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November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460
E-mail: OW-Docket@epa.gov

Re: EPA-HQ-OW-2011-0880, Proposed Clean Water Act Waters of the US Rule

To Whom It May Concern:

Amigos Bravos is a New Mexico clean water advocacy organization guided by social justice principles. Amigos Bravos' mission is to protect and restore the waters of New Mexico, and ensure that those rivers provide a reliable source of clean water to the communities and farmers that depend on them, as well as a safe place to swim, fish, and go boating. Amigos Bravos works locally, statewide and nationally to ensure that the waters of New Mexico are protected. We write to thank you for taking steps to protect New Mexico's waters by clarifying the scope of the Clean Water Act through the proposed EPA and U.S. Army Corps of Engineers Definition of the Waters of United States Proposed Rule (Rule). We urge you to finalize this Rule and to take additional steps to restore clean water protections to New Mexico's scarce and precious waters.

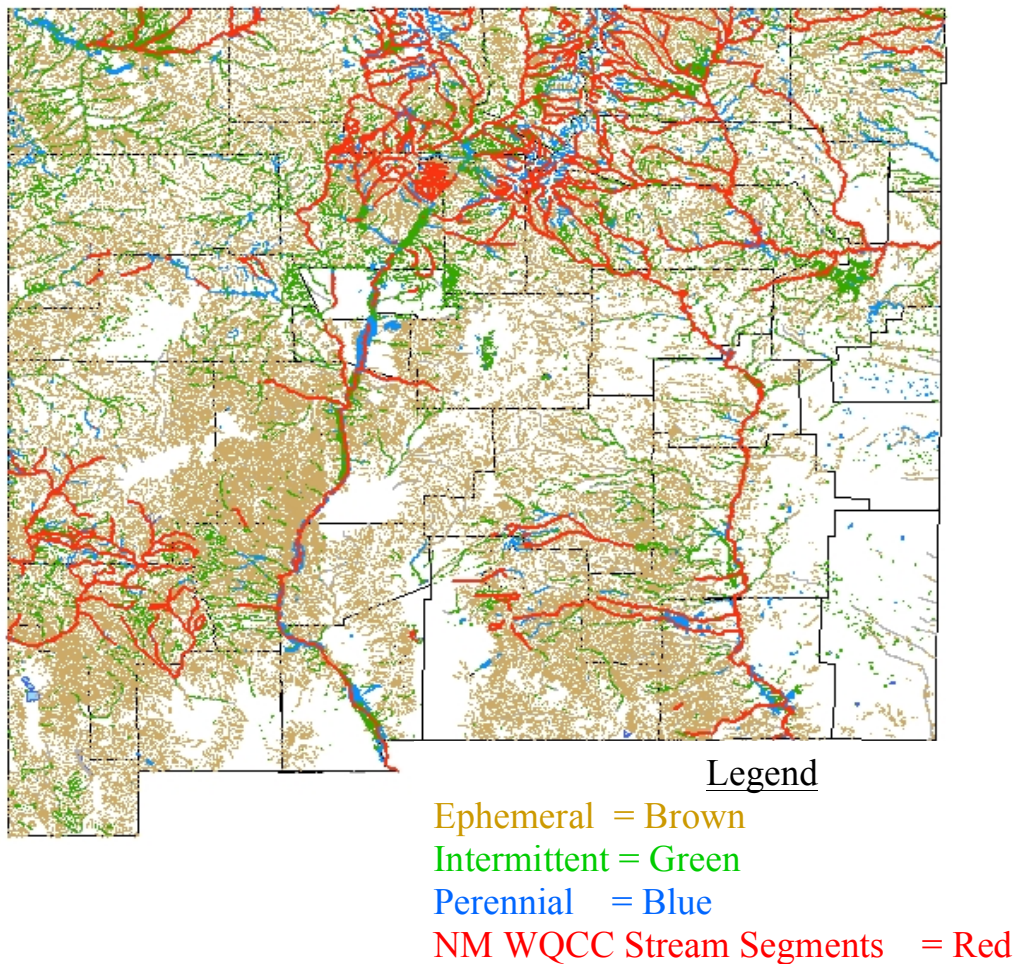
In New Mexico, where up to 94% of our waters are intermittent and ephemeral,¹ we strongly support the clarification that Clean Water Act protections apply to streams that flow only seasonally. (See Figure 1 below for map of intermittent and ephemeral waters in New Mexico.) Since the US Supreme Court decisions in the Rapanos and Carabell cases there has been a loss of historic protections for many of our small streams which provide clean water for drinking, irrigation and wildlife in New Mexico. These Supreme Court decisions have made it confusing and burdensome for the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers to protect small streams and wetlands under the Clean Water Act. As a result, enforcement actions against polluters have declined, and it has become clear that some polluters are using the decisions as a justification to avoid permitting and reporting requirements for discharging

¹ See 2010-2012 State of New Mexico Clean Water Act 303d/305b Integrated Report, page 4. Available at: <http://www.nmenv.state.nm.us/swqb/303d-305b/2010-2012/>

pollutants into our waters. The Rule would clarify that some of the waters that have lost protections in the confusion after the Supreme Court decisions, namely ephemeral and intermittent tributaries, are once again protected under the Clean Water Act.

Ephemeral and intermittent waters, waters in closed basins, wetlands, and playa lakes all serve critical functions to both wildlife and people in New Mexico. As an arid state, we rely upon all of our water resources and depend upon those resources staying clean and healthy for drinking, irrigating, wildlife habitat, cultural practices and industrial uses. Since we are a non-delegated state under the NPDES program we rely even more than other states on EPA and USACE to regulate discharges to our state's water resources, thus making it all the more critical that essential Clean Water Act Protections are applied accurately and in a manner that protects water quality across the state.

Figure 1: Types of New Mexico Surface Waters



(Figure taken from NMED exhibit at New Mexico's 2004 Triennial Review of Water Quality Standards. Almost all of the red stream segments are perennial)

I. Importance of Ephemeral and Intermittent Waters in New Mexico

Ephemeral waters are critically important for the health of New Mexico's communities, wildlife and economy. A search of the New Mexico Department of Game and Fish's BISON-M database shows that almost one fifth of NM vertebrate species, excluding fish, (127 species) use ephemeral and/or intermittent waters (list attached as Exhibit 1). These 127 vertebrate species include: 9 taxa classified as State and/or federal threatened, endangered or candidate; 8 taxa classified as State and/or federal sensitive or species of concern 24 taxa classified as State "Species of Greatest Conservation Need"; 25 game species; 1 taxa endemic to NM; and 10 species listed as of cultural importance to Pueblo Tribes (Exhibits 2 and 3). Even some fish use ephemeral waters. For example, Pecos Pupfish and White Sands Pupfish (both State Threatened, State "Species of Greatest Conservation Need", and federal Species of Concern) are exploiters which will move into ephemeral waters when available. The New Mexico Department of Game and Fish (NMDGF) actively manages 17 isolated wetlands and five intermittent streams (Mimbres River, Running Water Draw, Tularosa Creek, Three Rivers, Tajiue Creek) to provide fishing opportunities for resident and non-resident anglers.²

Ephemeral waters are essential for all three species of spadefoot toads in New Mexico. Spadefoots stay burrowed in the soil (several years has been documented) until conditions are suitable for breeding. Emergence from burrows is triggered by thunderstorms and breeding occurs quickly (as short as one night) in ephemeral waters. Eggs hatch in as little as 15 hours, and tadpoles metamorphose and leave the ephemeral waters in as little as 13 days. Ephemeral waters also appear to be important to Box Turtles, Garter Snakes, and tiger salamanders. Many of crustaceans and insects also occur in ephemeral and intermittent streams.



Bitter Lake Playa Lake, NMED File Photo

Protecting ephemeral and intermittent waters in New Mexico is essential for protecting public health. EPA estimates that 280,000 people in New Mexico receive drinking water from sources that rely at least in part on ephemeral, intermittent or headwater streams

² Letter from Larry Bell, Director of the New Mexico Department of Game and Fish to EPA (NMDGF comment letter on the 2003 ANPRM), April 15, 2003, at 5.

(Exhibit 4).³ These impacts are not hypothetical as there have been numerous instances of ephemeral waters being found not jurisdictional in New Mexico.⁴

II. The Need for Protections for Playa Lakes and Closed Basins in New Mexico

We are concerned that the proposed Rule does not do enough to protect isolated waters like playa lakes and waters in closed basins. Waters within the closed basins in New Mexico (Tularosa, Mimbres, Estancia, San Augustine, Salt, Southwestern and North Plains Basins) cover up to one fifth of New Mexico and include 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands.⁵ There are over 20,000 playa lakes in eastern New Mexico and west Texas, a region that supports some of the most concentrated areas of playa lakes in the country.⁶

Playa lakes provide habitat for many New Mexican animal species. At least 37 mammal species use playas nationwide for some or all of their life cycle. In addition, there are 185 bird species in 41 families reported in playas.⁷ In New Mexico, there are 131 species that are documented as using playas and closed basins which include 28 game species and 10 species that are considered culturally important to Pueblo Tribes (Exhibit 5) In addition, there are 3 federally endangered (Interior Least Crane, Whooping Crane, and the Brown Pelican) and 2 federally threatened species (Mountain Plover and Piping Plover) that are found in NM playa lakes (Exhibit 6). New Mexico playas are also a primary recharge for the Ogallala aquifer of the southern high plains. Photos of many of New Mexico's playa lakes can be found in Exhibit 7.



Sacramento Closed Basin

³ Note that this analysis was conducted in 2006 prior to the surface water diversions for the cities of Albuquerque and Santa Fe going online, so this number is most likely substantially greater now.

⁴ See SPA-2007-636-ABQ, SPA-2007-00677-ABQ, SPA-2007-442-ABQ, SPA-2007-3540-ABQ, SPA-2008-54-AQB (research was conducted only for 2007 and 2008 and is not comprehensive)

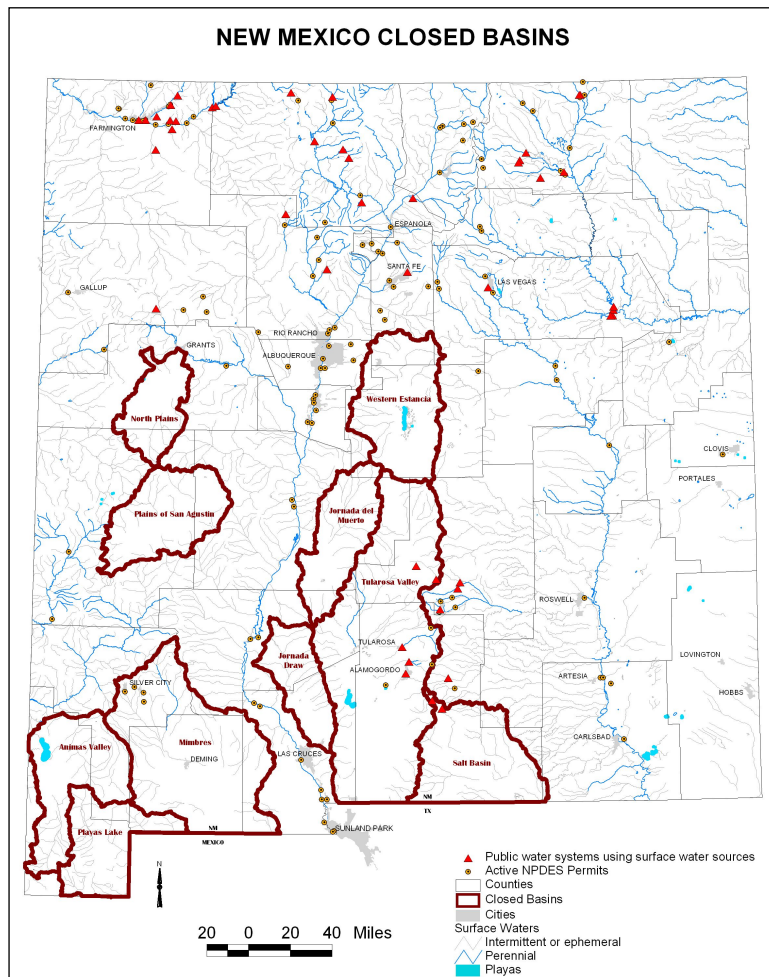
⁵ Written Testimony of Ron Curry, Secretary of the New Mexico Environment Department, before the United States House of Representatives' Transportation and Infrastructure Committee Regarding the Clean Water Restoration Act (HR 2421) July 17, 2007

⁶ Haukos, D. A. and L. M. Smith. 1994. The importance of playa wetlands to biodiversity of the Southern High Plains. *Landscape and Urban Planning* 28:83–98.

⁷ Id

There is a wastewater treatment plant located on the floodplain of the Tularosa River, a river located in one of New Mexico's closed basins, that has a history of discharges to the river. Because New Mexico is a non-delegated state, without Clean Water Act coverage there would be no enforcement options or protections under the NPDES program for the river and downstream communities. The Mescalero Tribe uses drinking water from springs at the headwaters of the Rio Tularosa, and the residents of Nogal and Bent depend on the local shallow water table associated with the Tularosa for their drinking water. Some residents drink directly from the river.⁸ The Mimbres River, another closed basin waterbody, starts in the Aldo Leopold Wilderness area providing fishing and recreational opportunities for many locals and visitors alike. The Mimbres then leaves the wilderness area and flows through the Mimbres Valley providing essential water for irrigation (hay, alfalfa and apples) and livestock.

Figure 2: Map of New Mexico Closed Basins



⁸ Letter from Governor Bill Richardson to the EPA (New Mexico comment letter on the 2003 ANPRM), April 7, 2003, at 6.

Closed basins are essential to New Mexico's economy and are essential to interstate commerce. The Department of Game and Fish has stated that they believe a significant portion of wildlife viewing in New Mexico, which brings in about 550 million annually, is conducted by out of state recreationists in the closed basins of New Mexico.⁹

V. Conclusion

Amigos Bravos strongly supports the proposed Rule and urge you to quickly finalize it and then take additional steps to ensure that waters in closed basins and playa lakes are protected. These are waters that New Mexicans drink, swim in, and irrigate from and we urge you to restore the Clean Water Act protections that were in place for almost 30 years prior to the Supreme Court decisions to ensure our health and way of life is protected.

Thank you for your consideration.

Sincerely,

Rachel Conn
Projects Director
Amigos Bravos

⁹ Letter from Larry Bell, Director of the New Mexico Department of Game and Fish to EPA (NMDGF comment letter on the 2003 ANPRM), April 15, 2003, at 6.