

Impacts in New Mexico of Revised Clean Water Act Jurisdiction

Editor's Note: The following papers represent a transcription of the speakers' remarks made at the conference; no follow-up papers were submitted by the speakers. Remarks were edited for publication by the editor. The speakers did not review this version of their presentation, and the editor is responsible for any transcription and editing errors.



Shelly Lemon, New Mexico Environment Department

Shelly Lemon has worked for the Surface Water Quality Bureau (SWQB) of the New Mexico Environment Department for over 15 years, serving many distinct roles. The mission of the SWQB is to preserve, protect, and improve New Mexico's surface water quality for present and future generations. As bureau chief, Lemon currently manages and oversees three technical teams that fulfill the state's responsibilities under both the federal Clean Water Act and state Water Quality Act, such as developing and revising water quality standards, and implementing surface water protection regulations. Lemon earned a bachelor's degree in biology and a master's degree in hydrology from the University of Arizona. As a graduate student, Lemon worked for the Sustainability of semi-Arid Hydrology and Riparian Areas (SAHRA) and completed her thesis research on spatial and temporal variability in water chemistry associated with land use and hydrologic flow paths in the San Pedro River watershed, Arizona.

I was asked today to talk about different regulatory changes that have been happening. As Mike Connor pointed out in his previous talk, numerous regulatory changes have occurred over the past four years, with some having significant impacts. I'm going to give information about the scope and jurisdiction of the Clean Water Act and provide a brief history of the waters of the United States. Then I'll move on to the new Navigable Waters Protection Rule and discuss the actions the Environment Department is taking now to partially fill the gaps created by these new rules.

Over time, Supreme Court decisions have clarified that the jurisdictional scope of the Clean Water Act encompasses more than traditional navigable waters, but less than all waters. I would like to remind people that the purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. It does not grant federal jurisdiction over all waters found within the boundaries of the United States. As we know, many waters are hydrologically connected, and there are temporary or permanent upstream waters that have the potential to change downstream waters over a variety of spatial and temporal scales. Currently, the challenge is to reconcile the Twenty-First Century ecological and hydrological science's core concept of connectivity with the Clean Water Act's Nineteenth Century paradigm of navigability, and Congress has thus far declined to resolve this tension. I will also discuss how the Supreme Court has contributed to the confusion.

So, a brief history of Clean Water Act jurisdiction: we had a definition of waters of the United States for quite

a while, until relatively recently. The definition followed the 1986 WOTUS definition, which included traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, territorial seas, and adjacent wetlands. Then, in 2001 and 2006, the Supreme Court issued decisions that clarified that the scope of navigable waters must be more closely tied to protecting the integrity of waters used for navigation. In 2006, the Rapanos Court attempted to establish clear jurisdictional boundaries but was unable to reach a majority opinion, resulting in two opinions being formed from that decision. The Scalia opinion said that federal protection only extends to "relatively permanent" waters and wetlands with a continuous surface connection to larger rivers and streams. The Scalia opinion was the official plurality opinion of the court, in that although the majority did not join, it had the highest level of support with four justices. The Kennedy opinion relied on the "significant nexus" test, which requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. Despite being a concurrence, the Kennedy concurring opinion is the one that's most often cited in significant water jurisdiction cases since Rapanos. Essentially, the Kennedy concurrence was the law as far as courts were concerned until 2015.

After Rapanos, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers were left to formulate a rule that would modify the 1986 efforts to define the scope of waters protected under the Clean Water Act, based on the guidance in these three court cases:

United States v. Riverside Bayview (1985), SWANCC v. Corps (2001), and Rapanos v. United States (2006).

In 2015, a new definition of “waters of the United States” was developed, proposed, and issued, sparking significant litigation. The 2015 Clean Water Rule emphasized Kennedy’s significant nexus test, and it included traditional navigable waters, interstate waters and territorial seas, tributaries and adjacent waters due to their presumed significant nexus, impoundments of jurisdictional waters, certain regional waters within a floodplain, and looking at things on a case-by-case analysis for significant nexus. It depended on chemical, physical, and biological data to evaluate the jurisdiction of the waters, either individually or in combination.

Then, in 2020, a new rule was proposed and became effective on June 22, and that is the Navigable Waters Protection Rule, which emphasizes Scalia’s “relatively permanent” opinion. The new rule interprets the term “waters of the United States” to encompass these four categories of waters that are federally regulated under the Clean Water Act: territorial seas and traditional navigable waters; perennial and intermittent tributaries; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands next to other jurisdictional waters.

The Navigable Waters Protection Rule shows 12 categories of waters that are not considered waters of the United States and therefore are not federally regulated under the Clean Water Act, including ephemeral features, which is significant for the state of New Mexico. Most of our surface waters in the state are ephemeral waters. We also have groundwater, which wasn’t a change from the earlier waters of the United States definition, but the Supreme Court recently held in *County of Maui v. The Hawaii Wildlife Fund* that groundwater connectivity does not sever jurisdiction where discharges are the functional equivalent of a direct discharge. So groundwaters could be regulated if there is a functional equivalent to a direct discharge. We also have certain artificial lakes, ponds, and impoundments; ditches; prior converted cropland; and stormwater control features. Those were excluded, as well as wetlands that do not meet jurisdictional conditions, even if the surface connection is artificially broken, which is a key consideration. So, if there is a wetland divided by a road, it may no longer be jurisdictional if there is no surface water connection between the two to another jurisdictional water.

There are critical impacts to the State of New Mexico from this new rule. As I said before, most of our surface waters are ephemeral. Less than seven percent of New Mexico’s streams are perennial, leaving most of the state’s waters subject to pollution threats under this new rule, including important interstate streams such as the Rio Costilla in the Valle Vidal and the Gila River in the

southwestern part of the state. In addition, many of our perennial streams and intermittent streams are interrupted and therefore may not be subject to Clean Water Act protections because the surface water connection is broken. We also have ephemeral water bodies that serve as drinking water sources, which puts those sources under threat. Figure 1 shows the important estimates that the Environment Department has looked at: 89 percent or more of stream miles are non-jurisdictional because 89 percent of our waters are ephemeral. Up to 50 percent of perennial and intermittent streams may be non-jurisdictional due to these interruptions. Of course, 100 percent of our ephemeral streams are not jurisdictional, and 70 percent or more of our wetlands may not be jurisdictional because of the clause that if an artificial divide prevents surface connection, then the wetland is no longer jurisdictional. As a result, a large majority of National Pollutant Discharge Elimination System (NPDES) permits may no longer be needed (60 percent or more of individual permits; ~80 percent of general permits) because the location where they are discharged is no longer considered jurisdictional.

Over the past year, we’ve seen a trifecta of new Clean Water Act rules come into effect. As I mentioned earlier, the Navigable Waters Protection Rule, which took effect on June 22, 2020, has significant implications for ephemeral deregulation. We’ve already received complaints from the public about the impact of ephemeral alterations. The Clean Water Act Section 401 Certification Rule was also revised. That rule takes effect on September 11, 2020, and we’re still trying to determine its implications for the state and the department. We’re concerned about state conditions that may no longer apply under the new rule. Recently, the Corps of Engineers issued nationwide permits for Clean Water Act Section 404 dredge and fill activities. The last permits were issued in 2017 and are usually effective for five years, but the Corps decided to issue early and publish the revised nationwide permits on September 15. I will point out that the public comment period is still open, and the public can provide comments to the docket until November 16, 2020.

So, what is the Environment Department doing to help at least learn more about the impacts or help fill the gaps? We entered multistate litigation over the Navigable Waters Protection Rule. We also entered multistate litigation over the changes to the Section 401 state certification rule. We hired a contractor to conduct an NPDES gap analysis, evaluating where the state is deficient, where existing rules and regulations are already in place, and what funding and resources will be required to assume authority over the NPDES program in New Mexico. We are certainly commenting on and going to certify the proposed nationwide permits. We’re involved in the

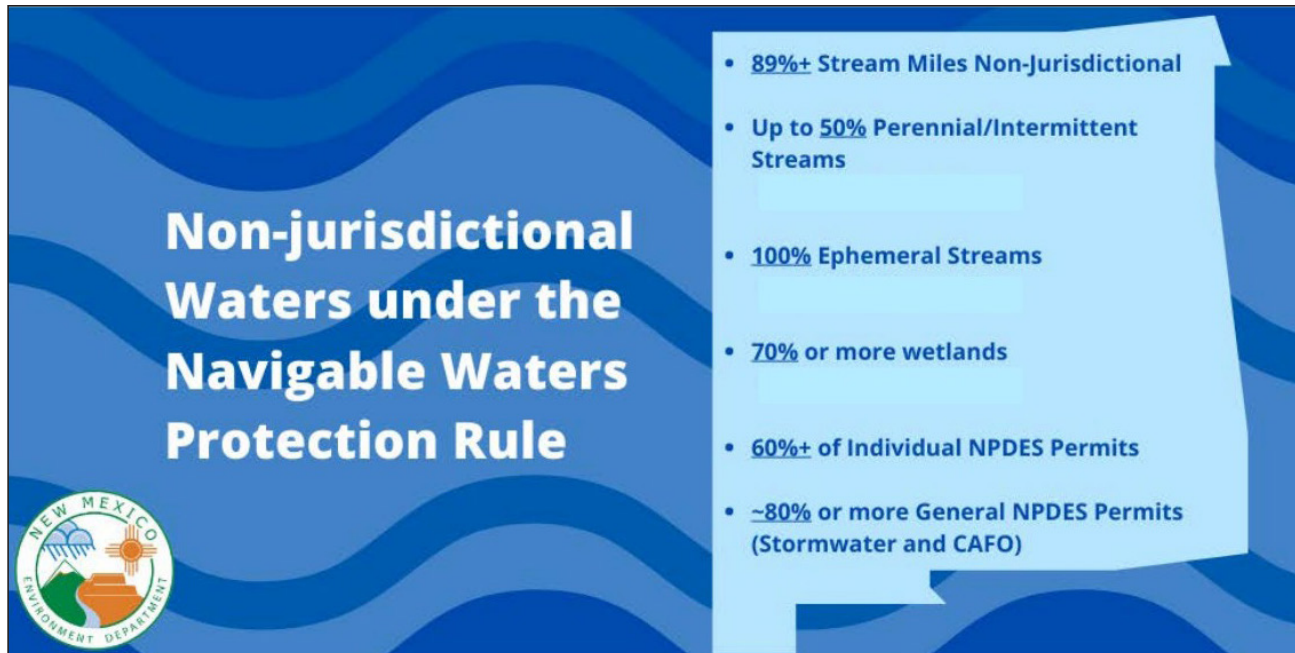


Figure 1. Critical impacts of NWPR in New Mexico.

water data initiative and a data challenge, which you may have heard Stacy Timmons talk about yesterday. We are involved in the national stream flow duration study, which is helping to implement the Navigable Waters Protection Rule. The Surface Water Quality Bureau also has a hydrology protocol that shares a similar concept. It basically helps to decide whether the stream is ephemeral, intermittent, or perennial. We're investigating the potential to enter into memoranda of understanding with the Corps and EPA regarding 401 certifications, so that both federal and state agencies understand the process and timelines that we agree upon. We're also coordinating with a variety of stakeholders to discuss water challenges and potential actions. The Navigable Waters Protection Rule is not rebalancing the relationship between states and the federal government, which the Clean Water Act does envision. It's essentially punting environmental protection to the states, and some states, like New Mexico, do not have the infrastructure right now. We're not equipped to adjust for those immediate gaps. We're working on it, but it won't be an immediate solution.

I believe I have a couple of minutes for questions. I provided my contact information (shelly.lemon@state.nm.us, 505-470-5018), along with that of my boss, Rebecca Roose (rebecca.roose@state.nm.us, 505-670-6852), who is the Director of the Water Protection Division, and John Verheul, our Assistant General Counsel (john.verheul@state.nm.us, 505-469-8862). If you have any legal questions, you should contact John to discuss them.

It looks like the first question is, "Can you say more about the number and kind of complaints from the public regarding the impact of ephemeral alterations?" We receive complaint calls about people filling in arroyos with dirt and other debris. With storm events, people are reporting that their roads are getting flooded and that clogged culverts have gone awry. If they're damaged in any way, there's no regulation to work on that. We haven't had many problems. We've just gotten a few complaints about ephemeral filling when it rains. We've also talked with the Department of Transportation, and they're very worried about the ephemeral exclusion.

The second question asks, "Is the Rio Grande, especially below Caballo, considered an ephemeral stream? It is bone dry most of the year." It is not considered ephemeral. I would consider something like that to be interrupted. The Rio Grande at the Texas border is traditionally navigable water. Therefore, if there is a surface connection to the traditionally navigable water at the Texas border in any given year, it would be considered jurisdictional. So, the Rio Grande is still jurisdictional in that area. Justin Riggs, who will be speaking after me, may have some additional comments on that.

The last question is, "Can the New Mexico legislature provide the Environment Department with the ability to replace the diluted rules? If yes, what action is being taken?" We cannot replace the federal rule. What we can do is establish state regulations and statutes to help protect the state's surface waters, and the state has a more stringent or protective definition of surface waters.

However, we do not have a regulatory program to regulate discharges to surface waters of the state. Right now, the federal government regulates those discharges. There are federal permits under the Clean Water Act, not under the state Water Quality Act. We are investigating the gaps

in regulations and statutes that may require changes or implementation, as well as the resources needed to transfer these programs from the federal government to the state level. Obviously, implementing it will require people, resources, and time, which we are looking into.



Justin Riggs, U.S. Army Corps of Engineers

Justin Riggs is a regulatory project manager with the U.S. Army Corps of Engineers Albuquerque District. He has been with the district for eight years. Justin's area of responsibility is southern New Mexico and west Texas. He evaluates projects under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Justin has a bachelor's degree in soil science and a master's degree in plant and environmental sciences, both from New Mexico State University. Before working for the Corps, Justin was a soil scientist for the Natural Resources Conservation Service. He was responsible for mapping soils on White Sands Missile Range as well as parts of Doña Ana, Sierra, and Luna Counties in New Mexico.

As mentioned in the previous presentation, I will delve into the Navigable Waters Protection Rule in a bit more depth.

We're going to talk about the key changes from the 2019 rule. Under the new rule, we have only four categories, which were previously discussed. However, in the Obama Administration's 2015 rule and the 1986 rule, there were originally eight jurisdictional waters. Today, we have four categories: territorial seas and traditionally navigable waters; tributaries; lakes, ponds, and impoundments of jurisdictional waters (the new category); and adjacent wetlands. Regarding the key changes, I mentioned earlier that there were eight categories of jurisdictional waters; now we have four, with the addition of twelve categories of excluded waters that are not jurisdictional. Under the categories of jurisdictional waters, the new rule has combined traditionally navigable waters with territorial seas. Those were both jurisdictional. Under the other two rules, they were categorized separately, and currently, they are combined into one. The other significant issue is the absence of a stand-alone category for interstate waters. In the 2015 rule, or the 2019 rule, as it was renamed, and the 1986 rule, waters across state boundaries were considered interstate waters and thus jurisdictional. Today we don't have that. We also no longer conduct case-specific significant nexus analyses, where we had to examine and determine if water was chemically, physically, or biologically connected to the downstream water that is no longer at our disposal. Another key change is the new category of lakes, ponds, and impoundments.

We'll start with (a)(1) territorial seas and traditional navigable waters (TNW). There are no major changes

aside from the new rule that combines the categories of navigable waters and territorial seas. As mentioned, the Rio Grande is traditionally navigable water after the State Line, right at the American Diversion Dam. Under the Clean Water Act, the Rio Grande is considered perennial even though it is shut off and dry most of the year. According to the Corps of Engineers, we consider it perennial and thus jurisdictional, and it becomes a TNW in Texas.

The major changes came in (a)(2) tributaries. Again, we don't have a significant nexus test, and we no longer have ephemeral streams. Now, one thing I want to make clear is that if you are in an ephemeral tributary, but upstream of that tributary there is an intermittent or perennial reach, as long as there is still a surface connection to downstream water, then it would still be considered jurisdictional. In this case—where I am and where most of us are—the Rio Grande, Gila River, Pecos, or any of those major rivers that have an upstream intermittent or perennial and an ephemeral reach are still jurisdictional. The ephemeral reach would not be jurisdictional, but the intermittent or perennial would still be jurisdictional. About 86 percent of the waters within the Albuquerque District are ephemeral. That includes waters in west Texas and southern Colorado. In New Mexico itself, I imagine it's even a little bit higher than that. But within the Albuquerque District, we have lost 86 percent of our jurisdictional waters.

The new section is (a)(3) lakes, ponds, and impoundments of jurisdictional waters. The main thing here is that even if a water is impounded, as long as it has some sort of surface water connection or is inundated or flooded from an (a)(1), (a)(2), or (a)(3) water, it is still jurisdictional.

Even if there is a flood control dam or something above it, there is still potential for jurisdiction if it maintains a connection or is inundated by flooding.

The last one is (a)(4) adjacent wetlands. The big change here is that if there is a break, particularly a man-made break, there is a potential loss of jurisdiction. A wetland has to have some sort of connection by a culvert, a stream, or something to an (a)(1), (a)(2), or (a)(3) water. If there is a man-made break and no connection to that water, then the wetland is indeed non-jurisdictional under the new rule. Again, we no longer perform significant nexus tests.

The big thing, and it has been touched on before, is that now we have excluded features. These are waters that are not listed as waters of the United States (WOTUS):

- Waters not listed as WOTUS
- Groundwater
- Ephemeral features
- Diffuse stormwater runoff
- Ditches not identified as WOTUS
- Prior converted cropland (PCC)
- Artificially irrigated areas
- Artificial lakes and ponds
- Water-filled depressions incidental to mining or construction activity
- Stormwater control features
- Groundwater recharge, water reuse, and wastewater recycling structures
- Waste treatment systems

We'll go through them briefly. The key elements of exclusions are uplands and surface water connections. The Corps of Engineers has never asserted jurisdiction over uplands, so there is no change in this regard. Surface water connections are excluded. Certain features can act as surface water connections. As I said, if it is an ephemeral reach, but it is the direct connection for the upper reach of either intermittent or perennial water, that water can still maintain jurisdictional status. It's just that the ephemeral reach of that stream would not be jurisdictional.

Of the exclusions, the first exclusion is (b)(1) waters not listed as WOTUS. This is a catchall. If it's not an (a)(1), (a)(2), (a)(3), or (a)(4) water and does not meet the other exclusions, we throw it into this exclusion as waters not listed as WOTUS. Groundwater (b)(2) has been touched on before. The big thing is that ephemeral features (b)(3) are no longer jurisdictional. For (b)(4) diffuse stormwater runoff and directional sheet flow over upland, there is no major change. We have never asserted jurisdiction over that.

Under (b)(5) of the new rule, almost no ditches are jurisdictional. Previously, under the 2015 rule, or as we call it, the 2019 rule, or under the 1986 rule, ditches that maintain a direct or indirect connection were considered jurisdictional. For example, we still maintained jurisdiction over the Elephant Butte Irrigation District irrigation

network here in Doña Ana County. Under the previous rule, that network was considered a water of the United States. It maintained a connection to and from the Rio Grande. Under the new rule, it is no longer jurisdictional. So, we've lost a lot of jurisdiction with this ditch exclusion as well.

We don't deal with (b)(6) prior converted cropland too much here. It's a Natural Resources Conservation Service call, usually for wetlands, but if something were considered prior converted cropland, we did not have jurisdiction over it. There's no change there. We've never had jurisdiction over converted cropland. There is no major change with (b)(7) artificial irrigated areas. For (b)(8) artificial lakes and ponds, if an artificial lake and pond had a connection to an (a)(1) through (a)(4) water under the previous rules, it would have been jurisdictional. But now, under the new rule, it is no longer. We've never had jurisdiction over water-filled depressions incidental to mining and other construction, (b)(9), so there is no major change there. It's the same with (b)(10) stormwater control features, (b)(11) wastewater recycling structures, and, finally, (b)(12) waste treatment systems.

The big thing with the new rule is that the Albuquerque District of the Corps of Engineers has lost jurisdiction over the majority of our waters. We have been issuing permits across ephemerals for years, and it has had a major impact on our workload. We have individuals, municipalities, and other groups working within ephemeral reaches, which are now exempt from permits, that fill arroyos and ephemeral streams. They are conducting work in those streams that have an impact both downstream and upstream, and can affect those intermittent and perennial reaches. We have issues with the ephemerals being non-jurisdictional in the sense that if they are blocked off, filled, and no longer meet that connection downstream, there are questions. Does the reduced surface water connection within the ephemeral reach now remove jurisdiction for the upper reaches, even though they are perennial or intermittent? Those are questions that haven't been answered yet. There are potential problems with this new rule, but we'll work through it, and we do the best we can.

To get further information on the Clean Water Act, visit <https://www.epa.gov/nwpr>. You can direct questions to the Environmental Protection Agency at CWAwotus@epa.gov. My email address is Justin.C.Riggs@usace.army.mil. People asking questions is where we get the best information. At this point, I would like to answer all the questions you have. I've got the Q&A open.

The first question says, "What is the status of ephemeral streams that are effluent dependent and flow intermittently?" We cannot use an effluent flow as a form of water to say whether something is intermittent or perennial. We have to go by the definition. If there is natural flow from a rainstorm or precipitation event, and

that's the only major form of water, we would assume that the stream is ephemeral, even if it has effluent flow. We would not consider the effluent flow because it can always be cut off. It's not considered a permanent type of flow, so we cannot consider it.

Another question asks, "Could you say anything about the changes in nationwide permits that were proposed in September?" Yes, we have a lot of changes—some good, some bad. Within the nationwide permit program, we have around 55 permits that we verify for individuals, municipalities, and other groups to use. We were directed to reissue those this year, and we have started that process. There are new changes, one of which is that many of our permits have a 300-linear-foot limit, stating that a permit holder cannot impact, change, or experience any loss exceeding 300 feet. Under the new proposed nationwide permits, most of those limits are gone. So, the rule reverts back to the limit of half an acre. Most nationwide permits have a threshold of around half an acre, but some were also limited to 300 linear feet, which is now no longer applicable. There is a proposal for federal agencies to be exempt from reporting to the Corps of Engineers. There are a few other minor changes, but the major change is that the impact thresholds are being reduced, effectively allowing for more impact than was previously allowed under the old nationwide permits.

The next question says, "Is that estimate of 90 percent measured in stream miles?" It is measured by stream miles. Yes.

Fernald: Justin, I have a question for you. Where do you think the state really needs to step in? There are a lot of things they could do. But if you were going to give a

priority item for the State of New Mexico, where do you think they need to step in, either places where the federal role has been limited, or places you see that really need some action?

Riggs: The major action we need—and I'm talking as Justin Riggs now, not as a federal employee—is to address this loss of ephemeral waters. We have a major issue with that. We have lots of work going on in our waters. Again, they're happening in ephemeral streams, which the federal agency does not have jurisdiction over. So, it would be good if the state could have some sort of law/policy/rule—that's way above my pay grade—to address that issue, perhaps some sort of permit or some sort of Clean Water Act analog that the state can use to address this issue of the loss of ephemeral streams.

Finally, the last question asks, "The rule creates regulatory uncertainty, as definitions of ephemeral, intermittent, perennial, and typical year are subjective and not easily applied. What does this mean for the Gila that dries out similarly to the Rio Grande, although it isn't necessarily interrupted?" The Gila River is still considered perennial under both the previous and current WOTUS rules. There are significant uncertainties surrounding the definitions of ephemeral, intermittent, and perennial. We're working on that right now with the New Mexico Environment Department and the EPA, trying to figure out a better way to address those. But, again, the Gila River is considered perennial by the Corps of Engineers.

Fernald: Wonderful. Well, that's perfect timing, Justin. Thanks a lot for leaving time for questions.