miles of watercourses flow year-round (perennial waters). Given the large percentage of ephemeral and intermittent waters in New Mexico, it is estimated that 96% of the state's waters are not subject to CWA jurisdiction and protection under the current rule. The failure to recognize ephemeral and intermittent streams as WOTUS has left almost an entire state's surface waters without any oversight or protection. This is especially true as New Mexico is one of a handful of states that does not have its own state laws and regulations to assume control over surface water quality. If the CWA does not apply the waters of New Mexico, there is no state regulation to fill the gap. Essentially, the CWA is the last line of defense for New Mexico's surface waters. It is critical that the NWPR be reversed and that the new rule include ephemeral and intermittent streams as part of the WOTUS.

II. The Buckman Direct Diversion Regional Water Treatment Facility ("BDD")

Ephemeral and intermittent streams do not exist in a vacuum. The quality of these streams can have substantial impacts on traditional navigable waters, downstream. One example is the impact of flows into the Rio Grande from ephemeral streams located upstream, near Los Alamos National Laboratory ("LANL"), on the region's ability to provide safe and reliable drinking water to its residents. Together with the City of Santa Fe, Santa Fe County jointly operates the Buckman Direct Diversion Regional Water Treatment Facility ("BDD"), a municipal water supply project in northern New Mexico that diverts San Juan-Chama and native Rio Grande water rights for the benefit of City of Santa Fe, and Santa Fe County residents. The BDD treats diverted surface water in accordance with federal and state Safe Drinking Water Act standards to ensure a clean and safe water supply for the residents of the County and City of Santa Fe.

The BDD intake structure on the Rio Grande is located to the west of the City of Santa Fe, and downstream of several communities and CWA National Pollutant Discharge Elimination System ("NPDES") permittees on the Rio Grande and its tributaries, including the community of Los Alamos, and LANL. LANL is located on the Pajarito Plateau, west of the Rio Grande, and includes watersheds with a number of perennial, intermittent, and ephemeral streams that are tributaries to the Rio Grande. At least two of these tributaries are upstream of the BDD intake structure. Pollutants from industrial outfalls and storm water discharge enter ephemeral tributaries of the Rio Grande from numerous sites located at LANL, or on lands formerly occupied by LANL. Dozens of these sites are in the ephemeral Los Alamos Canyon watershed, whose confluence with the Rio Grande is only three miles upstream of the BDD intake structure. As a result of these discharges, and other LANL operations that generated hazardous, mixed, and radioactive wastes, legacy contamination is entrained in sediments in the canyons. Stormwater from flood events carries these contaminated sediments down canyon to ephemeral reaches during flood events.

The water quality of the Rio Grande and its tributaries has a direct impact on the BDD's ability to divert its source water, and the associated expense to treat it in accordance with federal and state drinking water standards. Any potential for an increase in contamination or sedimentation of the Rio Grande or its tributaries, will have an adverse impact on BDD operations and the public that it serves.

Prior rulemakings that touched on the definition of WOTUS (most crucially, the 2015 Obama-era Clean Water Rule) have established that ephemeral tributaries and certain non-floodplain wetlands significantly improve the quality of downstream traditional navigable waters by transporting and filtering pollutants, trapping storm water, and performing many other chemical, physical, and biological functions that benefit human health and the environment. Because of this connection to traditionally navigable water, the 2015 Clean Water Rule ensured that the definition of WOTUS included ephemeral streams and disconnected wetlands, therefore providing critical protections to the BDD source waters under CWA permitting programs.

In contrast, the NWPR has affected the BDD drinking water utility by eliminating ephemeral streams from federal protection and CWA permitting requirements for industrial outfalls, stormwater discharges, and dredge and fill activities for most stream reaches on the Pajarito Plateau. The BDD relies on appropriate CWA permitting at LANL and other upstream sites to ensure the discharges in the BDD source area are appropriately regulated to protect human health and the environment. In fact, effective permitting under the CWA is a crucial part of the statutory and regulatory framework that ensures cleanup of legacy pollution at LANL is accomplished to levels that maintain and preserve the BDD's source water quality. Without effective permitting, monitoring, and enforcement of discharges by federal and state regulatory agencies, these contaminant sources located in ephemeral streams upstream of the BDD – including those at LANL – will inexorably migrate downstream, creating deleterious cumulative impacts in the Rio Grande and at the BDD intake location.

It's worth repeating that New Mexico is one of only a few states that lack CWA permitting authority, and the only such state in the arid west. The CWA permitting programs are the primary mechanism for regulating and limiting discharges of pollutants into WOTUS. Without authority or capacity to develop and implement a state-based permitting program to fill the gap created by the NWPR, New Mexico cannot currently regulate surface water discharges to any waters, including ephemeral reaches, and contaminants can therefore continue to migrate unmonitored and unregulated into the Rio Grande. Moreover, the threat from unregulated discharges to ephemeral reaches will increase treatment costs borne by BDD ratepayers.


III. Environmental Justice for All New Mexicans

Principles of environmental justice further dictate shoring up protection of New Mexico's ephemeral and intermittent streams. Within Santa Fe County are located the Pueblos of San Ildefonso, Tesuque, Pojoaque, Nambe and Cochiti. These pueblos are home to indigenous people who have a long and proud history of agricultural and cultural and religious practices associated with New Mexico's waters. Additionally, Hispanic and Latino residents currently constitute about half of Santa Fe County's population, and rely on these watercourses for their rich economic, cultural, and religious traditions. Sadly, Native-Americans, Hispanics and Latinos, and other people of color, have traditionally faced some of the worst environmental devastation and water quality conditions in the United States. All people deserve fair treatment with respect to the development of environmental regulations and policies. By including ephemeral waters such as arroyos as WOTUS, it will ensure that equality of environmental protection will continue to be meaningfully pursued with respect to people of color and Native-Americans inhabiting the Southwest.

In conclusion, the BCC strongly encourages the Agencies to reverse the NWPR and revise the definition of the WOTUS to include wetlands, ephemeral, and intermittent streams. Recognizing our unique geography and ensuring the overwhelming majority of the state's surface waters are protected from pollutants, depends on it. Upholding environmental justice principles and reversing years of inequitable application of environmental regulations to people of color and Native-Americans, demands it. The people and wildlife of New Mexico are counting on it. Lastly, the BCC supports the "two-rule" process proposed by the Agencies, and agrees that the pre-NWPR rule should be reinstated and bolstered with regulatory and statutory changes that adhere to Supreme Court precedent and reduce the likelihood of rollbacks of the regulatory framework for WOTUS in the future.

Thank you for the opportunity to provide these comments.

Respectfully,



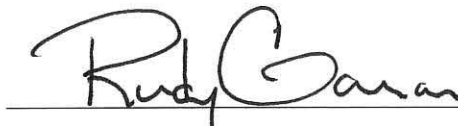
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