



New Mexico Environment Department

Moving Towards a State-Led Surface Water Permitting Program

Shelly Lemon, Surface Water Quality Bureau

December 8, 2023





Existing Surface Water Quality Protections



- Under the federal **Clean Water Act (CWA)** it is illegal to discharge a pollutant through a point source into a “*water of the United States,*” or WOTUS, without a permit.
- New Mexico’s **Water Quality Act (WQA)**, authorizes the State to require permits for the discharge of pollutants to waters.



Existing Surface Water Quality Protections Clean Water Act (CWA) Permits

□ In New Mexico...

- The State does not have authority (“primacy”) to issue federal CWA permits.
- The Section 402 NPDES permit program is administered by EPA.
- The Section 404 Dredged or Fill Permit Program is administered by the U.S. Army Corps of Engineers.
- New Mexico does issue Section 401 Certifications of NPDES and 404 Dredged or Fill Permits.
 - Section 74-6-4(F) of the NM WQA states that NMED “...shall provide technical services, including certification of permits pursuant to the federal [CWA]...”
 - Section 74-6-5(B) of the NM WQA states that the Water Quality Control Commission (WQCC) “...shall adopt regulations establishing procedures for certifying federal water quality permits.”
 - 20.6.2 NMAC articulates the procedures for certification of NPDES and Dredged or Fill permits, as well as other federal permits.



Why Now?

New “Waters of the U.S.” Definition

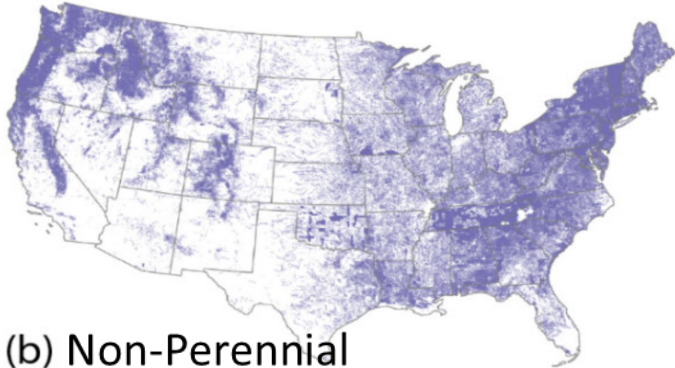
- Federal jurisdiction under CWA is limited to “**waters of the US**” but no clarification of this term provided in the enacting language
- EPA and the Army Corps tried to clarify in the 1980s
- Starting in 2000s, Supreme Court started to weigh in on this issue
 - Resulted in “significant nexus” test and “relatively permanent” test
- In 2022, Supreme Court heard **Sackett v. EPA** to consider whether the “significant nexus” test is the proper test to determine CWA jurisdiction
- **May 25, 2023**: Supreme Court decision in Sackett case – emphasizes “relatively permanent” test
- The new rule was published in the Federal Register on **September 8, 2023**
- NMED’s understanding is that **federal discharge permits** are in effect unless they are terminated or are not renewed



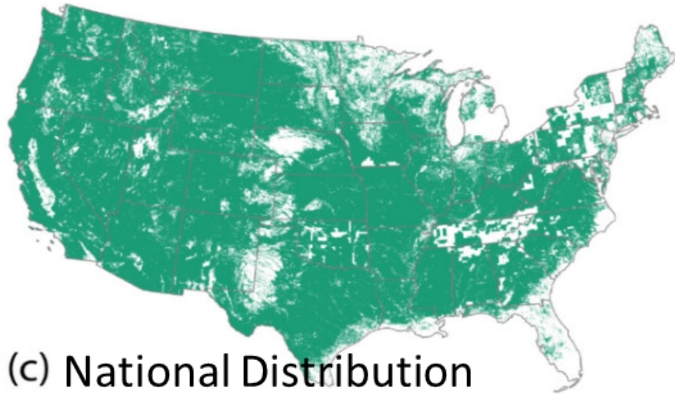
Why Now?

What does *Sackett* mean for New Mexico?

(a) Perennial



(b) Non-Perennial



(c) National Distribution

Non-Perennial
8,066,218 km
79%

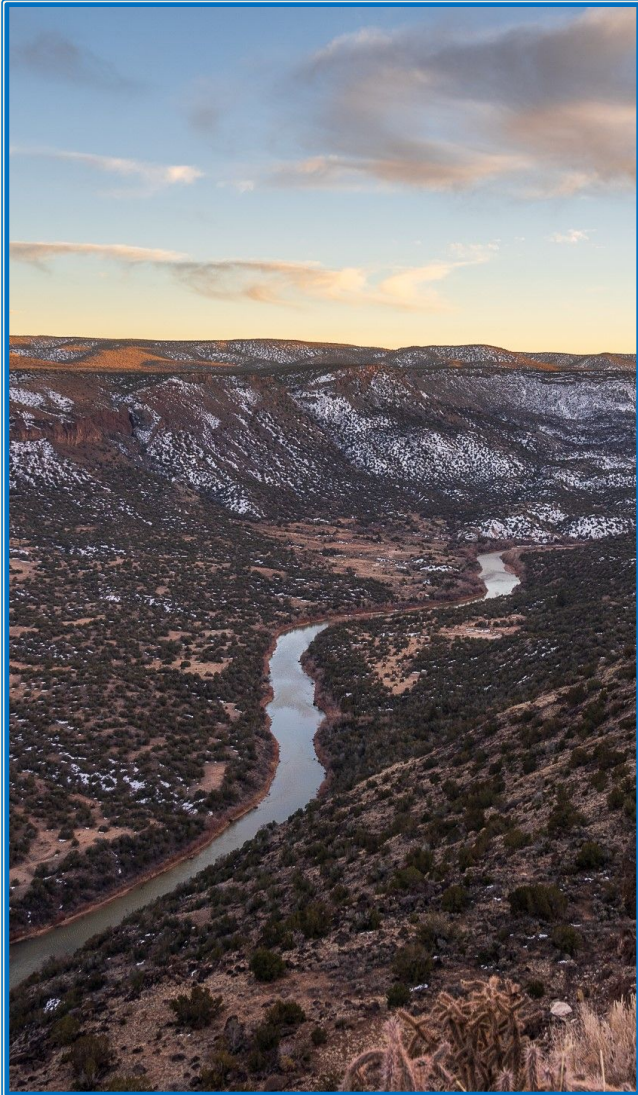


Perennial
2,182,018 km
21%

- Many of NM's waters are likely no longer subject to NPDES and Section 404 permit requirements.
- State law recognizes a much broader set of waters than WOTUS, but under the status quo, NM cannot fully protect its waters from contamination and degradation.
- These maps compare the extent of intermittent vs perennial streams
 - 6,698 perennial river/stream miles
 - 190,225 non-perennial miles (96%)
 - 85,369 acres of public lakes/reservoirs
 - 1,053,809 acres of freshwater wetlands



Looking Ahead: State Permitting Program Overview



- New Mexico's federal NPDES permitting universe consists of **approximately 4,641 permittees.**
- **A state permitting program to protect "waters of the state" (beyond WOTUS) and including wetland protections may result in additional permittees.**
- NMED must build capacity in (1) permit writing, (2) pretreatment program, (3) biosolids program, (4) compliance monitoring, (5) enforcement, (6) data management and handling, etc.



Looking Ahead: State Permitting Program Overview

- Phase I – Outreach; Regulations and Statutes; Program Outline; Funding Strategy
- Phase II – Guidance, Standard Operating Procedures, Templates; EPA Application
- Phase III – Staff Recruitment, Hiring, and Training; State/EPA Memorandum of Agreement; Application Package
- Phase IV – Phased Implementation of Permitting Program
- Timeline to Full Program Implementation:
 - 7-10 years for NPDES program (municipal, industrial, stormwater, pretreatment, sludge, etc.).
 - 4-6 years for “surface waters of the state” (SWOTS, or non-WOTUS) program.



Looking Ahead: State Permitting Program Overview

**Currently in Phase 1 = Outreach; Regulations and Statutes;
Program Outline; Funding Strategy (hired 3 FTE + lawyer)
*Phase 1 = approx. 24-month timeline.***

As we move forward with developing a permitting program:

1. We will be working with stakeholders to evaluate the scope of a state permit program (e.g., NPDES, state-only, wetlands).
2. A state NPDES permitting program cannot be less stringent than the federal program under the CWA.
3. Program development will evaluate how a state permitting program would be implemented and applied to “surface waters of the state” including wetland protections.
4. We will be developing draft regulations and statute (if necessary) in the next calendar year.
5. We have initiated database development to meet both SWQB and GWQB discharge e-permitting and e-reporting needs and hope to have a database as early as next year.



How to Stay Informed: SWQB State Permitting Program

- There will be additional opportunities to share thoughts, concerns, and questions about a state-led surface water quality permitting program. **If you would like to stay informed about this process or if you have questions, please email swq.pp@env.nm.gov.**
- **SWQB website:**
<https://www.env.nm.gov/surface-water-quality/spp/>



Home / Surface Water Quality Bureau



**Surface Water Quality Permit
Program Initiative**



Contact us

Ph: 505-827-0187 Find a list of Surface Water Quality staff contacts [here](#).



To End...

“Water is the most critical resource issue of our lifetime and our children's lifetime. The health of our waters is the principal measure of how we live on the land.”

Luna Leopold,
First Chief Hydrologist of the USGS



Contact Information

swq.pp@env.nm.gov

Pam Homer, State Permit Program Team Lead

Surface Water Quality Bureau

New Mexico Environment Department

Pam.Homer@env.nm.gov

Shelly Lemon, Bureau Chief

Surface Water Quality Bureau

New Mexico Environment Department

Shelly.Lemon@env.nm.gov

Christal Weatherly, Assistant General Counsel

Office of General Counsel

New Mexico Environment Department

Christal.Weatherly@env.nm.gov

John Rhoderick, Director

Water Protection Division

New Mexico Environment Department

John.Rhoderick@env.nm.gov