

Testimony of Rebecca Roose

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To the United States Senate

Committee on Environment and Public Works

Regarding a hearing on

“Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean  
Water Act”

September 16, 2020



Mr. Chairman, Ranking Member Carper, members of the Committee, my name is Rebecca Roose and I currently serve the State of New Mexico as Director of the Water Protection Division at the New Mexico Environment Department. The Environment Department certifies federal Clean Water Act (CWA) permits issued in New Mexico and has primary responsibility for implementing the activities of the New Mexico Water Quality Control Commission, which is the state water pollution control agency for purposes of the CWA. I appreciate the opportunity to provide testimony today on the impact of the Navigable Waters Protection Rule (NWPR) in New Mexico. My testimony draws on my nearly 15 years of experience implementing the CWA at the state and federal level.

My testimony focuses on three primary issues related to the new definition of Waters of the United States (WOTUS) that was finalized by the Environmental Protection Agency (EPA) and Army Corps of Engineers (ACE) (collectively the “Agencies”) and took effect earlier this year: 1) New Mexico’s rivers, streams, lakes and wetlands are at risk like never before; 2) the NWPR and its implementation by the Agencies leave a huge regulatory gap in New Mexico; and 3) the NWPR and its implementation by the Agencies fail to deliver on the promise of regulatory certainty and will hurt state and local economies. The stakes in New Mexico are incredibly high as we look to mitigate the loss of CWA protections for the majority of surface waters, which are relied upon by New Mexicans for drinking water, cultural uses and economic vitality.

## **THE NWPR’S HARM TO NEW MEXICO WATERS**

New Mexico is home to high mountains, expansive plains and plateaus, river gorges, and broad valleys. Land surface elevations in New Mexico vary from just under 3,000 feet above sea level at the Texas border to just over 13,000 feet in the northern mountains. New Mexico is the fifth largest of the fifty states, with a total area of 121,607 square miles. Of this, approximately 34% is Federal land, 12% is State land, 10% is Native American land, and 44% is privately owned. New Mexico is also one of the driest states, averaging less than twenty inches of annual precipitation. About half of annual precipitation is received during the summer months with brief but intense, localized summer storms, commonly referred to as “monsoons.” Much of the winter precipitation falls as snow in the high mountains and as snow or rain at lower elevations in more widely distributed, regional storm fronts.

Nevertheless, the State is rich with iconic rivers, such as the Rio Grande, Pecos and Gila; stream and acequia networks that support multi-generational farms; and wetlands, lakes and reservoirs that are critical for drinking water supplies, crop production, a vibrant outdoor recreation economy and interstate compact agreements. Table 1 below provides a summary of New Mexico’s surface water resources.

The impact of the NWPR on CWA jurisdiction in New Mexico could not be more dramatic. In its review of the National Hydrography Dataset, the Environment Department determined that approximately 89% of the State's rivers and streams are ephemeral, 7% are perennial, and 4% are intermittent. Under the NWPR, none of the ephemeral streams are protected by the CWA. Let me be clear on this point: Nearly 90% of New Mexico’s rivers and streams are left out of CWA protections even though water quality in these waterbodies is just as important today as it was on June 21, 2020, the day before the NWPR’s effective date.

Table 1. Summary of New Mexico’s Surface Water Resources

Topic	Value
State population	2,096,829
Population dependent on surface water for drinking water	878,765
State surface area	121,607 mi
Total miles of perennial non-tribal rivers/streams	6,362 miles
Total miles of non-perennial non-tribal rivers/streams	88,810 miles
Number of significant public lakes/reservoirs	196
Acres of significant public lakes/reservoirs	89,042 acres
Acres of freshwater wetlands	845,213 acres

Science clearly demonstrates that ephemeral waters are ecologically and hydrologically significant in the arid southwestern United States. Ephemeral streams are the capillaries of watersheds, recharging aquifers and delivering water downstream for aquatic life, wildlife, and human use. Ephemeral streams may be the headwaters or major tributaries of perennial streams in New Mexico. Over time, pollutant discharges unregulated under CWA Section 402 and development activities unregulated under CWA Section 404 as a result of the NPWR will adversely impact downstream water quality in waters that are jurisdictional. For example, in New Mexico, ephemeral tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream waters, such as the Rio Grande. The cumulative impacts of these non-jurisdictional ephemeral stormflows will be detrimental to downstream water quality and threaten human health and the environment. This hydrologic and ecologic connection between ephemeral waters and downstream NWPR jurisdictional waters is well-established in EPA’s own scientific record, which the Agencies flatly ignored in the final rule that excludes all ephemeral streams from the definition of WOTUS.

Ephemeral flows need CWA protection because when they are functioning properly they provide important hydrologic connections across the landscape and across geopolitical boundaries; they dissipate stream energy during high flow events to reduce erosion, thus improving water quality; they recharge aquifers where water can be stored for current and future drinking water supplies; they transport, store and deposit sediment to help maintain floodplains; they transport, store and cycle nutrients for vegetation, wildlife and aquatic life; and they support and provide migration corridors. Given the distribution of ephemeral streams in New Mexico (89% of streams) and their important hydrological and ecological functions, cumulative impacts of ephemeral streams throughout a watershed must be considered in order to protect and maintain water quality and watershed health. Indiscriminately removing protections from ephemeral streams degrades water quality in the watershed and, most notably, the jurisdictional waters that they feed.

The NWPR also results in the loss of many wetlands in New Mexico. Saint Mary’s University of Minnesota’s Geospatial Services, with input from the Environment Department, created a model to evaluate the extent of federally protected wetlands and other surface waters in the Cimarron River Watershed located in northeastern New Mexico.<sup>1</sup> The results of this case study show that

<sup>1</sup> For details of the Saint Mary’s University of Minnesota model, visit <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>.

by narrowing the scope of federal jurisdiction, the number of wetlands protected by the CWA is substantially decreased, likely leading to a loss of benefits provided by wetlands such as flood control and attenuation, pollution control, wildlife habitat, and recreation. The Cimarron River Watershed is known for its special trout waters, cross country and downhill skiing, boating, ice fishing, and other recreational opportunities that contribute to an important outdoor recreation economy for the communities in and near the watershed. Depending on how the WOTUS definition in the NWPR is applied, 20-70% of the wetlands in the Cimarron River Watershed lose federal protections, threatening the livelihoods of these small, rural towns.

Because of the ephemeral exemption and new definition of “adjacent wetland,” the NWPR creates a significant gap in regulation under CWA Section 402 general permits (i.e., construction and industrial stormwater discharges) and CWA Section 404 dredge and fill permits in ephemeral streams and non-abutting wetlands. The Agencies considered the potential effect of the NWPR on issuance of CWA Section 402 permits for stormwater from construction activities. Overall, the Agencies concluded that the ephemeral exemption would likely change circumstances in arid and semi-arid states where many streams are ephemeral, and CWA protections would be removed from the vast majority of waters in these states.<sup>2</sup> The water quality impacts associated with construction and development activities are well-known and firmly established in the scientific record. Besides excess sediment, which can smother bottom-dwelling organisms, fill deep pools that are critical refugia during summer and drought, and clog or injure gills of fish, stormwater carries other harmful pollutants. Construction, industrial, and urban sites generate pollutants such as phosphorus and nitrogen from the application of fertilizer, bacteria, various metals (arsenic, cadmium, chromium, copper, zinc), acidic wastewaters, pesticides, phenols, paints, solvents, phthalates, petroleum products, and solid wastes that attach to sediment and/or get washed into streams and wetlands during overland stormflows. Sediment loading rates from construction sites are typically 10 to 20 times that of agricultural lands and 1000 to 2000 times that of forest lands. Even a small amount of construction or industrial activity can have a significant negative impact on water quality in localized areas if permits are not required and proper management practices are not implemented to reduce or eliminate pollutants in stormwater. New Mexico has over 1000 facilities covered by CWA stormwater general permits. As a result of the NWPR, we estimate that 25-45% of these facilities are no longer subject to federal stormwater management requirements and, as I explain below, the State does not have an established program to promptly ensure the requisite protections in lieu of EPA and ACE permits.

The NWPR also creates a significant gap in regulation of individual permits issued by EPA under CWA Section 402 in New Mexico. The Agencies did not sufficiently consider the potential effect of the NWPR on issuance of CWA Section 402 individual permits for discharges to ephemeral or other non-jurisdictional waters under the NWPR. New Mexico currently has 115 individual, EPA-issued NPDES permits in the State, including permits issued in Indian Country. Under the NWPR, Environment Department experts estimate that approximately 50% of these current permittees will no longer be required to obtain an NPDES permit because they discharge to receiving streams that are not within the new narrow WOTUS definition. Examples of facilities in New Mexico that discharge to NWPR non-jurisdictional waters include: municipal

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<sup>2</sup> *Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.”* U.S. Environmental Protection Agency and Department of the Army (January 22, 2020).

and private domestic wastewater treatment plants; tribal and Bureau of Indian Affairs wastewater treatment plants; multiple types of mines, both active and in reclamation (coal, uranium, cement, rock, minerals and metals); national laboratories and other federal facilities; fish hatcheries; and oilfield sanitary waste treatment plants. Eliminating CWA protections and federal regulation of these dischargers degrades water quality of ephemeral receiving streams as well as the downstream Traditional Navigable Waters (TNWs) and other jurisdictional waters that they feed.

Three specific examples of NWPR impacts follow:

**The Rio Grande.** Tijeras Arroyo presents an example of the devastating effects of the NWPR on water quality. This waterway winds for 26 miles from its headwaters in the Sandia and Manzano Mountains east of Albuquerque, New Mexico through developed and undeveloped areas of Albuquerque in the foothills, including Kirtland Air Force Base, before entering the Rio Grande. The waterway is perennial in the headwaters but is ephemeral for 11 miles as it flows out of the mountains and into the Rio Grande. Tijeras Arroyo is a major tributary of the Rio Grande in the Albuquerque area and carries stormwater, and any pollutants mobilized by stormwater, to the Rio Grande during significant rain events, but maybe not in a “typical year” as defined in the NWPR. It is the subject of (1) a Watershed Restoration Action Strategy under CWA Section 319 to address excess *E. coli* bacteria and sedimentation through stormwater management and erosion controls; (2) a Total Maximum Daily Load (TMDL) under CWA Section 303(d) to reduce watershed nutrient loading during both low-flow and high-flow events; and (3) federal permits including several CWA Section 404 permits, an individual CWA Section 402 NPDES permit for Kirtland Air Force Base, and the Municipal Separate Storm Sewer System (MS4) permit for the Albuquerque-Bernalillo County area under CWA Section 402. These various permits and requirements limit and/or monitor the discharge of the following pollutants into Tijeras Arroyo: nitrate-nitrogen, ammonia-nitrogen, total nitrogen, total phosphorus, *E. coli* bacteria, sediment, ethylene dibromide (EDB), heptachlor, per- and polyfluoroalkyl substances (PFAS), total residual chlorine, total suspended solids, biological oxygen demand, and oil and grease. In addition, the Rio Grande downstream of Tijeras Arroyo is impaired for *E. coli* bacteria, polychlorinated biphenyls (PCBs) in fish tissue, and dissolved oxygen. Tijeras Arroyo was jurisdictional under the 1980s regulations and the 2008 *Rapanos* Guidance but is not jurisdictional under the NWPR. Surface water quality is also a major concern for the two acequia associations in the Tijeras watershed and the Pueblo of Isleta, which is downstream of Tijeras Arroyo and the City of Albuquerque. Under the NWPR, these CWA protections (e.g., *E. coli* strategy, TMDL, NPDES permits) are not enforceable as is. Depending on how the NWPR is implemented, they will either be modified to move the point of discharge to a jurisdictional water and consequently change the limitations and requirements, or they will be terminated.

**The Pecos River and Rio Ruidoso.** The Rio Hondo Watershed in south-central New Mexico is yet another example of the irreparable harm the NWPR will have on New Mexico. As the perennial headwaters of the Rio Ruidoso and Rio Bonito flow downstream, they become interrupted and eventually go underground along several ephemeral segments. Because the ephemeral segments are substantially long (over 50

miles), it is highly unlikely that the Rio Ruidoso, Rio Bonito or upstream portions of the Rio Hondo have a surface connection to the Pecos River (a jurisdictional water) in a “typical year.” Therefore, everything upstream of these ephemeral breaks/segments is considered non-jurisdictional under the NWPR. In this watershed there are several facilities discharging to the river, including the Village of Ruidoso Regional Wastewater Treatment Plant and the Ruidoso Downs Race Track. The Rio Ruidoso already exceeds water quality standards for total nitrogen and total phosphorus, two pollutants that are currently controlled by NPDES permits. Historically, excess nitrogen and phosphorus have negatively impacted downstream irrigation uses, hurting family farms. Further, construction and industrial sites are no longer required to obtain NPDES permit coverage for their stormwater discharges. This means industrial facilities and construction sites could discharge pollutants into the river without consequence under federal law. Loss of federal pollution control for the Rio Ruidoso will result in polluted water conveyed to local farms via the 82 acequias, or community ditches, in this area. Acequias have important historical and cultural value in New Mexico, with many dating to the 17<sup>th</sup> and 18<sup>th</sup> Centuries, and provide essential water for agriculture. Public health and the environment are directly impacted by the NWPR and unregulated pollutant discharges in the Rio Hondo Watershed.

**The Gila River.** Another example of the NWPR’s harm and regulatory uncertainty is the Gila River, which originates in the Nation’s first designated wilderness area (the Gila National Wilderness) and is the last major wild and free-flowing river in New Mexico. The Gila River supports a remarkable abundance of aquatic life and wildlife, provides significant economic value to the region through plentiful outdoor recreation opportunities, and is culturally important to indigenous peoples whose ancestors have lived in southwestern New Mexico for thousands of years. Under prior definitions of WOTUS, the Gila River was covered by the CWA because it is an interstate water, flowing from New Mexico into Arizona. Some segments of the Gila River in Arizona have been designated as TNWs, while the Gila River in New Mexico is designated through an Approved Jurisdictional Determination through 2023. New Mexico’s Gila River was named by American Rivers as the country’s most endangered river in 2019 because of threats from water diversions and climate change.<sup>3</sup> The temporary designation of the Gila River in New Mexico creates uncertainty surrounding federal protection under the CWA that did not exist prior to the NWPR and results in a precarious future for this precious resource.

The NWPR will have a profoundly adverse effect on water quality in the State. More frequent droughts and shifting precipitation patterns due to climate change result in lower water levels in rivers, lakes, and streams, leaving less water to dilute pollutants. In addition, more frequent and more powerful storms increase polluted runoff from urban and disturbed areas, which transports pollutants from the landscape to nearby waterways. These changes stress aquatic ecosystems and dramatically impact communities throughout the United States, especially in the Southwest. Community impacts include threats to public health, economic strain, and decreased quality of

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<sup>3</sup> See <https://www.americanrivers.org/2019/04/americas-most-endangered-rivers-of-2019-spotlights-climate-change-threats/>.

life. In short, our precious surface waters are more in need of protection than ever before. The effects of climate change in New Mexico amplify the complexities of western water management and contribute to greater regulatory uncertainty surrounding CWA jurisdiction under the NWPR, as discussed further below.

## **EXISTING STATE PROGRAMS CAN'T CLOSE THE FEDERAL REGULATORY GAP**

A core argument by those in favor of the NWPR is that it “ensures that America’s water protections – among the best in the world – remain strong, while giving our states and tribes the certainty to manage their waters in ways that best protect their natural resources and local economies.”<sup>4</sup> However, this promise relies on a false premise that the roll-back of federal jurisdiction will not actually weaken water quality protections at the state, tribal and local level. In some parts of the country it may be true that states and tribes will pick-up where the CWA leaves off, utilizing existing authorities to close the regulatory gap and retain the critical water quality accomplishments of the past 50 years. Meanwhile, in New Mexico and a number of other states, as well as across tribal lands, it could take years and millions of unavailable, unappropriated dollars to prevent water quality and watershed degradation as the Agencies rush to implement the NWPR coast to coast.

Furthermore, the same federal agency leaders touting the rule as maintaining strong water protections in the U.S. are simultaneously touting the rule for “accelerat[ing] critical infrastructure projects,” and “ensur[ing] that land use decisions are not improperly constrained.”<sup>5</sup> These purported benefits are actually premised on an assumption that states and tribes will not close the regulatory gap. In other words, the federal agencies cannot take credit for ensuring ongoing strong protections while simultaneously celebrating the lack of those protections. Decisions by the EPA and the Army Corps of Engineers to begin implementing the narrow definition of WOTUS, regardless of a state’s readiness to protect the excluded waters, further undermines the Agencies’ assertions that the rule is intended to maintain strong water quality protections. In fact, the NWPR and its early implementation by the Agencies preclude ongoing protection of all surface waters in the State of New Mexico that were jurisdictional under prior WOTUS definitions.

New Mexico cannot, as a practical matter, immediately fill the burdensome federal regulatory gap created by the NWPR. New Mexico is one of only three states without NPDES authority, and the only such state in the arid west. The NPDES program is the primary mechanism under the CWA for regulating and limiting discharges of pollutants into the “waters of the United States.” Developing, adopting and implementing such a program requires significant time, funding, and staff. Unlike most states with established NPDES programs, New Mexico does not have the legal and procedural program infrastructure to issue and enforce NPDES-like permits to regulate discharges of pollutants to surface waters of the state that are not WOTUS under the new definition. As laid out above, the Environment Department estimates that 50% of NPDES individual permits and 25-45% of stormwater general permits are no longer required, which could amount to hundreds of unregulated discharges and thousands of pounds of pollutants

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<sup>4</sup> EPA Headquarters News Release (January 23, 2020), available at <https://www.epa.gov/newsreleases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-0>.

<sup>5</sup> Id.

entering New Mexico's surface waters every year as a result of the NWPR federal rollback.

The NWPR imposes significant resource burdens on the Environment Department while putting the health of New Mexico waters and citizens at great risk. The premise that all states are capable of addressing water quality issues in their state is false. Not all states can implement a robust and successful water quality program without significant federal assistance. Recurring federal and state funds need to be identified to support a New Mexico surface water discharge permitting program because reasonable permit fees would not cover the costs of the program in New Mexico. To exacerbate this issue, federal financial support for water pollution control programs has been steadily declining over the past decade, making it more and more difficult to establish an effective and viable permitting program, to the detriment of New Mexico's precious surface waters. Many other states face challenges associated with existing laws that limit those states' ability to protect wetlands, streams and other water resources more broadly than federal law.<sup>6</sup>

A preliminary analysis performed this year by an Environment Department contractor indicates that establishing and operating a surface water discharge permitting program may cost New Mexico taxpayers, including working families and small businesses, as much as \$15 million in the first year alone. For context, the current budget for all the Environment Department's surface water quality programs is approximately \$6.5 million annually. Meanwhile, New Mexico, like many other states, faces a budget shortfall amid the current economic recession.

The NWPR introduces great uncertainty into the Environment Department's regulatory efforts and burdens the Environment Department with the onerous task of interpreting and applying the NWPR. When the NWPR became effective, previous guidance documents, memoranda, and materials were rendered inoperative. In addition, the Environment Department is unaware of a firm commitment by EPA and ACE to provide guidance and training to assist with early implementation of the NWPR. With no new federal or state funding associated with this substantial shift in CWA jurisdiction, any Environment Department involvement in NWPR implementation will strain available resources for other priorities and programs, such as ambient water quality monitoring, assessment and reporting on the status of the State's surface waters, water quality standards revisions, water quality management and watershed-based planning, watershed and wetland restoration, groundwater protection, and program and project effectiveness monitoring. For example, on-the-ground investigations are needed to delineate, for compliance and enforcement purposes, which waters are truly intermittent and which are ephemeral. Considering New Mexico has over 88,000 miles of non-perennial streams, and the vast majority of streams in the State do not have active gages to measure stream flows, these stream-specific investigations will be extremely resource-intensive. The Environment Department already has received inquiries from various stakeholders, including the regulated community, about scope and implementation of the NWPR that cannot be answered due to uncertainties related to jurisdictional interpretation and enforcement.

For decades the Environment Department has relied on close coordination with EPA and ACE on CWA permitting actions in furtherance of our mission to preserve, protect and improve

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<sup>6</sup> *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* (2013), available at <https://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters>.

surface water quality across our state. Simply put, there is no ready substitute under State laws and budgets to maintain the critical surface water protections achieved through CWA Section 402 and 404 permits. The decision of federal agencies to proceed with NWPR implementation without consideration of state and tribal coverage will allow hydrologically connected ephemeral tributaries to be permanently filled or degraded, to the detriment of the downstream jurisdictional waters the NWPR purports to protect.

### **POLLUTED WATERS HURT THE NEW MEXICO ECONOMY**

The value of healthy surface waters in New Mexico is both cultural and economic. New Mexico's diverse waters recharge aquifers, support an amazing variety of wildlife and aquatic life, maintain drinking water resources for over 40 percent of the population, and sustain critical economic activity. The Environment Department is concerned about the economic costs associated with the regulatory vacuum created by the NWPR for the majority of New Mexico surface waters. Not only are polluted waters costly for drinking water utilities, farmers and the thriving tourism industry, we see implementation of the rule as creating new areas of regulatory uncertainty that will burden New Mexico businesses and communities.

The regulatory gaps created by the ephemeral waters exemption and loss of wetlands protections resulting from the NWPR will result in decreased water quality, as explained above. As a result, the cost to treat drinking water and maintain drinking water infrastructure will increase. The cost to treat surface water to drinking water standards depends on the quality of water coming into the treatment plant, the technologies used, the size of the system, and the energy source. Municipalities will likely need to invest in water treatment infrastructure and other costly technologies, such as desalination and ultrafiltration, to provide clean, safe water for drinking. Degraded water quality coming into the treatment plant, the need for improved and more costly treatment technologies and the less populated, rural nature of New Mexico as a whole will cause water treatment costs to increase substantially for many in the state and may force municipalities to choose lower water quality over necessary investments for clean and safe drinking water. In addition, enhanced treatment to remove pollutants causes increased water loss during treatment, which translates to less potable water in an increasingly arid State.

Outdoor recreation is among New Mexico's largest economic sectors, representing the lifeblood of communities across the state and providing livelihoods for tens of thousands of New Mexicans. More than twice as many jobs in New Mexico depend on outdoor recreation than on the energy and mining sectors combined. The NWPR does not take into account the recreational economy impacts associated with poorer water quality. In addition to tourism dollars spent by New Mexicans in New Mexico, the Tourism Department reports that the State also has a high percentage of out-of-state visitors who come to New Mexico for outdoor recreation activities, such as river rafting, fly fishing, camping, boating and wildlife viewing along the State's scenic waters. Visitors spent \$846 million on recreation in the State in 2017, supporting 13,000 direct jobs. In addition, the New Mexico Department of Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending \$268 million on their activities annually. The New Mexico Outdoor Recreation Division, created by legislation in 2019, is tasked with increasing outdoor recreation-based economic development, tourism and ecotourism, recruiting new outdoor recreation business to New Mexico, and promoting education about outdoor recreation's benefits to enhance public health. People do not want to recreate on polluted waters that cannot

sustain healthy fish, bird and wildlife populations. The outdoor recreation industry in New Mexico will be adversely impacted by the regulatory gap created by the NWPR, to the detriment of jobs and revenue in New Mexico.

Agriculture is part of New Mexico's cultural and economic identity. We are the top state in the country in chile production, third in pecans and in the top 10 for number of dairy cows. According to the New Mexico Economic Development Department, there are 24,800 farms in the State and agriculture and food products are among the State's top five exports.<sup>7</sup> As a rural state with a poverty rate nearly twice the national average, many family farms grow crops and raise livestock for their own families and neighbors, as well as to contribute to the local economy. The Environment Department's surface water quality programs are designed and implemented to identify waters used for irrigation/irrigation storage and livestock watering and to then take actions to protect and restore those waters to support that use. Based on the scope of the NWPR and New Mexico's inability to close the regulatory gap, waters that farmers rely on to irrigate crops and water livestock to feed New Mexicans and export to other states and nations will be vulnerable to increased pollutant loads from dischargers and detrimental impacts from dredge and fill activities.

To represent benefit-cost analyses of the NWPR, EPA and ACE relied on three case studies in the supporting Economic Analysis, "to explore potential changes and resulting forgone benefits and avoided costs."<sup>8</sup> The case studies focused on three geographical regions – the Ohio River Basin, the Lower Missouri River Basin, and the Rio Grande River [sic] Basin – that intersect 10 states. The Rio Grande River Basin was divided into two major watersheds, the Upper Pecos (HUC 1306) and Lower Pecos (HUC 1307) River Basins, which contain a combined 44,300 square miles in New Mexico and Texas from east of Santa Fe, New Mexico to the confluence of the Pecos River and Rio Grande at the Texas-Mexico border. This case study found 85% of stream miles within the Upper Pecos River Basin in New Mexico are ephemeral, and 34% of all wetland acres to be "non-abutting" wetlands. These ephemeral waters and non-abutting wetlands in the Upper Pecos River Basin are clearly not federally protected under the NWPR, whereas many other waters in the Upper Pecos River Basin *may* no longer be protected under the NWPR because they likely do not contribute surface flow to a downstream jurisdictional water in a "typical year." The cost analysis for the Rio Grande/Pecos River case study shows benefits of the NWPR to be minimal or negligible; however, the Agencies did not quantify or monetize the environmental effects and forgone benefits of the NWPR for this case study, blaming this deficiency on limitations in the data. Again, the Agencies chose to ignore their own research and data by disregarding the 2015 *Economic Analysis of the EPA-Army Clean Water Rule*, which monetized the ecosystem services and benefits from wetlands.<sup>9</sup> In fact, the estimation of nonmarket environmental values is not new – one notable example is compensation for the 1989 Exxon Valdez oil spill in the Gulf of Alaska. It is well known that wetlands provide many ecological and economic benefits to watersheds, such as filtering and improving water quality,

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<sup>7</sup> See <https://gonm.biz/uploads/documents/publications/AgricultureWEB.pdf>.

<sup>8</sup> *Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States."* U.S. Environmental Protection Agency and U.S. Department of the Army (January 22, 2020).

<sup>9</sup> *Economic Analysis of the EPA-Army Clean Water Rule.* U.S. Environmental Protection Agency and U.S. Department of the Army (May 20, 2015), available at [https://www.epa.gov/sites/production/files/2015-06/documents/508-final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-20-15.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf).

flood attenuation, erosion control, carbon sequestration, aquifer recharge, and providing fish and wildlife habitat and nurseries.<sup>10</sup> It is also known that ephemeral waters are ecologically and hydrologically significant in arid and semi-arid watersheds of the southwestern United States, and transport nutrients and sediment to downstream ecosystems, provide habitat for wildlife, and recharge aquifers used for drinking water.<sup>11</sup> The NWPR fails to account for the economic costs of degraded ephemeral streams and unprotected wetlands.

Beyond these intersections between New Mexico's economic engines and clean water, I will provide a few examples of why grandiose claims of an era of regulatory certainty made possible by the NWPR are false. First, the NWPR significantly changes the national regulatory landscape, cutting away at the CWA authors' goal of establishing a level playing field to regulate discharges from state to state. In our 21<sup>st</sup> Century economy, hundreds of businesses that operate in multiple states will have the added burden of navigating state surface water regulatory regimes that once shared a common baseline through CWA program implementation.

Another area of regulatory uncertainty is the reliance in the NWPR on determining whether waterbodies are perennial or intermittent in a "typical year." A lack of connectivity or perennality today or in a "typical year" is not a suitable feature that EPA, ACE and New Mexico can rely upon to define a jurisdictional water. Under the NWPR, ephemeral waters, such as the Santa Fe River, Rio Hondo, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito Plateau (which contain legacy contamination from the Manhattan Project), will have severed and interrupted jurisdiction in the middle and lower reaches. This creates a patchwork of jurisdictional and non-jurisdictional segments along the path of a river that make it nearly impossible to implement an effective water quality protection program, and likewise make it difficult for the regulated community to be certain of what is required of them.

Finally, the Agencies failed to address cross-media implications of the NWPR, thereby adding regulatory uncertainty for municipalities and businesses. The federal Resource Conservation and Recovery Act (RCRA) exempts wastewater treatment units from regulation under RCRA if, in addition to a number of other conditions, those units discharge effluent pursuant to an NPDES permit.<sup>12</sup> Under the NWPR in New Mexico, many facilities currently discharging pursuant to an NPDES permit are no longer required to have such a permit due to changed jurisdictional status of the receiving waterbody. As a result, these facilities may be subject to regulation under RCRA for the first time, are likely to not have performed an analysis of whether they are subject to RCRA and will likely be operating in violation of RCRA requirements as a result. Given that a number of these facilities are industrial or municipal facilities that have not contemplated regulation as a RCRA treatment, storage or disposal facility (TSDF), this will present an additional economic hardship on these facilities in New Mexico. If the industrial or municipal facilities discharging to an ephemeral stream lose NPDES permit coverage, these newly regulated TSDFs may also be deemed as land disposing of waste – or hazardous waste – as an implication of WOTUS.

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<sup>10</sup> See <https://www.epa.gov/sites/production/files/2016-02/documents/wetlandfunctionsvalues.pdf>.

<sup>11</sup> Levick, L., et al. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

<sup>12</sup> 42 U.S.C. § 6903(27).

## CONCLUSION

Enactment of the CWA is one of our nation's great successes. Waters that fifty years ago were thick with pollutants from point and nonpoint sources now support thriving recreational and economic activities and improved ecological conditions for aquatic species and wildlife. Our quality of life has improved as a result.

I appreciate the opportunity today to provide the New Mexico Environment Department's reaction to the NWPR. As illustrated by all of the evidence above, our reaction, in short, is that we now face a perfect storm of water quality devastation and economic harm from the rule itself and its rushed and reckless implementation by EPA and ACE, which precludes any opportunity for New Mexico to cover the regulatory gap before irreversible degradation unfolds.