



New Mexico Environment Department

Surface Water Discharge Permitting Program

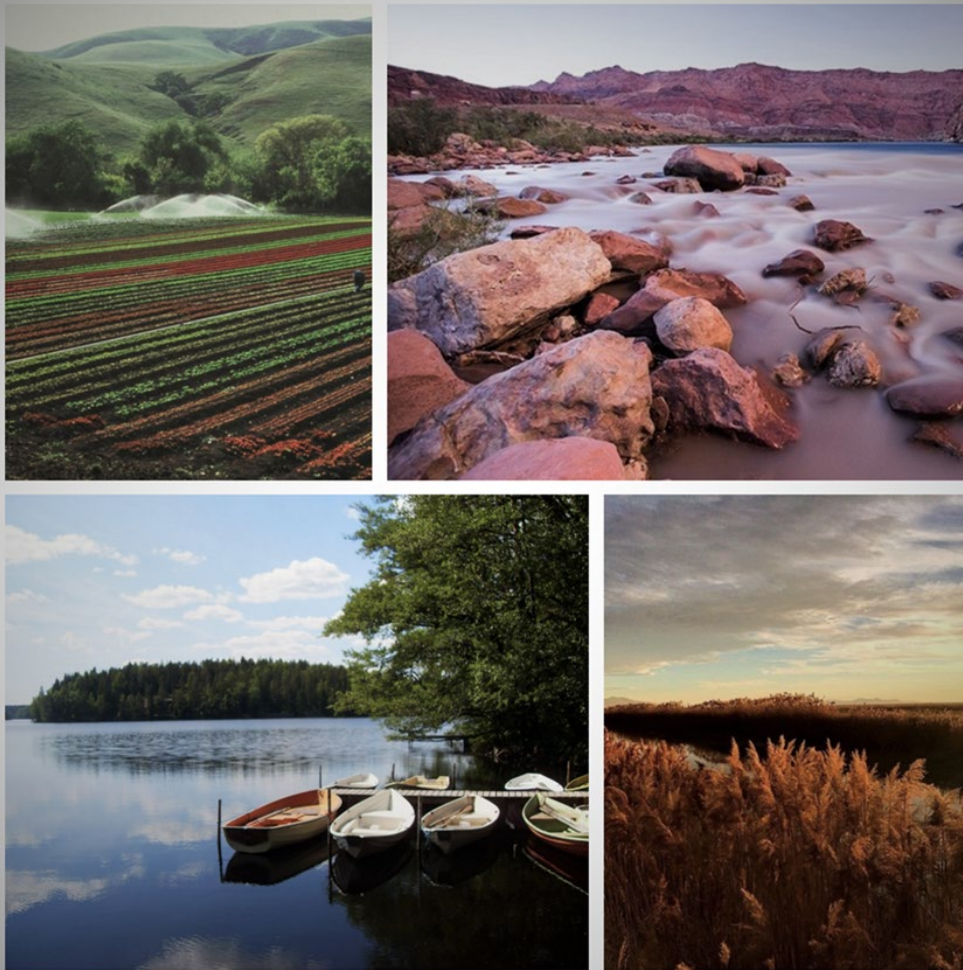
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Surface Water Advisory Panel

August 19, 2024



Surface Water Quality Protections



- Under the **Clean Water Act (CWA)**, 33 U.S.C. § 1251 *et seq.*, 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)**, NMSA 1978, §§ 74-6-1 to -17, authorizes the State to issue permits for the discharge of pollutants to waters.



Federal & State Clean Water Goals

Clean Water Act

- Prevent, reduce, and eliminate pollution in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
- Improve water quality such that the Nation’s waters are “fishable” and “swimmable.”
- Eliminate the discharge of pollutants into WOTUS (by 1985).
- Water quality has improved under the authority of the CWA, which has had direct benefits for drinking water, public health, recreation, wildlife, & local economies.

Water Quality Act

- Provides authority for water quality management in NM.
- Establishes the Water Quality Control Commission as the “state water pollution control agency” for all purposes of the CWA.
- Protect water quality and designated uses.
- Prevent, reduce, and abate water pollution at sites that pose a risk to human health and the environment.
- May adopt regulations for surface water discharges.



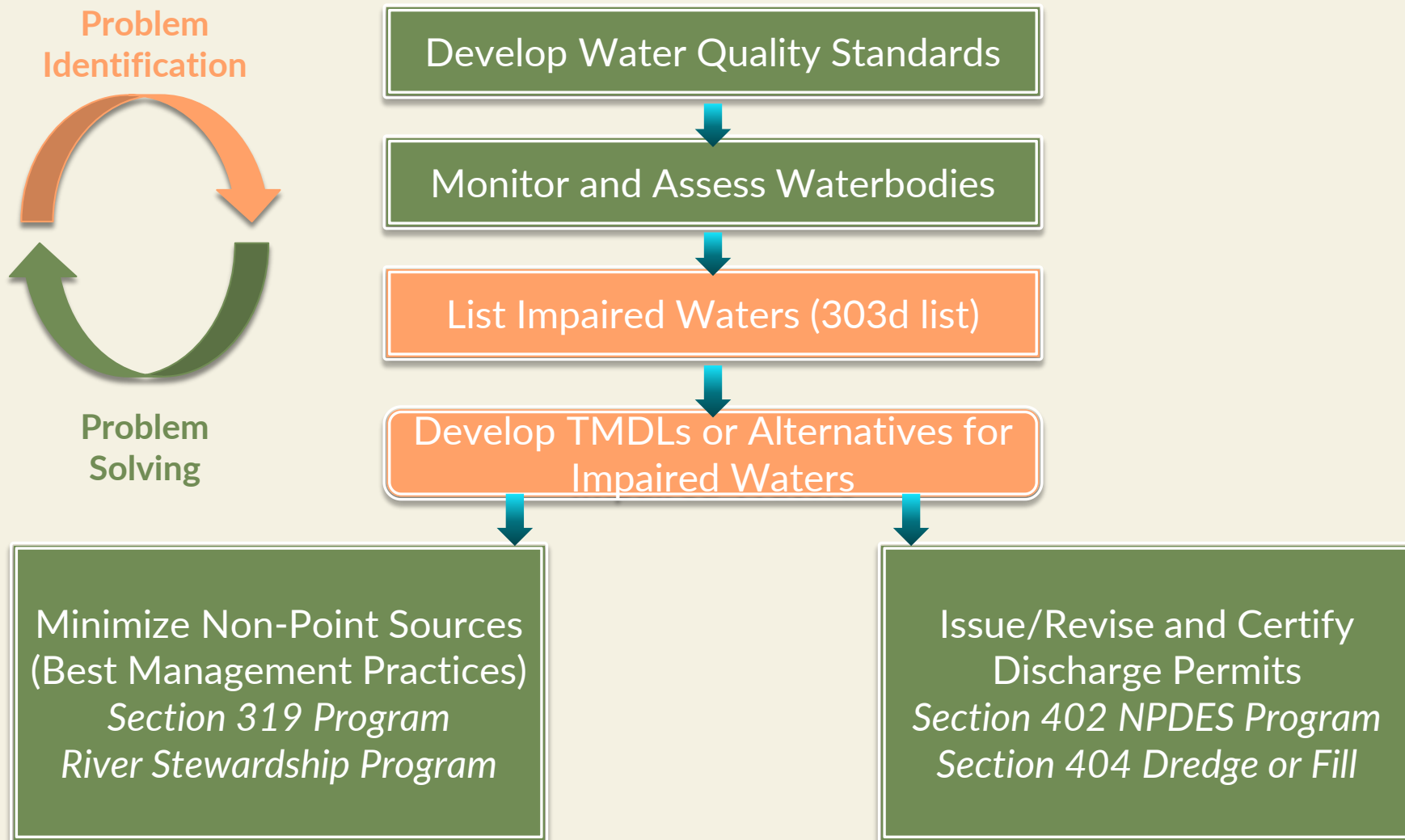
Key Sections of the Clean Water Act



- **101 – Outlines objective and major goals**
- 106 – Grants for Water Pollution Control Programs
- **301 and 302 – Related to Developing Effluent Limits for Discharge Permits**
- Section 303 – Water Quality Standards requirements; List of Impaired Waters; TMDLs
- Section 319 – Nonpoint Source Pollution
- **401 – State/Tribal Certification of Federal Discharge Permits**
- **402 – National Pollutant Discharge Elimination System (NPDES)**
- **404 – Permits for Dredged or Fill Material**
- 502 – Key Definitions
- 510 – State/Tribal Authority
- 604 – Grants for Water Quality Management Planning



Clean Water Act (CWA) Framework





Surface Water Quality at a Glance

- ✓ 47 FTE (technical, financial, admin) in SWQBB
 - 3 FTE on State Permitting Team
- ✓ 197,000 stream and river miles in NM
- ✓ 173 significant lakes and reservoirs in NM
- ✓ 1,000,000 acres of wetlands
- ✓ 50% *assessed* waters have impaired water quality
- ✓ **Top 3 impairments for streams** = temperature, E. coli bacteria, and nutrients
- ✓ **Top 3 impairments for lakes** = mercury and PCBs in fish tissue, and temperature





NM Surface Water Quality Protections

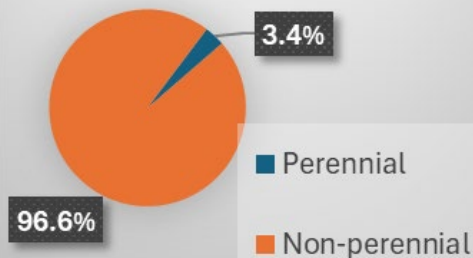
- **20.6.2 NMAC Ground and Surface Water Protection Regulations**
 - Outlines requirements for groundwater discharge permits.
 - Describes procedures for state certifications under CWA Section 401.
 - Requires notification and corrective actions for unauthorized discharges of water contaminants to surface and groundwaters.
 - Prohibits the disposal of refuse in a natural watercourse.

- **20.6.4 NMAC Standards for Interstate and Intrastate Surface Waters**
 - Defines Surface Waters of the State.
 - Identifies designated uses of a water body, sets criteria necessary to protect those uses, and establishes an antidegradation policy and implementation plan.
 - Designated uses include uses such as domestic water supply, irrigation and irrigation storage, recreational contact, livestock watering, wildlife habitat, and aquatic life.
 - Water quality criteria are established to sustain and protect designated uses and include both narrative and numeric criteria.
 - The antidegradation policy and implementation plan protect water quality from degradation.

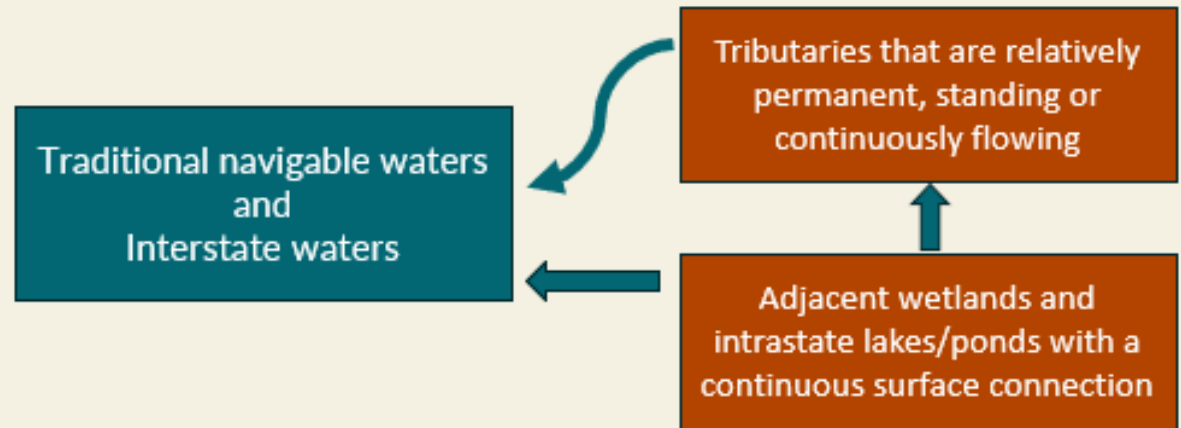


U.S. Supreme Court: *Sackett v. EPA*

Stream Miles in NM



- On May 25, 2023, the U.S. Supreme Court in *Sackett v. EPA* held that the CWA applies only to ***relatively permanent, standing, or continuously flowing*** bodies of water with a ***continuous surface connection*** to a traditional navigable water.
- What's still included in WOTUS? The revised rule:





WOTUS vs. SWOTS

Waters of the U.S. (WOTUS)

- (1) Traditional navigable waters (TNWs), territorial seas, and interstate waters.
- (2) Impoundments of these waters.
- (3) Tributaries of these waters that are relatively permanent, standing, or continuously flowing bodies of water.
- (4) Adjacent wetlands that are relatively permanent, standing, or continuously flowing and have a continuous surface connection to waters in #1-3.
- (5) Additional intrastate lakes and ponds that are relatively permanent with a continuous surface connection to waters in #1-3.

"relatively permanent"
"continuous surface connection"

Surface Waters of the State (SWOTS)

NM's definition of "Surface Waters of the State" is more inclusive than WOTUS.

- ▣ lakes, rivers, streams (incl. intermittent and ephemeral streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, reservoirs, and natural ponds.
- ▣ all tributaries of such waters, including adjacent wetlands, manmade bodies of water that were originally created in a SWOTS, and any WOTUS not included in the preceding description.
- ▣ NOT private waters
- ▣ NOT waste treatment systems
- ▣ 20.6.4.7(S)(5) NMAC



Impact of *Sackett* on New Mexico

Many of NM's waters are likely no longer subject to NPDES and Section 404 permit requirements.



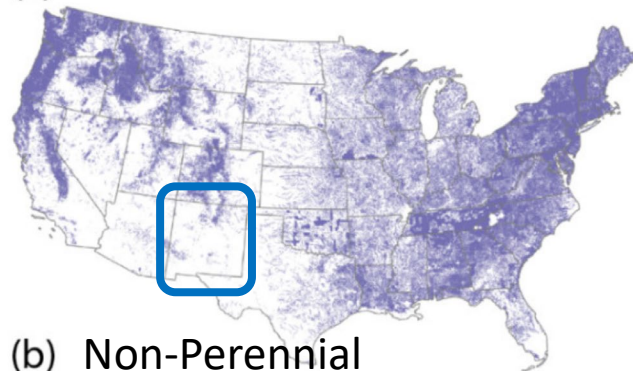
Likely OUT

- ✗ Ephemeral waters
- ✗ Wetlands without continuous surface connection (dike, road)
- ✗ Isolated wetlands (playas, springs, fens)
- ✗ Isolated ponds/lakes
- ✗ Interrupted stream reaches?
- ✗ Intermittent waters?

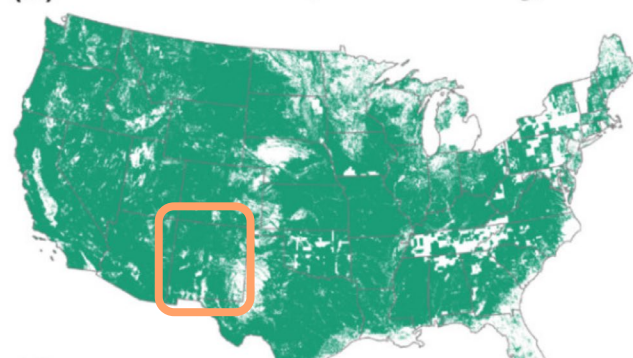
NM Surface Water Statistics

- 6,698 perennial river/stream miles (3.4%)
- 190,225 non-perennial miles (96.6%)
- 85,369 acres of public lakes/reservoirs
- 1,053,809 acres of freshwater wetlands

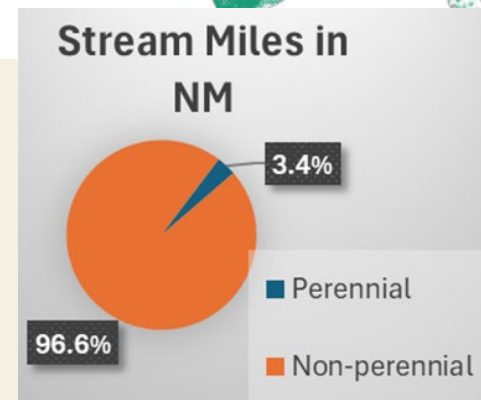
(a) Perennial



(b) Non-Perennial



(c)





Scope of Proposed Program

"The commission ... may adopt regulations to be administered by the department of environment for surface water discharges."

NM Water Quality Act, Section 74-6-4(Q)

"Commission" refers to the Water Quality Control Commission (WQCC)

- Waters of the U.S. (Clean Water Act)
 - Seek delegation from EPA for the NPDES program for point source discharges
 - Do not seek delegation for the Section 404 discharge program: U.S. Army Corps of Engineers will continue to regulate discharges of dredged and fill materials to waters of the U.S.
- Surface waters of the state (Water Quality Act)
 - Create a State program to fill the gaps left by *Sackett* that covers both point source discharges and discharges of dredged and fill materials in surface waters of the state
 - The program will not apply to tribal waters, but NMED will be responsive to tribal concerns



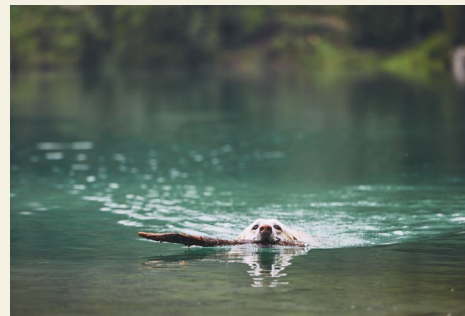
Steps to Program Approval

NPDES Primacy

- ❑ Engage stakeholders.
- ❑ Draft statute & rule.
- ❑ Enact statute.
- ❑ Conduct rulemaking hearing.
- ❑ Prepare and submit program application to EPA .
- ❑ Effective upon EPA approval.
- ❑ *Phased implementation.*

State “Gap” Program

- ❑ Engage stakeholders.
- ❑ Draft rule.
- ❑ Conduct rulemaking hearing.
- ❑ Effective upon rule adoption.
- ❑ *Phased implementation.*





Questions?

