SURFACE WATER ADVISORY PANEL (SWAP) FINAL REPORT

New Mexico Environment Department

January 2025

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Acronyms and Abbreviations

BMPs: Best Management Practices

CAFO: Concentrated Animal Feeding Operations

CDX: Central Data Exchange

CFR: Code of Federal Regulations

CWA: Clean Water Act

EPA: United States Environmental Protection Agency

EJ: Environmental Justice

GIS: Geographic Information System

NetDMR: Network Discharge Monitoring Report

NMED: New Mexico Environmental Department

NOI: Notice of Intent

NOV: Notice of Violation

PFAS: Per- and Polyfluoroalkyl Substances

SWAP: Surface Water Advisory Panel

SWOTS: State Waters of the State

WOTUS: Waters of the United States

WQA: New Mexico Water Quality Act

USACE: U.S. Army Corps of Engineers

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Executive Summary

The Surface Water Advisory Panel (SWAP), convened by the New Mexico Environment Department (NMED), gathered diverse technical, operational, and policy insights to inform the development of a State-led surface water permitting program. This program is being considered in response to multiple U.S. Supreme Court rulings that have narrowed the scope of federal jurisdiction under the Clean Water Act (CWA), including the most recent ruling in *Sackett v. EPA.* These rulings have left many surface waters in the State unprotected at the federal level. Waters at risk include wetlands, ephemeral streams, and waters that do not flow into interstate rivers (closed basins). By creating a State-specific permitting framework, New Mexico aims to ensure comprehensive protection of these waters while reflecting local ecological conditions, hydrologic realities, and stakeholder priorities.

Role and Scope of SWAP Input

SWAP members represented diverse perspectives and interests within New Mexico:

- Industry: oil and gas, mining, construction, and business sectors.
- Agriculture: acequias, conservation districts, dairies, ranching and farming organizations.
- Environmental groups: conservation and advocacy organizations.
- Tribal government: one Pueblo government provided representatives.
- Local government: water utilities, wastewater and stormwater authorities.
- Water delivery/control: irrigation districts and flood control organizations.
- State and federal agencies.
- Federal facilities: Los Alamos and Sandia National Laboratories.
- Watershed and wetland restoration professionals.

The SWAP did not operate as a decision-making or consensus-seeking body. Instead, it served as a forum for stakeholders to offer ideas, perspectives, and suggestions. These inputs, while not formal recommendations, are helping to guide legislative development, program structure, and implementation strategies. This report synthesizes the input offered and highlights key points raised by SWAP members during the meetings and in optional written submittals (See Appendices D and E). The report does not intend to imply that agreement or consensus was reached on any particular issue.

Key areas of discussion and input included:

- **Regulatory Scope and Clarity**: SWAP members emphasized the importance of defining regulated waters and establishing clear regulatory boundaries to ensure compliance and reduce confusion. Many considered alignment with existing federal programmatic elements and exemptions beneficial, while allowing the State to incorporate arid-region hydrology and operational realities unique to New Mexico. Members supported tools such as GIS-based mapping to delineate jurisdictional boundaries and ensure predictable permitting pathways.
- **Public Engagement and Communication**: SWAP members explored ways to improve public notification and outreach strategies, highlighting the importance of transparent, accessible, and equitable public engagement. Members suggested that multilingual notices, maintaining traditional notification methods (e.g., newspaper ads, postal mail), and employing GIS-based

tools could enhance accessibility, especially for people living in rural and underserved communities. Suggestions also included incorporating environmental justice screening tools, such as EPA's EJScreen, which could help identify vulnerable communities, ensuring their residents receive adequate notice and opportunities to participate in decision-making. The SWAP's input also addressed how agencies and applicants might share responsibility for public notifications. Certain members highlighted the importance of involving key state agencies, tribes, and the public in the early stages of permitting decisions and actions. Permit applicants need requirements for notice and engagement to be clear to avoid uncertainty and minimize litigation risk.

- **Sector-Specific Operational Considerations**: Input from industries, agriculture, municipalities, and other stakeholders emphasized flexibility to accommodate operational realities, including intermittent and ephemeral flows. Participants suggested that the state's permitting framework address seasonal conditions, regional hydrological variability, and differences in infrastructure capacity while minimizing duplicative requirements where other state programs already regulate certain aspects. Timely action on permits was emphasized by stakeholders representing regulated entities.
- **Sustainable Funding**: Various SWAP members expressed concern about NMED's capacity to administer the program and considered various funding mechanisms. Suggestions included proportional fee structures to avoid placing undue burdens on smaller entities and alternative funding sources (e.g., expedited permitting fees, reallocated enforcement penalties). Overall, the panel input pointed towards establishing a balance of fairness, affordability, and funding for the resources needed to run an effective, state-administered program with long-term viability.
- **Consistency, Transparency, and Resource Allocation**: The SWAP's input underscored the critical importance of consistency with federal processes, transparent decision-making, and the efficient use of resources. Members indicated that these principles would foster trust and ensure the permitting process does not overburden any single sector or community.
- **NPDES Delegation**: Some members viewed the potential delegation of NPDES authority as an opportunity to streamline processes and tailor permitting to local conditions. Input included adopting electronic reporting tools, ensuring appropriate staffing and training, and retaining practical components of existing federal processes to simplify compliance and transitions, while adapting others for state needs. Members noted the need for careful attention to transition planning, focusing on phased implementation, building administrative capacity, training staff, and permittees, and using electronic reporting platforms (e.g., EPA's NetDMR) to streamline operations and help mitigate potential disruptions. Some members raised enforcement and citizen suits as important issues. Members provided feedback on draft legislation and rules.
- **State Water Quality Act (WQA) Program Development**: SWAP input focused on clarifying scope and jurisdiction, retaining or adapting exemptions, addressing emerging contaminants, considering antidegradation protections, and using best practices from other states. The panel's discussion included suggestions for the Notice of Intent process, general permits, mitigation strategies, long-term monitoring, and methods to streamline permitting by leveraging geospatial mapping tools and standardized procedures. Some members emphasized enforcement issues. Members provided feedback on draft WQA amendments.
- **Dredge and Fill Activities**: Input included tiered permitting levels for discharges of dredged and fill material and emphasized basing mitigation requirements for impacts to wetlands and other

aquatic resources on functional ecosystem values rather than acreage alone. Many members supported balancing operational feasibility with robust environmental protections and incorporating avoidance and minimization strategies into project designs.

- **Construction and Stormwater Permitting Specifics**: SWAP input acknowledged the distinct challenges of stormwater permitting in arid environments. Suggested approaches included retaining low erosivity waivers for minimal-impact projects, integrating dust control measures, applying both qualitative and quantitative benchmarks, and selecting appropriate stabilization requirements at construction completion. Participants also recommended improved training programs for inspectors and operators.

Process and Documentation

The SWAP process occurred over multiple meetings, supported by structured agendas, optional written submissions, and resource materials posted online. This approach ensured transparency, encouraged candid dialogue, and allowed participants to share specific insights. The final SWAP report synthesizes these perspectives, providing a detailed record that will inform the next steps in the program's development.

Conclusion

The SWAP's input reflects a spectrum of stakeholder viewpoints to help New Mexico design a surface water quality permitting program that protects scarce surface water resources, meets the State's unique needs, and upholds fairness, clarity, and inclusivity principles. While these contributions do not represent final decisions or formal recommendations, they offer a substantive foundation for NMED as it considers the next steps in its program development

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Surface Water Advisory Panel (SWAP) Report

1. Introduction

This report captures the insights, contributions, and discussions of the Surface Water Advisory Panel (SWAP), convened by the New Mexico Environment Department (NMED), to provide technical, operational, and policy input for developing a state-led surface water permitting program in New Mexico.

The SWAP process engaged representatives with diverse perspectives and interests within New Mexico. Their collective feedback will inform the program's development – how to address regulatory gaps, ensure transparency, and promote sustainable water quality protection tailored to New Mexico's unique environmental and operational needs.

1.1. Background and Rationale

Several Supreme Court decisions, including the most recent ruling in *Sackett v. EPA*, have significantly narrowed the scope of federally regulated waters. As a result, many surface waters in New Mexico now fall outside federal jurisdiction. Waters at risk include wetlands, ephemeral streams, and that waters do not flow into interstate rivers (closed basins). This regulatory gap has reduced water quality protection for critical water resources in the State. It highlights the need for a State-led surface water permitting program to ensure New Mexico's unique environmental, hydrological, and public health priorities are reflected in its water quality management framework. By tailoring the program to the State's conditions, New Mexico can provide comprehensive protection for its surface waters currently at risk due to the narrowed scope of the CWA while supporting local economic and operational needs.

1.2. The SWAP's Role in Program Development

NMED is implementing a structured, multi-phase approach to develop New Mexico's State-led surface water quality permitting program. It is critical to build the program on a solid foundation, with input from diverse stakeholders and the necessary infrastructure, resources, and staff to support its successful implementation.

The SWAP served as a platform for gathering technical, operational, and policy input early in program development. The process solicited feedback on New Mexico obtaining NPDES program primacy and the development of a State surface waters permitting program, regulation of wetlands no longer subject to the requirements of Section 404 of the CWA, proposed statutes and regulations, associated program costs to the State, potential fee structures for permit coverage, and other applicable aspects of State-run programs.

2. SWAP's Purpose, Structure, and Scope

This section outlines the SWAP's purpose, composition, and process, which NMED established to ensure comprehensive stakeholder engagement and diverse perspectives in developing a state-specific surface water quality permitting program.

2.1. SWAP's Purpose and Objectives

NMED convened the SWAP as a consultative body to gather individualized technical, operational, and policy input on developing and implementing a surface water quality permitting program in New Mexico. Its primary objectives included:

- Providing Technical Expertise: Offering insights into the technical aspects of permitting, including regulatory compliance and environmental considerations.
- Practical Considerations: Identifying operational challenges and opportunities based on stakeholders' real-world experiences.
- Policy Perspectives: Sharing viewpoints on how state permitting processes could address ecological, economic, and social priorities.

The SWAP operated as a non-decision-making body under a non-consensus model. This approach encouraged open dialogue by allowing for a wide range of perspectives without the need for unanimity. The SWAP created a forum for candid discussions that informed program development by focusing on consultation rather than decision-making. The purpose of these meetings was never to build a consensus on the actions NMED would pursue, only to ensure that NMED heard and understood the various perspectives of the stakeholders.

2.2. SWAP Formation, Composition, and Process

A. Solicitation of SWAP Members

NMED solicited SWAP members through public announcements and direct outreach efforts to encourage and ensure broad stakeholder participation. Interested parties submitted interest forms during an open application period.

B. SWAP Composition

The SWAP included representatives with diverse perspectives and interests within New Mexico:

- Industry: oil and gas, mining, construction, and business sectors.
- Agriculture: acequias, conservation districts, dairies, ranching and farming organizations.
- Environmental groups: conservation and advocacy organizations.
- Tribal government: one Pueblo government provided representatives.
- Local government: water utilities, wastewater and stormwater authorities.
- Water delivery/control: irrigation districts and flood control organizations.
- State and federal agencies.
- Federal facilities: Los Alamos and Sandia National Laboratories.
- Watershed and wetland restoration professionals.

The balance of ecological, economic, and social interests represented by those with extensive expertise and broad knowledge of their stakeholder groups ensured the program input reflected a wide range of priorities and concerns.

A designated alternate could attend SWAP meetings if the primary SWAP member could not attend in-person.

See Appendix A for the complete list of members and their affiliations.

C. Chatham House Rule

Meetings were conducted under the Chatham House Rule to enable candid discussions without attribution. This encouraged members to share ideas and concerns openly, fostering constructive dialogue. NMED staff took notes to capture the perspectives of SWAP members for later consideration.

D. Member Contributions

SWAP members provided feedback through structured discussions during meetings and formal written submissions. This dual approach ensured that sector-specific insights were captured alongside broader, facilitated dialogues.

2.3. Meeting Structure, Agenda, and Timeline of Key Topics

A. Meeting format

SWAP meetings were held in-person. SWAP members or their alternates could attend. NMED staff and staff from cooperating federal and state agencies also attended. An option to observe the meetings virtually was provided but did not allow for participation. See Appendix B for the record of meeting attendance.

Each SWAP meeting followed a structured agenda designed to maximize productivity and focus. Agendas typically included:

- **Presentations:** NMED representatives and volunteer speakers from the SWAP membership provided technical and policy context.
- **Facilitated Discussions**: Members shared feedback, proposed ideas, and addressed key topics.
- **Forward Planning**: Meetings concluded with a preview of upcoming topics, allowing members to prepare for the subsequent discussion.

The structured format allowed SWAP discussions to progress sequentially, with each meeting building on the outcomes of prior sessions. This iterative approach helped refine program development recommendations.

NMED posted all SWAP materials, including agendas and optional member contributions, on a dedicated webpage to ensure transparency and accessibility throughout the process [https://www.env.nm.gov/surface-water-quality/swap/].

B. Timeline and Key Topics

The SWAP process was organized into six meetings, each focusing on specific aspects of program development:

Meeting 1: Introduction of existing programs and identification of key considerations for the State permitting program.

Meeting 2: Benefits, disadvantages, and challenges of obtaining federal CWA NPDES delegation and establishing foundational principles for a state permitting program under the New Mexico WQA.

Meeting 3: Federal NPDES Program and Delegation: Draft NMPDES statute and rule. State WQA Program Process: Notices of Intent (NOIs), applications, public involvement, hearings, administrative and judicial review.

Meeting 4: State WQA Program: Options for Point Source Discharges, retention, and adaptation of the NPDES framework for the State program.

Meeting 5: State WQA Program: Options for Dredged and Fill Material Discharges. Retention and adaptation of Section 404 dredge and fill permitting considerations.

Meeting 6: Program Cost and Funding Options; Water Quality Act Amendments. Evaluating fee structures and funding strategies for the State program and gathering feedback on draft legislative amendments.

See Appendix C for the meeting agendas.

3. SWAP's Key Feedback

3.1. Introduction and Overarching Themes

Recurring themes emerged from SWAP discussions and written submissions, focusing on the following:

- Regulatory Clarity
- Public Notification, Interagency Communication, and Public and Tribal Engagement
- Sector-Specific Considerations
- Sustainable Funding
- Consistency, Transparency, and Resource Allocation

A. Regulatory Clarity

Many SWAP members highlighted the importance of clear definitions for WOTUS (waters of the United States) versus SWOTS (surface waters of the state), indicating that precise definitions of regulated waters will avoid regulatory ambiguity. Ambiguity in the scope of regulation was highlighted as a barrier to compliance, particularly for industries managing ephemeral streams.

Some in the panel noted that alignment with existing federal programmatic requirements and processes, where possible, would reduce confusion and streamline transitions for stakeholders.

B. Public Notification, Interagency Communication, and Public and Tribal Engagement

SWAP members discussed designing public notification processes to ensure transparency and equity. Direct notification to key agencies was recommended. In particular, the Office of the State Engineer and Interstate Stream Commission requested notification and incorporation of conditions related to return flow and water supply issues. There was also some discussion about whether the applicant or agency should be responsible for issuing and conducting public notice requirements and how best to facilitate demonstration of compliance with these requirements.

Many SWAP members strongly advocated for outreach efforts tailored to New Mexico's demographics. Recommendations included multilingual public notices and GIS-based public notification tools to engage with people living in underserved and rural communities and to ensure inclusivity and transparency. Several members emphasized the importance of targeted outreach for people living in rural and remote communities often excluded from standard notification processes, citing examples where limited English proficiency and limited internet access hindered public participation.

Many members highlighted the importance of modifying existing public notification processes to ensure accessibility and transparency. Recommendations included retaining newspaper advertisements for public notices in both English and Spanish to ideally reach a broader audience, particularly in underserved and rural communities with existing newspaper circulations. These suggestions aim to foster inclusivity and ensure equitable public engagement.

Many panel members emphasized balancing traditional and modern public notification methods to ensure accessibility for diverse stakeholders. While electronic notifications are efficient, several members recommended retaining traditional methods such as postal mail to accommodate communities with limited internet access. Concerns about using text messages for notifications were raised, citing reliability issues and limited effectiveness. Several panel members advocated retaining traditional notification methods, such as email and postal mail, alongside modern approaches to provide comprehensive coverage and inclusivity.

Members representing regulated entities emphasized the importance of certainty in the notice process. They wanted clear rules about what is required so that it is easy to demonstrate they fulfilled the requirements, which reduces litigation risk. They also advocated for timelines that allow for prompt permit decisions.

C. Sector-Specific Considerations

Concerns from mining, agriculture, and municipal stakeholders included ensuring flexibility in regulations to reflect operational realities and environmental conditions. These members stressed the need for tailored frameworks that reflect operational realities for industries (e.g., mining, oil and gas, and agriculture) within New Mexico's arid climate, such as seasonal water

use and arid-region hydrology. Mining stakeholders argued that mining impacts to surface waters are already comprehensively regulated under various state and federal laws such that a new permitting program would result in duplicative or conflicting requirements. Municipal stakeholders underscored the need for flexibility in permitting timelines to accommodate infrastructure challenges. Some agricultural stakeholders suggested optimizing current systems rather than expanding regulations, focusing on providing voluntary incentives and avoiding fines and fees. They expressed concern that ranchers will likely be affected given that many ranches include both private and federal lands and that regulating arroyos and intermittent streams will complicate land management practices.

D. Sustainable Funding

All SWAP members expressed concern that NMED will not have sufficient capacity in terms of funding and staffing to run an efficient state program that can respond to the needs of the regulated community in a timely fashion. Regulated community members had concerns about fees. Most panel members indicated that application and annual fees were acceptable but should be reasonable and affordable.

Many identified proportional fee structures, alternative funding mechanisms, cost-sharing initiatives, and legislative appropriation to supplement program costs (to avoid a 100% fee-based program) as essential considerations for program sustainability.

Discussions on funding focused on balancing fairness and practicality. Proposals included proportional fees for larger discharges, cost-sharing initiatives for smaller entities, and alternative revenue streams, such as shared monitoring costs. Many members expressed that equitable fee structures, alternative revenue sources, and cost-sharing mechanisms are essential to program sustainability. One example of alternative funding mechanisms suggested during meetings was to provide expedited permitting for a higher fee. Another suggestion for cost-sharing was to have municipalities and local governments permit and regulate construction activities, which account for many surface water general permittees.

E. Consistency, Transparency, and Resource Allocation

Many members identified consistency between federal and state programs, transparency, and efficient resource allocation as critical principles for program development. Members underscored the importance of these factors in ensuring a successful and equitable permitting framework.

3.2. NPDES Program Delegation

The SWAP process provided a platform for panel participants to share insights and feedback on the potential delegation of NPDES permitting authority to New Mexico. Many panel members emphasized opportunities to tailor the program to state-specific needs while retaining practical components of the federal framework. Participants also identified existing challenges, highlighted the importance of phased strategies and administrative capacity, and discussed alignment with existing federal programmatic requirements and processes.

A. Overview

SWAP discussion highlights included the opportunities and challenges of transitioning NPDES permitting authority to New Mexico. Panel member feedback varied but included the following areas of discussion: retaining vital elements of the federal framework such as multilingual notifications and tribal consultation, which they considered effective for inclusivity and transparency, and streamlining consultation processes with agencies such as the State Historic Preservation Office (SHPO) to reduce permitting action delays while maintaining cultural and environmental protections.

Many panel members focused on modernizing reporting processes. They advocated adopting electronic platforms, such as EPA's Network Discharge Monitoring Report (NetDMR), to enhance efficiency, reduce processing times, and improve accessibility for applicants and regulators. While some expressed concerns about training and accessibility for smaller entities, many noted that modern tools would provide long-term benefits.

Many members viewed delegation as an opportunity to increase local control and responsiveness, enabling the State to tailor permitting frameworks to address challenges unique to New Mexico, such as managing intermittent and ephemeral waters in an arid climate. However, some members noted challenges, including potential industry pushback, aligning State databases with federal systems, and concerns about maintaining public rights, such as citizen suits. Some panel members advised that clear and consistent rules, phased implementation strategies, and robust training programs would be needed to address these challenges.

B. Local Control and Responsiveness

Delegating NPDES permitting authority to New Mexico would significantly enhance accountability and responsiveness by leveraging local knowledge of environmental and operational conditions. Many panel members emphasized that local regulators would be better equipped to address issues specific to New Mexico, such as managing intermittent and ephemeral waters and wetlands, and potentially increase protection for surface waters of the state. Additionally, local control would provide the flexibility to adapt permitting frameworks to the state's unique climate and operational priorities. Other benefits of NPDES delegation that panel members raised included the ability to facilitate collaborative working relationships between permittees, permit writers, and enforcement staff that could also lead to alternative compliance solutions.

C. Permit Denial and Modification Criteria

To enhance environmental protection and/or adaptability, some panel members suggested:

- Denying permits where compliance with downstream State or Tribal water quality standards cannot be ensured.
- Specifying the criteria for modifying or terminating permits.

D. Transition

Managing the transition from EPA-administered NPDES permits to a State-led program was identified as critical to minimizing disruptions. Some panel members noted that thoughtful consideration and communication during the transition period would ensure that regulated entities remain compliant while the State phases in the NPDES program elements.

Some panel members raised concerns about the potential for small businesses and rural communities to overcome disproportionate impacts during the transition to a State-led program. Certain panel members recommended targeted outreach to these groups to ensure they are well informed and supported during the transition. Additionally, phased or tiered fee structures were proposed to minimize financial burdens on smaller entities while ensuring program sustainability. It was noted during the discussion of fees that the EPA administers the NPDES program without charging fees and that excessive fees from the state could create pushback.

E. Modernizing Application and Reporting Processes

Adopting electronic platforms for permit applications and reporting was a recurring theme among SWAP participants. Tools like EPA's NetDMR were highlighted as effective solutions to improve efficiency, accountability, and accessibility. Panel members acknowledged that modernizing these processes would require investments in training and support, particularly for smaller entities and those unfamiliar with digital tools. However, the long-term benefits, including streamlined workflows and reduced processing times, were seen as outweighing these initial challenges.

F. Alignment With Federal Requirements and Processes

Some on the panel emphasized aligning with existing federal requirements and processes to ensure consistency and minimize disruption. Specific recommendations included:

- Aligning NOI procedures with EPA requirements to simplify transitions for permittees.
- Coordinating NOIs for groundwater and surface water permits.
- Ensuring State database compatibility with federal systems to maintain continuity and streamline reporting processes.
- Using the EPA general permit program as a starting point since it is well-developed, functional, and effective.

The SWAP also discussed the benefits of NPDES delegation, including reducing duplication between regulating authorities and streamlining permits and applications.

G. Feedback Highlights on NPDES Program Delegation

Improved Responsiveness:

NPDES delegation would enable the State to develop solutions tailored to New Mexico's unique environmental and operational conditions. Local control would enhance accountability and responsiveness to regulated entities and address community concerns.

Administrative Capacity:

Sufficient and robust staffing, training, and infrastructure are needed to manage the program effectively. Durable and informative training programs and clear guidelines for regulators and permittees are essential to building administrative capacity.

Phased Implementation and Equity:

A phased approach to program rollout to manage funding, staffing, and permittee adaptation will more readily allow NMED and the regulated community to adapt. Targeted outreach and phased fee structures would ensure equity during the transition. Recommendations included implementing training programs in stages to minimize disruptions.

3.3. State WQA Program

The State Water Quality Act (WQA) program was a central focus of the SWAP process, as the panel discussed its role in addressing regulatory gaps and managing surface water discharges. The framework's development will be critical to New Mexico's ability to regulate waters no longer under federal jurisdiction and tailor solutions to state-specific challenges.

A. Regulatory Frameworks, Legislative Needs, and Permitting Process

Panel members identified the WQA as a critical tool for managing surface water discharges and addressing gaps left by the narrowing scope of federal jurisdiction. Many highlighted the need for a clear and comprehensive regulatory framework to ensure consistency, transparency, and effective implementation. Discussions centered on the following aspects:

- **Clarity in Scope**: Statutory and rule considerations for precise definitions and regulatory boundaries.
- **Jurisdictional Clarity**: Avoiding overlaps between the WQA surface water permitting and other regulatory frameworks (e.g., groundwater discharge permitting under the WQA, the U.S. Army Corps of Engineers (USACE) Section 404 permitting program, the Mining Act, and the Oil and Gas Act).
- **Streamlined Permitting**: Leveraging general permits and GIS tools for efficient and navigable processes.
- **Emerging Contaminants**: Incorporating per- and polyfluoroalkyl substances (PFAS) and microplastics into regulatory and monitoring frameworks.
- **Antidegradation Policies and Procedures**: Exploring innovative tools to complement the state's antidegradation policies.

(1) Regulatory Clarity and Definitions

Many panel members discussed the importance of precise definitions to ensure consistency and transparency across regulatory applications. Panelists stressed the need for clear guidance and tools to help delineate "Surface Waters of the State" (SWOTS), where permits are required, and what type of permit and program applies, which would support jurisdictional consistency and streamline compliance efforts. Members expressed concern that permitting ephemeral channels could quickly overwhelm NMED without clear foresight and guidelines on how far upstream the regulations will apply. Recommendations included using GIS-based tools to define regulatory boundaries and compliance areas visually.

Many members emphasized the need for a regulatory framework that simplifies permit applications while addressing State-specific environmental challenges. Panelists repeatedly recommended using GIS-based tools and flowcharts to guide applicants through the permitting process and clearly define expectations. Clear, GIS-supported delineation of regulated waters and voluntary wetland improvement programs were highlighted as critical elements. Some viewed establishing clear timelines for individual permit processing, processing NOIs, and applications as vital to ensuring efficiency and transparency.

Specifically for industrial stormwater general permits, no-exposure certifications were identified as an existing tool that works well. Low erosivity waivers were brought up for use with construction general permits and are discussed again in Section 3.5.D below. Additionally, select members suggested a permit-by-rule general permit model for consideration in some cases to simplify permitting. Permit coverage in those cases would be self-implementing without requiring NOIs. Some members also expressed general interest in not having to file NOIs for smaller discharges.

Mitigation Requirements and Unavoidable Adverse Effects

Some SWAP members emphasized the importance of clarifying mitigation requirements. Recommendations included:

- Providing examples to define "unavoidable" and limiting mitigation to direct adverse effects caused by permit issuance.
- Incentivizing preservation and enhancement in high-value areas.
- Streamlining mitigation monitoring to reduce costs while maintaining ecological benefits.

(2) Jurisdictional Clarity

Several panel members underscored the importance of avoiding jurisdictional overlaps between the WQA and other regulatory programs, such as groundwater discharge permitting under the WQA, the Mining Act, the Oil and Gas Act, and the USACE Section 404 permitting program. Specific recommendations included:

- Unifying permitting authority for surface water discharges from oil and gas facilities under one state agency, rather than splitting the jurisdiction between NMED and OCD.
- Establishing clear boundaries to ensure regulatory consistency and avoid conflicts.
- Retaining federal exemptions, such as those for irrigation maintenance, while adapting their scope to New Mexico's context.

(3) Streamlined Permitting

Panelists suggested reviewing successful permitting approaches in other states to inform the development of New Mexico's framework. This would help identify best practices and enhance program implementation. Some discussion comments suggested developing simple screening tools integrated into the permit application process to assess threatened and endangered species, cultural resources, and socio-economic impacts without creating overly burdensome requirements.

Additionally, some members identified regulatory overlap between programs as a key concern. For example, some members expressed concern over stormwater at mining facilities that may already be regulated under groundwater discharge permits, and whether a stormwater general permit would be needed.

The meeting discussion commentary also cited the need for effective communication between permitting staff, compliance and enforcement staff, and electronic reporting via Central Data Exchange and Discharge Monitoring Report (CDX/DMR) staff and the importance of avoiding a distinct grouping of these functions where tasks and information may become siloed.

Several members also recommended NMED consider extending permit durations to 10 years to reduce administrative burdens and improve predictability for permittees. This measure was seen as a way to enhance efficiency and lower costs for regulators and applicants.

(4) Emerging Contaminants

Some members emphasized incorporating emerging contaminants, including PFAS and microplastics, into state-level water quality permitting as these contaminants present growing environmental concerns. Panelists also recommended data collection initiatives and reasonable regulatory thresholds to manage their impacts effectively. Some panelists argued against setting effluent limits and requiring permittees to monitor in the absence of established water quality standards. Suggestions included focusing on source identification and source control, and identifying hotspots where regulatory action could be targeted.

Testing Flexibility

Some panel members proposed expanding acceptable testing procedures to include validated methods beyond those specified in 40 CFR Part 136. Recommendations included:

- Specifying applicable dates for CFR references to avoid referencing unknown future standards.

- Allowing flexibility in pollutant testing for emerging contaminants, such as polychlorinated biphenyls (PCBs), by validating alternative methods approved by NMED.

(5) Antidegradation Policies and Procedures

Panelists generally supported retaining the federal antidegradation framework to protect surface waters with exceptional water quality. Some members requested more transparency for the public about how antidegradation is evaluated. Outstanding National Resource Waters (Tier 3) designation was considered an important tool by some panelists. Suggestions for adaptation and innovation included:

- Considering whether the existing Tier 1/2/3 paradigm is suitable for playa lakes and other nonperennial waters.
- Placing the initial burden on the applicant to conduct the antidegradation analysis.
- Allowing pollutant trading mechanisms to incentivize dischargers to reduce their environmental footprint by earning credits for actions like cleaning waterways or restoring wetlands.
- Considering using qualitative assessments for stormwater since it is more difficult to characterize stormwater quantitatively.

B. Public Process, Public Engagement, and Environmental Justice

Public engagement was a central theme throughout the SWAP process. Many members highlighted that robust public engagement mechanisms are essential for ensuring transparency and trust. Suggestions included:

- Providing multilingual notices.
- Using community-specific outreach methods, such as signage in public spaces, posting on community websites, local radio announcements, postal mail, or door-to-door engagement.
- Incorporating GIS-based public notification tools to improve accessibility and outreach.
- Using Environmental Justice (EJ) screening tools, such as EPA's EJScreen, to proactively identify and address potential community impacts.
- Notifying trade associations.
- Using clear timelines and public engagement steps to improve efficiency and transparency in the permitting process.
- Including a comment and hearing process for downstream states and tribes.

During meeting discussions, some members expressed that incorporating holistic or cumulative environmental impact assessments into permitting processes would help address environmental justice concerns and protect vulnerable communities from disproportionate impacts. Additional feedback included the suggestion that a public-facing tracking system be developed, allowing communities to access real-time compliance information and enhancing transparency and accountability while supporting public awareness of water quality impacts.

C. Point Source Discharges.

Panel members generally supported retaining consistency with the NPDES program for regulating point source discharges. Some suggested developing NOI procedures to streamline transitions for regulated entities.

Addressing Exemptions and Downstream Protections

To ensure consistency with federal requirements, many panel members supported retaining sector-specific exemptions, such as those for irrigated agriculture and stormwater discharges from mining operations and oil and gas facilities. Some panelists raised concerns about exemptions for stormwater discharges from mining, oil and gas operations, and road construction. They recommended stricter controls to mitigate sediment impacts and pollutant loads.

Additional suggestions included:

- Replacing "exemptions" with "exclusions" to align with federal terminology.
- Strengthening safeguards to ensure downstream water quality protections, particularly for Tribal and State waters.
- Protecting acequias from external discharges.

Sector-specific Considerations

Panel member feedback included the suggestion that individual permits be required for all Concentrated Animal Feeding Operations (CAFOs) to ensure adequate oversight, that these permits consider cumulative impacts on receiving waters, and that stringent monitoring and reporting requirements are prioritized. Another addition was that a permitting pathway be included that allows for denials where waters are at risk of being impacted beyond capacity.

Some panel members also noted that individual stormwater permits should include tailored best management practices (BMPs) and benchmarks that reflect the sediment-laden nature of southwestern waters.

Discussion feedback included suggesting a process for facilities without specific Standard Industrial Classification (SIC) codes to apply for stormwater general permit coverage if their operations align with existing regulated activities.

Additionally, sampling exemptions or special procedures for facilities with infrequent discharges, such as sand and gravel operations, were suggested for consideration to reduce unnecessary burdens.

Some members provided the following detailed recommendations for construction and stormwater permits to address New Mexico’s unique environmental conditions:

- Low Erosivity Waivers: Retaining these waivers for small construction projects, recognizing their role in reducing administrative burdens for low-impact activities.

- Dust Mitigation: Providing more guidance and better practices for dust mitigation and control from construction sites given New Mexico's arid climate.
- Qualitative Benchmarks for Stormwater Permits: Including qualitative benchmarks for stormwater discharges to increase flexibility and encourage watershed-based approaches, providing regulated entities with adaptable compliance pathways; and ensuring that qualitative benchmarks complement quantitative ones to encourage compliance while focusing on meaningful water quality improvements.
- Robust training programs for Stormwater Pollution Prevention Plan (SWPPP) inspectors: Including a tiered training structure, as seen in other states like California and Georgia, to enhance inspector capabilities and improve compliance; providing certification options or recognizing equivalent credentials to ensure consistency and improve regulatory outcomes.
- Monitoring/inspection requirements for Municipal Separate Storm Sewer Systems (MS4) permits: Including flexibility to accommodate the logistical challenges of sampling in ephemeral channels and sampling/inspections during wet-weather events, especially in arid regions.
- Including *de minimis* acreage thresholds for construction general permits, a setback from SWOTS, and other considerations, including the land disturbance size versus the drainage basin size, cumulative impacts, geology and grade, and implementation of the United States Department of Agriculture (USDA) Revised Universal Soil Loss Equation (RUSLE) program to calculate potential soil erosion and infiltration studies.

D. Dredged and Fill Material Discharges

Panel discussions included consideration of how to balance operational feasibility and environmental protections and several other key topics.

General and Individual Permits

Panel members commented that a general permit for minor discharges could be used to retain permit protections but not require notifications. The size of the activity and the size of the ephemeral water or drainage area would need to be considered. Additional comments made by various panel members included the following:

Permit Levels: The USACE has three levels of permits. Should the State have two or three permit levels (non-reporting general permits for minor impacts such as activities in ephemeral channels with minimal disturbance; reporting general permits for moderate impacts requiring submission of reports and minimal mitigation measures; and individual permits for significant impacts requiring extensive public involvement, detailed environmental assessments, and robust mitigation plans)?

Clear Thresholds: Thresholds for determining permit type should be based on proximity to threatened and endangered species or critical habitat, the size and quality of the impacted water feature (e.g., wetland acreage and ecological quality score), the type of activity (e.g., one-

time vs. recurring), and cumulative impacts and timeline of disturbances (e.g., chronic vs. short-term impacts).

Streamlined Determinations: To streamline the permitting process, the program should use GIS-based tools to identify SWOTS, reduce time spent on jurisdictional determinations, and provide clear criteria for SWOTS determinations to guide applicants and regulators.

Public Involvement: Individual permits should include robust public involvement processes, such as enhanced notification requirements and public comment periods, to ensure transparency and effectively address high-impact activities.

Exemptions

Panel discussions included comments that exemptions from permitting should be contingent upon using BMPs or other conditions applicable to sensitive areas to ensure minimal environmental impact. Further comments added that distinctions between construction and maintenance activities must be clear to avoid permitting duplication. Additionally, member comments included the need to retain 404 exemptions for tree trimming, irrigation ditches, and acequias activities, culvert cleaning (culvert cleaning was suggested to prevent NMED from getting overwhelmed), building roads across small arroyos, and road maintenance. Other comments added that exemptions should include conditions applied for sensitive areas. Comments that current forest road exemptions are a concern given water quality impairments on Forest Service lands were made, and that exemption may not be appropriate for New Mexico. Additionally, member comments included that larger disturbances like inlet construction should require a permit.

Some members commented that many agencies use the “excavation only” exemption, which allows excavating in a water body since it is not regulated as a discharge as long as the placement of the excavated material, which can discharge and impact the water body, is considered.

Avoidance and Minimization

Panel members made various comments throughout meeting discussions on avoidance and minimization of dredged and fill material discharges included here:

Encouraging Avoidance: Avoidance of impacts should be the first step in the mitigation hierarchy, focusing on preventing impacts on high-value wetlands, riparian areas, and ephemeral streams. Incentives for avoidance could include streamlined permitting for projects demonstrating significant design-based avoidance measures or reduced mitigation ratios for avoided impacts. By encouraging avoidance, the State can reduce ecological disturbance and preserve critical environmental functions of wetlands and aquatic systems.

Design-Based Strategies: Project proponents should be encouraged to incorporate avoidance strategies into their designs, such as increasing bridge spans or altering project

footprints to bypass sensitive areas. These proactive measures not only minimize resource use but also reduce permitting complexity.

Integration with Buffers: Tailored buffer requirements can support avoidance by clearly delineating areas where impacts should be minimized or avoided entirely. Buffers should vary based on the ecological function of the stream or wetland and reflect New Mexico's unique hydrological conditions.

The comments of meeting discussions included the need for easy-to-determine buffer requirements to protect against resource impacts. To balance environmental protection with program feasibility, member comments include that buffer requirements should be tailored to the function and type of stream (e.g., ephemeral vs. perennial). For example, a buffer distance could be calculated based on stream width. A concern was raised that overly restrictive buffers could cause the program to fail.

Mitigation

Panel members commented that mitigation for ephemeral channels should prioritize functional assessment over simple acreage thresholds, focusing on environmental resources being lost. Some panel members recommended trend-based monitoring and climate-resilient designs, such as drought-adaptive restoration, to ensure long-term success. It was further suggested that NMED evaluate mitigation ratios based on State-specific conditions and ecological priorities and that confidence ratios be used primarily with high mitigation ratios when continuing costs may not be needed to achieve positive outcomes. Some members encouraged NMED to allow flexibility and best professional judgment to assess the meeting of goals.

E. Stakeholder Outreach and Training

Some on the panel considered training and outreach programs foundational to the State program's success. Some members suggested implementing tailored pre- and post- permit program rollout training sessions for different permit types, ensuring precise and consistent communication with permittees. Other feedback from panel members included that these programs should prioritize accessibility, offering multilingual resources and virtual training options to reach stakeholders across the State. Outreach efforts should include educational materials on new permit program requirements and application processes, particularly for small and underserved communities.

F. Feedback Highlights on State WQA Program

Key feedback themes included:

- Using general permits for minor discharges.
- Integrating Section 404 dredge and fill permitting considerations.
- Tailoring mitigation requirements to arid-region conditions, including ephemeral streams and limited water availability.

- Focusing mitigation on functional losses rather than acreage alone and setting practical thresholds to simplify compliance.
- Using the bright line rule on the upstream point where waters are excluded since the ordinary high water mark concept is challenging for ephemerals.
- Question on determining a SWOTS's lateral extent and upstream ephemeral boundary.
- Allowing exemptions for restoration specific to dredge and fill and for mines within permit areas already regulated under other programs.

3.4. Funding Strategy Development (Program Cost and Funding Options)

Funding discussions during the SWAP process emphasized the need for a sustainable model that equitably distributes costs among stakeholders. The panel provided extensive feedback on proportional fee structures, innovative revenue sources, and financial support mechanisms for smaller entities. Some recommendations reflect a shared commitment to ensuring fairness and transparency in program funding.

A. Revenue Sources and Budgeting

Many panel members underscored the importance of sustainable and equitable funding mechanisms to support the implementation of the State permitting program. Some members proposed leveraging enforcement penalties and exploring innovative revenue sources to supplement traditional fee structures. Examples included cannabis revenue, license plate fees, and other dedicated funding streams that could support water restoration projects and compliance assistance initiatives.

B. Innovative Revenue Sources

(1) Compliance Incentives:

Enforcement penalties were highlighted as a potential resource for funding restoration and compliance initiatives. Some panel members pointed to successful models in other states where penalties are reinvested to support environmental projects and regulatory programs.

(2) Expedited Permitting Fees:

Some panel members discussed introducing higher fees for expedited permit processing. This approach, modeled after programs like the USACE 214 agreement, would allow permittees to fund priority reviews while generating additional revenue for the permitting program.

C. Equity Considerations

(1) Cost Sharing for Small Entities

Several panel members emphasized the need for cost-sharing mechanisms to ensure program costs do not disproportionately impact smaller operations. These initiatives could offset financial burdens and promote equitable participation across all permittee categories.

(2) Notices of Violation (NOV):

Some panel members recommended requiring a Notice of Violation (NOV) before issuing a compliance order to encourage voluntary compliance and reduce the need for escalated enforcement actions. Recognizing good faith efforts in penalty determinations was also proposed to foster collaboration and trust between regulators and permittees.

(3) Incentives for Restoration Projects

Permittees undertaking restoration or mitigation projects could receive fee reductions or credits as incentives for proactive environmental stewardship. Some panel members suggested innovative credit systems to encourage voluntary compliance and improve water quality.

(4) Penalty Allocation

Some panel members proposed that penalties for surface water violations be deposited into the Water Quality Management Fund rather than the General Fund. This approach would directly support water quality programs and align with reinvestment priorities in enforcement and compliance activities. Concerns were also raised about administrative costs associated with compliance orders and penalties, and members recommended revising penalty allocations to better support operational sustainability.

(5) Proportional Fee Models

- Individual Permits:
  Some panel members suggested that permit fee structures reflect the complexity and resources required to issue permits rather than relying solely on discharge volumes, design flow, or facility size. Member contributions included concern that fees based on treatment plan capacity could discourage future planning. Other considerations could include reuse initiatives which would be reflected in lower reported discharge quantities. Additional charges for discharges into impaired waters or those with established TMDLs (Total Maximum Daily Loads) were discussed as viable strategies to support program funding.

- General Permits:
  Simplified fee structures for general permits were proposed, including combining application and first-year fees into a single upfront cost. Some members also suggested tiered construction general permit (CGP) fees based on project acreage and potential environmental impact.

D. Feedback Highlights on Funding Strategy Development

Proportional Fees

Proportional fee structures could be used for both individual and general permits, with considerations for complexity, environmental impact, and discharges into impaired waters. Larger dischargers would contribute proportionally to program funding to reduce the burden on smaller entities.

Cost Sharing

Cost-sharing initiatives could be used to ensure equity, particularly for small-scale operations.

Innovative Revenue Sources and Incentives

Expedited permitting fees, compliance incentives, and restoration project credits could be used to encourage proactive environmental stewardship. Dedicated revenue sources, such as penalties reinvested into restoration funds, could ensure those program elements are sustainable.

3.5. Additional Considerations for Program Implementation

A. Mapping Tools and Jurisdictional Determination

Jurisdictional clarity was identified as a critical priority for program implementation. Many panel members consistently recommended leveraging GIS-based mapping tools and pre-developed resources to help applicants distinguish between SWOTS and WOTUS. Such tools would expedite jurisdictional determinations, reduce disputes, and minimize delays. Panelists emphasized the need for these resources to be accessible and regularly updated to reflect changes in regulatory boundaries.

Some panel members raised additional questions concerning the categorization of manmade ditches and canals, the exclusion of certain irrigation facilities from others that may be more natural in origin, and how a mapping tool would be used to account for changes such as new dams and flow changes. Suggestions were added for time-based reviews, ground truthing, and triggering events.

B. Workforce Development and Program Support

Some on the panel suggested that the NMED should prioritize hiring archeologists and natural resource professionals to support program implementation. Workforce development initiatives, such as internships and training programs, could attract qualified candidates and ensure long-term program capacity.

Some panel members commented that the State should prioritize upgrading laboratory facilities and providing training programs for local operators to support publicly owned treatment works (POTWs) and privately owned treatment works. Further, a dedicated State chemist or data steward position could assist utilities with monitoring and analyzing data to comply with emerging contaminant regulations.

Other panel members indicated concerns about the State agency's creation and retention of positions within the program, considering the many funded vacancies.

C. Stakeholder Engagement and Program Roll-Out

Many panelists were interested in offering further support for the project, particularly when more specifics are proposed for comment. To maintain transparency and foster ongoing

collaboration, some panelists recommended scheduling quarterly SWAP meetings during and after the program roll-out. These meetings would be opportunities to gather input, address emerging concerns, and evaluate the program's effectiveness. Some SWAP members also supported creating dedicated feedback channels to ensure adaptive improvements can be made efficiently throughout program implementation. Another suggestion was to provide existing permittees with at least annual email updates on the development of the State permitting process, ensuring they are informed about public comment periods and anticipated program changes.

4. Summary

4.1. Process Summary

Over three months, the SWAP process included robust and collaborative discussions among diverse stakeholders. The SWAP process provided members with a structured and inclusive platform to provide technical, operational, and policy input for developing a State-led surface water permitting program. Participants offered diverse perspectives through meetings and submittals, focusing on program design, legislative adjustments, and funding strategies.

4.2. Summary of Feedback

The SWAP's feedback is critical to shaping a permitting framework that reflects New Mexico's environmental and operational realities while aligning with broader regulatory goals. Key recurring themes emerged, including the need for regulatory clarity, tailored solutions for New Mexico's environmental and operational realities, and well-thought-out stakeholder engagement mechanisms.

Several panel members emphasized the importance of retaining practical elements of the federal framework, such as public participation components, exemptions, and use of general permits. Simultaneously, many members stressed the importance of incorporating State-specific adaptations. Discussions also highlighted challenges such as administrative capacity, funding sustainability, and potential regulatory overlaps. The SWAP process served as a critical venue for identifying and exploring collaborative solutions to address these issues.

4.3. Documentation

The SWAP process emphasized transparency and collaboration in documenting stakeholder contributions. During the process, SWAP members reviewed drafts of potential regulatory and statutory language and several provided input. NMED synthesized feedback from SWAP meetings, member submittals, and member comments on a draft of this report to produce the final report. This report reflects the collective contributions and feedback from the SWAP process. It serves as a record of the SWAP's contributions to the initial development of the State Permitting Program and will help inform subsequent development phases of the permitting program, including rulemaking, funding strategies, and infrastructure design.

See Appendix D for written input submitted by SWAP members and presentations given by SWAP members at meetings. Detailed comments on draft statutory and regulatory language are not attached to this report.

See Appendix E for member feedback on a draft of this report.

Appendices:

Appendix A: SWAP Membership

Appendix B: SWAP Meeting Attendance

Appendix C: SWAP Meeting Agendas

Appendix D: SWAP Member Written Input and Presentations

Appendix E: SWAP Member Comments on Draft Report

Appendix A: SWAP Membership

	Surface Water Advisory Panel Members and Alternates (A)	
	Name	Affiliation
1	**Aaron Chavez** achavez@sjwc.org	San Juan Water Commission
2	**Allen Haden** allen@naturalchanneldesign.com	Natural Channel Design Engineering, Inc.
2A	**Cathy Scudieri** cathy@naturalchanneldesign.com	Natural Channel Design Engineering, Inc.
3	**Colleen Cunningham** colleen.cunningham@ose.nm.gov	NM Interstate Stream Commission/Office of the State Engineer
3A	**Michelle Hunter** michelle.hunter@ose.nm.gov	NM Interstate Stream Commission/Office of the State Engineer
4	**Conrad Parrish** conrad.parrish@intrepidpotash.com	Intrepid Potash - New Mexico, LLC
5	**Corey Webster** corey.webster@dgf.nm.gov	NM Department of Game and Fish
5A	**Jack Marchetti** jack.marchetti@dgf.nm.gov	NM Department of Game and Fish
6	**Danielle Shuryn** dshuryn@abcwua.org	Albuquerque Bernalillo County Water Utility Authority
6A	**Merat Zarreii** mzarreii@abcwua.org	Albuquerque Bernalillo County Water Utility Authority
7	**David Gatterman** dgatterman@sscafca.com	Sandoval County Arroyo Flood Control Authority.
7A	**Kali Bronson** kbronson@bernco.gov	Bernalillo County
8	**Debbie Hughes** conserve@nmacd.org	NM Association of Conservation Districts
8A	**Rebecca Dow** Rebecca@dowfornm.com	NM Association of Conservation Districts
9	**Gaylen Barnett** gaylen@814solutions.com	Associated General Contractors of NM
9A	**Kelly Roepke-Orth** kroepke@agc-nm.org	Associated General Contractors of NM
10	**Joey Martin** joeymartin@dfamilk.com	Dairy Farmers of America
11	**John Kay** jtkay@sandia.gov	Sandia National Laboratories/National Technology & Engineering Solutions of Sandia, LLC (NTESS)

11A	**Terrill Lemke** tlemke@lanl.gov	Los Alamos National Laboratory - Triad National Security, LLC
12	**Jonathan Pennington** jonathan.a.pennington@conocophillips.com	ConocoPhillips
12A	**Keegan Fleming** keegan.fleming@conocophillips.com	ConocoPhillips
13	**Melanie Lawton** melanie@nmhba.org	NM Home Builders Association
14	**Lial Tischler** lial@tkee.com	NM Oil and Gas Association
14A	**Michelle Wanto** michelle.t.wanto@exxonmobil.com	ExxonMobil Technology & Engineering
15	**Max Trujillo** max@hechoonline.org	Hispanics Enjoying Camping Hunting and the Outdoors (HECHO)
15A	**Dan Roper** dan.roper@tu.org	Trout Unlimited
16	**Michael T. Sandoval** michaelt@sfpueblo.com	Pueblo of San Felipe
16A	**Edmund Chavez** edmundc@sfpueblo.com	Pueblo of San Felipe
17	**Rachel Conn** rconn@amigosbravos.org	Amigos Bravos
17A	**Steven Fry** sfry@amigosbravos.org	Amigos Bravos
18	**Roy Jemison** roy.jemison@usda.gov	USDA Forest Service, Southwestern Region
18A	**Kerry Jones** kerry.jones@usda.gov	USDA Forest Service, Southwestern Region
19	**Samantha Barncastle Salopek** samantha@h2o-legal.com	Elephant Butte Irrigation District and other public and private water delivery and use sectors
19A	**Gary Esslinger** nontiveros@ebid-nm.org	Elephant Butte Irrigation District
20	**Sarah Ganley** sganley@bhinc.com	NM Chamber of Commerce
20A	**Joelle Bobinsky** jbobinsky@bhinc.com	NM Chamber of Commerce
21	**Steven Perez** stperez@lascruces.gov	NM Municipal League and City of Las Cruces Utilities
21A	**Luis Guerra** lguerra@lascruces.gov	City of Las Cruces Utilities
22	**Stuart Butzier** stuart.butzier@modrall.com	NM Mining Association

22A	**Dalva Moellenberg** dlm@gknet.com	NM Mining Association
23	**Tannis Fox** fox@westernlaw.org	Western Environmental Law Center
23A	**Erik Schlenker-Goodrich** eriksg@westernlaw.org	Western Environmental Law Center
24	**Tiffany Rivera** tiffanyr@nmflb.org	NM Farm & Livestock Bureau
25	**Trent Botkin** trentbotkin@gmail.com	NM Department of Transportation Environmental Bureau
25A	**Steven Gisler** steven.gisler@dot.nm.gov	NM Department of Transportation Environmental Bureau
26	**Tricia Snyder** tricia@nmwild.org	NM Wild
26A	**Doug Meiklejohn** douglas@cvnm.org	Conservation Voters New Mexico
27	**Vidal Gonzales** vidal@lasacequias.org	NM Acequia Association
27A	**Paula Garcia** lamorena@lasacequias.org	NM Acequia Association

Appendix B: SWAP Meeting Attendance

Surface Water Advisory Panel (SWAP) Meeting 1 - Attendance List	
Name	
Aaron Chavez	
Allen Haden	
Andrew Knight	NMED
Beatriz Salazar-Archuleta	NMED
Chris Moander	EMNRD
Colleen Cunningham	
Conrad Parrish	
Corey Webster	
Christal Weatherly	NMED
Dan Connally	ERG
Danielle Shuryn	
David Gatterman	
Doug Meiklejohn	
Forrest Luna	USACE
Gaylen Barnett	
Jocelyn Harimon	NMED
Joey Martin	
John Kay	
Jonathan Pennington	
Lial Tischler	
Maryann McGraw	NMED
Melanie Lawton	
Pam Homer	NMED
Pam Jones	NMED
Rachel Conn	
Rebecca Dow	
Samantha Barncastle Salopek	
Sarah Ganley	
Shelly Lemon	NMED
Steven Perez	
Stuart Butzier	
Susan Lukas Kamat	NMED
Tannis Fox	
Tiffany Rivera	
Trent Botkin	
Vidal Gonzales	
Zach Ogaz	NMED

Online Observers	
Christina Conrad	ERG
Kali Bronson	
Merat Zarreii	
Jack Marchetti	
Dalva L. Moellenberg	
Steven Gisler	
Tricia Snyder	
Debbie Hughes	
Curry Jones	US EPA
Brent Larsen	US EPA

Surface Water Advisory Panel (SWAP) Meeting 2 - Attendance List	
Name	
Aaron Chavez	
Andrew Knight	NMED
Beatriz Salazar-Archuleta	NMED
Cathy Scudieri	
Chris Moander	EMNRD
Colleen Cunningham	
Conrad Parrish	
Corey Webster	
Christal Weatherly	NMED
Dan Roper	
Danielle Shuryn	
David Gatterman	
Doug Meiklejohn	
Edmund Chavez	
Gaylen Barnett	
Jocelyn Harimon	NMED
Joelle Bobinsky	
John Kay	
Jonathan Pennington	
Kate Lacey-Younge	NMED
Maryann McGraw	NMED
Pam Homer	NMED
Rachel Conn	
Roy Jemison	
Shelly Lemon	NMED
Steven Perez	
Stuart Butzier	
Susan Lukas Kamat	NMED
Tannis Fox	
Trent Botkin	
Vidal Gonzales	
Zach Ogaz	NMED

Online Observers	
Debbie Hughes	
Dalva L. Moellenberg	
Dan Connally	ERG
Joey Martin	
John Kay	
Kali Bronson	
Lial Tischler	
Samantha Barncastle	
Sarah Ganley	
Steven Gisler	
Tricia Snyder	

Surface Water Advisory Panel (SWAP) Meeting 3 - Attendance List	
Name	
Aaron Chavez	
Andrew Knight	NMED
Beatriz Salazar-Archuleta	NMED
Cathy Scudieri	
Christal Weatherly	NMED
Colleen Cunningham	
Dalva Moellenberg	
Danielle Shuryn	
David Gatterman	
Doug Meiklejohn	
Edmund Chavez	
Erik Schlenker-Goodrich	
Gaylen Barnett	
Jocelyn Harimon	NMED
Joelle Bobinsky	
Jonathan Pennington	
Lial Tischler	
Luis Guerra	
Maryann McGraw	NMED
Max Trujillo	
Pam Homer	NMED
Rebecca Dow	
Samantha Brancastle-Salopek	
Sara Willis Hilbrich	ERG
Shelly Lemon	NMED
Steven Fry	
Susan Lukas Kamat	NMED

Terrrill Lemke	
Trent Botkin	
Vidal Gonzales	

Online Observers	
Alan Klatt	NMED
Brecken Scott	NMED
Chris Moander	EMNRD
Corey Webster	
Dan Connally	ERG
Debbie Hughes	
Joey Martin	
Kali Bronson	
Renea Ryland	EPA
Roy Jemison	
Sarah Ganley	
Steven Gisler	
Tiffany Rivera	
Tricia Snyder	

Surface Water Advisory Panel (SWAP) Meeting 4 - Attendance List	
Name	
Aaron Chavez	
Andrew Knight	NMED
Beatriz Salazar-Archuleta	NMED
Cathy Scudieri	
Christal Weatherly	NMED
Colleen Cunningham	
Conrad Parish	
Corey Webster	
Dalva Moellenberg	
Dan Roper	
David Gatterman	
Edmund Chavez	
Gaylen Barnett	
Jocelyn Harimon	NMED
Joelle Bobinsky	
Jonathan Pennington	
Lial Tischler	
Luis Guerra	
Maryann McGraw	NMED
Merat Zarreii	
Pam Homer	NMED
Sara Willis Hilbrich	ERG
Shelly Lemon	NMED
Steven Fry	
Susan Lukas Kamat	NMED
Tannis Fox	
Terrrill Lemke	

Tricia Snyder	
Vidal Gonzales	

Online Observers	
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Antonio Griego	
Brecken Scott	NMED
Chris Moander	EMNRD
Dan Connally	ERG
Doug Meiklejohn	
Joey Martin	
Kali Bronson	
Rachel Conn	
Rebecca Dow	
Renea Ryland	EPA
Roy Jemison	
Samanthan Barncastle Salopek	
Sarah Ganley	

Surface Water Advisory Panel (SWAP) Meeting 5 - Attendance List	
Name	
Allen Haden	
Andrew Knight	NMED
Beatriz Salazar-Archuleta	NMED
Colleen Cunningham	
Conrad Parrish	
Corey Webster	
Dalva Moellenberg	
Dan Roper	
David Gatterman	
Debbie Hughes	
Jocelyn Harimon	NMED
Joelle Bobinsky	
Keegan Fleming	
Maryann McGraw	NMED
Merat Zarreii	
Pam Homer	NMED
Paula Garcia	
Rachel Conn	
Shelly Lemon	NMED
Steven Perez	
Susan Lukas Kamat	NMED
Tannis Fox	
Trent Botkin	
Trician Snyder	
Zach Ogaz	NMED

Online Observers	
Doug Meiklejohn	

Joey Martin	
Sarah Ganley	
Chris Moander	OCD
Kali Bronson	
Gaylen Barnett	
Dan Connally	ERG
Kate Lacey-Younge	NMED
Samantha Barncastle	
Lial Tischler	
Tiffany Rivera	
Steven Fry	
Brecken Scott	NMED

Surface Water Advisory Panel (SWAP) Meeting 6 - Attendance List	
Name	
Aaron Chavez	
Allen Haden	
Andrew Knight	NMED
Beatriz Salazar-Archuleta	NMED
Colleen Cunningham	
Conrad Parrish	
Christal Weatherly	NMED
Dan Roper	
Danielle Shuryn	
David Gatterman	
Edmund Chavez	
Elizabeth Foster	
Jocelyn Harimon	NMED
John Kay	
Keegan Fleming	
Lial Tischler	
Maryann McGraw	NMED
Michael Sandoval	
Pam Homer	NMED
Rachel Conn	
Rebecca Dow	
Roy Jemison	
Sarah Ganley	
Shelly Lemon	NMED
Stuart Butzier	
Susan Lukas Kamat	NMED
Tannis Fox	

Tricia Snyder	
Vidal Gonzales	
Zach Ogaz	NMED

Online Observers	
Corey Webster	
Dalva Moellenberg	
Dan Connally	ERG
Doug Meiklejohn	
Elizabeth Foster	
Gaylen Barnett	
Kali Bronson	
Samantha Barncastle	
Trent Botkin	

Appendix C: SWAP Meeting Agendas

Surface Water Advisory Panel (SWAP)
Agenda

Meeting 1 – August 19 **Introduction**	
Morning	
9:00 – 10:00	Introductions Name, affiliation, interest in program
10:00 – 10:30	**Presentation: Overview of SWAP Purpose, Process, and Meeting Agendas**
10:30 – 10:45:	Break
10:45 – 12:00	**Presentations: Surface Water Quality Discharge Permitting in New Mexico** 1. Context: Overall Surface Water Quality Protections and Authority 2. Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) Program Regulating Point Source Discharges 3. CWA Section 404 Program Regulating Discharges of Dredged or Fill Material
Afternoon	
1:15–1:30	**Presentation: SWAP Focus: Looking Forward**
1:30 – 3:00	**Member Discussion:** • What is working under the current permitting programs that should be retained for the state permitting program? What could be improved or adapted to better suit New Mexico under a state permitting program? • What protections or considerations would you like to add that do not exist in current permitting programs that would help ensure clean water for future generations? • What do you see as a way to positively protect and restore New Mexico's waters through this process? • What do you see as a way to positively affect water users and permittees through this process? • What are your biggest concerns about NPDES delegation and the creation of a state permitting program?
3:00 -3:15	Break
3:15 – 3:45	**Presentation: NPDES Delegation** ***Questions for Member Discussion at Meeting 2*** *1. What do you see as the benefits, disadvantages, and challenges of obtaining NPDES delegation?* *2. What other thoughts do you have on delegation?*
3:45 – 4:00	Wrap up

Surface Water Advisory Panel (SWAP)
Meeting 2 Agenda

Meeting 2 – September 11
Delegation / NMPDES Statute and Rule / General Principles for State Permitting Program

Morning

9:00 – 9:20 Introductory Comments

9:20 – 10:30 **Member Discussion: NPDES Delegation**

1. What do you see as the benefits, disadvantages, and challenges of obtaining NPDES delegation?
2. What other thoughts do you have on delegation?

10:30 – 10:45 Break

10:45 – 11:30 **Member Discussion continued**

11:30 - 12:00 **Presentation: Draft New Mexico Pollutant Discharge Elimination System (NMPDES) Statute and Rule**

Afternoon

1:15 – 1:30 **Presentation: General Principles for Developing a State Permitting Program under the Water Quality Act (WQA) to Protect Surface Water Quality**

1:30 – 2:45 **Member Discussion:** What are your thoughts on the general principles suggested – do you have others to suggest?

2:45 – 3:00 Break

3:00 – 3:45 **Introduce Topics for Meetings 3 and 4**

Presentations:

1. **State (WQA) Program – Process** (Meeting 3)

   Questions for member discussion at Meeting 3

   a. *How can we make the process of determining whether/which permit is needed easy to navigate?*
   b. *What are effective and reasonable methods for public notice and addressing environmental justice?*
   c. *What other comments do you have on the proposed process elements?*

2. **State (WQA) Program – Options for Point Source Discharges** (Meeting 4)

   Questions for member discussion at Meeting 4

   a. *From your perspective what aspects of the NPDES framework are most important to retain?*
   b. *What adaptations would you suggest to improve efficiency or improve water quality protection?*
   c. *What factors should be considered for various facility types and community interests, such as POTWs, MS4s, industrial and other non-POTWs, construction activities, CAFOs, downstream water users, aquatic habitats?*

3:45 – 4:00 Wrap up

Surface Water Advisory Panel (SWAP)
Meeting Agendas

Meeting 3 – October 1 **NMPDES / State (WQA) Program - Process**	
Morning	
9:00 – 9:20	Introductory Comments
9:20 – 10:45	**Member Discussion: Feedback on NMPDES Statute and Rule** Presentation from Meeting 2, draft statute, draft rule, crosswalk. *What aspects of these drafts are of most interest or concern to you and why?* **Member Presentation:** NM Oil & Gas Association
10:45 – 11:00	Break
11:00 – 12:00	**Member Discussion: State (WQA) Program – Process** Notices of Intent (which permit is needed), applications, public notice and comment, public meetings and hearings, administrative and judicial review. Please review presentation from Meeting 2. 1. *How can we make the process of determining whether/which permit is needed easy to navigate?* 2. *What are effective and reasonable methods for public notice and addressing environmental justice?* 3. *What other comments do you have on the proposed process elements?*
Afternoon	
1:15 – 2:45	**Member Discussion continued: State (WQA) Program – Process**
2:45 – 3:00	Break
3:00 – 3:45	**Member Discussion continued: Final Comments and Key Takeaways**
3:45 – 4:00	Wrap up

Meeting 4 – October 2
State (WQA) Program – Options for Point Source Discharges

Morning

9:00 – 9:20 Introductory Comments

9:20 – 10:30 **Member Discussion:**
State (WQA) Program – Options for Point Source Discharges
What aspects of the NPDES framework should be retained, dropped, or adapted for a permitting program to protect state surface waters?
Please review presentation from Meeting 2.

1. *From your perspective what aspects of the NPDES framework are most important to retain in the state program?*
2. *From your perspective, what exemptions are important and why? (See 40 CFR 122.3 and 40 CFR 122.26(a)(2) for existing NPDES exemptions.)*
3. *What adaptations would you suggest to improve efficiency or improve water quality protection?*
4. *What factors should be considered for various facility types and community interests, such as POTWs, MS4s, industrial and other non-POTWs, construction activities, CAFOs, downstream water users, aquatic habitats?*

10:30 – 10:45 Break

10:45 – 12:00 **Member Discussion continued**
Member Presentations: NM Mining Association, NM Oil & Gas Association

Afternoon

1:15 – 2:30 **Member Discussion continued**

2:30 – 2:45 Break

2:45 – 3:15 **Member Discussion: Final Comments and Key Takeaways**

3:15 – 3:45 **Introduce Topic for Meeting 5**
Presentation: State (WQA) Program – Options for Dredged and Fill Material Discharges

Questions for member discussion at Meeting 5

1. *From your perspective, what exemptions are important and why?*
2. *From your perspective what aspects of the Section 404 framework are most important to retain?*
3. *What adaptations would you suggest to improve efficiency or improve resource protections?*
4. *What mitigation approaches would be most effective in NM?*

3:45 – 4:00 Wrap up

Surface Water Advisory Panel (SWAP)
Meeting Agenda

Meeting 5 – October 15
State WQA Program – Options for Dredged and Fill Material Discharges

Morning

9:00 – 9:20 Introductory Comments

9:20 – 12:00 with a break

Member Discussion:

State (WQA) Program – Options for Dredged and Fill Material Discharges

What aspects of the Section 404 framework should be retained, dropped, or adapted? Please review presentation from Meeting 4.

1. *From your perspective, what exemptions are important and why?*
2. *From your perspective what aspects of the Section 404 framework are most important to retain?*
3. *What adaptations would you suggest to improve efficiency or improve resource protections? (what has not worked well and how can it be improved?)*
4. *What mitigation approaches would be most effective in NM?*
5. *What other suggestions or concerns do you have related to a state dredge and fill permitting program?*

Member Presentations:

Natural Channel Design Engineering
NM Department of Transportation

Afternoon

1:15 – 2:45 **Member Discussion continued**

2:45 – 3:00 Break

3:00 – 3:45 **Introduce Topics for Meeting 6**

NMED Presentations:

1. Program Cost and Funding Options (Dan Connally, ERG)
2. Topic Areas for Water Quality Act Amendments (Shelly Lemon, NMED-SWQB)

3:45 – 4:00 Wrap up

Surface Water Advisory Panel (SWAP)
Meeting Agenda

Meeting 6 – October 25
Program Cost and Funding Options / Water Quality Act Amendments

Morning

9:00 – 9:20 Introductory Comments

9:20 – 12:00 (with a break)

Member Discussion: **Program Cost and Funding Options**

NMED will provide more explanation of program costs and potential fee structures for discussion.

- *What do you consider to be an equitable basis for fees?*
- *Are there options besides the General Fund for helping to underwrite this program?*

Member Presentation

Equity and Environmental Justice - NM Acequia Association, NM Wild, and San Felipe Pueblo

Afternoon

1:00 – 2:30 **Member Discussion**: **Draft Water Quality Act Amendments**

NMED will provide draft amendments and their rationale for discussion.

2:30 – 2:45 Break

2:45 – 3:15 **What's Next?**

Placeholder meetings Nov. 13-14: are there topics needing more discussion?
Timeline for SWAP input, draft/final SWAP report, rulemaking process

3:15 – 4:00 **Member Closing Remarks**: Final takeaways

Wrap up

Meeting 7 – November 13
Reserved for Topics Needing More Discussion

Meeting 8 – November 14
Reserved for Topics Needing More Discussion

Appendix D: SWAP Member Written Input and Presentations

Submitted Document List

Albuquerque Bernalillo County Water Utility Authority (ABCWUA)

File: 2024-11-18 ABCWUA Wrap up SWAP comments.pdf

Elephant Butte Irrigation District

File: EBID SWAP Comments.FINAL.pdf

Los Alamos National Laboratory

File: LANL Triad Section 404 Dredge and Fill Comments 7 NOV 2024.pdf

Natural Channel Design Engineering

File: Restoration-Dredge-and-Fill-Presentation.pdf

NM Acequia Association, NM Wild, and Pueblo of San Felipe

File: 10.25 NMAA-NMWild-SanFelipe SWAP presentation.pdf

NM Association of Conservation Districts

File: NMACD Comments for SWAP 2024-11-08.pdf

NM Chamber of Commerce

File: Chamber Point Source Breakout Groups Notes.pdf
File: NM Chamber SWAP Comments 2024-10-11.pdf

NM Department of Transportation

File: NMDOT_Challenges_2024.pdf

NM Farm & Livestock Bureau

File: NMFLB SWAP Comments Overall 2024-10-11.pdf

NM Mining Association

File: 2024-11-08 NMMA SWAP Comments.pdf
File: Member-Presentation-NMMA.pdf

NM Oil and Gas Association

File: Comments of the New Mexico Oil and Gas Association-state permits_r1.pdf
File: Member-Presentation-NMOGA NMPDES-Statute-Rule.pdf
File: Member-Presentation NMOGA-State Program.pdf

Sandia National Laboratories

File: SNL comments to SWAP 11-8-2024.pdf

ABCWUA Written Input

File: 2024-11-18 ABCWUA Wrap up SWAP comments.pdf

From: Shuryn, Danielle
To: Homer, Pam, ENV
Subject: [EXTERNAL] Wrap up SWAP comments
Date: Monday, November 18, 2024 3:40:46 PM
Attachments: image001.png
image003.png

Hi Pam,
I had a couple of final SWAP comments that I wanted to pass on for the final report that are not necessarily tied to the drafts & redline comments that you were collecting.

1. It would be really great if the SWQB could provide periodic (at least annual) email updates on the state NMPDES permitting process to existing NPDES permitees. Permit contact email addresses should be available to NMED already, and it would be a great way to inform the permitees, especially community POTWs, of what is happening, how they can participate in the public comment periods and when they should expect to see program changes.

2. I have concerns that calculating the annual discharge permit fees based on the treatment plant capacity is inappropriate to represent an actual discharge amount. I know that we will comment on this later during the regulation development, but I thought it is important to consider as soon as you can. First in principle it discourages a design capacity that plans for the future. We are currently planning to make changes to increase our reuse discharge permit at the GWQB, which will also reduce the amount we will be discharging to the river in the future. In general when all of the treated wastewater may not be discharged to the WOTUS, treatment plant capacity is not an appropriate replacement criteria to measure discharge quantity, especially when the permitees are reporting actual discharge quantities each month and the data is readily available in the database. Annual fees should be related to the max (or average) discharge amount for the previous year as the fee is applied.

Thanks for the opportunity to participate,
Danielle

Danielle Shuryn
Compliance Division Manager
Albuquerque Bernalillo County Water Utility Authority
PO Box 568 | Albuquerque NM | 87103
505-289-3382 (ofc) | 505-803-1970 (cell)
www.abcwua.org

Elephant Butte Irrigation District Written Input

File: EBID SWAP Comments.FINAL.pdf

BARNCASTLE LAW FIRM

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November 8, 2024

Surface Water Quality State Permitting Program
c/o Ms. Pamela E. Homer, Team Lead
PO Box 5469
Santa Fe, NM 87502

VIA EMAIL ONLY TO:
pam.homer@env.nm.gov

Re: **Comments of the Elephant Butte Irrigation District regarding SWAP Process**

Dear Ms. Homer,

On behalf of the Elephant Butte Irrigation District (EBID), we appreciate the opportunity to participate in the Surface Water Advisory Panel (SWAP) process, which has recently concluded. EBID submits the following overall comments regarding the matters discussed in the meetings, building on oral comments provided in the meetings, but without specific reference to conversations or drafts of documents. Thank you for your consideration of the same.

Agriculture is a way of life in the Rio Grande Valley of southern New Mexico. The rural communities that we serve depend on the water resources we manage to sustain our way of life. EBID delivers water to 90,640 acres of land and approximately 7,900 water users, spanning 130 miles of land along the Rio Grande Valley from Caballo Dam to El Paso, Texas. In a normal irrigation season, EBID delivers water from mid-March to mid-October. There are hundreds of miles of drainage ditches and laterals—most of which are dry for long stretches of the year—that cross the individual farms that receive water via the district. The canals, laterals, and ditches that crisscross the valley make it possible to grow the highest quality fruits, vegetables, and nuts on lands that would otherwise be unproductive scrub.

EBID has long been active in participating on the federal level related to water quality permitting. In that context, several lessons have been learned. In that regard, EBID encourages the State of New Mexico to adopt a similar approach to what we have seen out of federal agencies in implementing the federal Clean Water Act. In general, and discussed in more detail below, EBID advocates for a State system that contains all the same protections for agriculture and irrigation features as does the current Federal system. In that regard, we appreciate that you took time to learn about topics such as how water is actually moved both into and through the EBID system. It is imperative that we avoid costly permitting requirements simply due to lack of understanding of basic design features, and to that end, EBID believes adequate feedback was provided within the meetings to ensure your team fully understands operation and maintenance of the EBID system.

EBID understands that the proposal of the Environment Department will include explicit exclusions of certain features, or at the very least, streamlined permitting for those features. The explicit exclusion from permitting of the following features tied to water delivery at EBID are important to ensure costs of permitting do not overwhelm EBID's members:

- Groundwater, including groundwater drained through subsurface drainage systems;
- Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland areas and arroyo flow;
- Construction and maintenance of ditches, diversion structures, weirs, headgates, and other related facilities that connect the irrigation ditches
- Prior converted cropland
- Artificially irrigated areas that would revert to upland without irrigation
- Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds)
- Construction activities in upland areas even if they connect to the EBID system.

As an agricultural water district in the arid West whose sole job is to deliver water to the members of our district efficiently and effectively, regulatory certainty is critical to our performance of obligations to our membership. EBID advocates for a total exemption from permitting jurisdiction for operation and maintenance of irrigation infrastructure, including but not limited to drainage ditches, canals, weirs, headgates, and reservoirs. First, regarding maintenance, EBID regularly performs maintenance on emergency and other bases wherein requiring a singular permit on each occasion would be unduly burdensome. Hindering agriculture related operations in such a manner will increase risk and cost to producers, thereby impacting the overall economy of southern New Mexico. Broad exemptions from permitting jurisdiction for both construction and maintenance, but also for operations are imperative to ensure the burden of permitting does not improperly fall on the shoulders of farmers. At an absolute minimum, broadly applicable general permits that avoid disruption of EBID functions are necessary.

EBID also advocates for explicit exemption of groundwater as a conduit in this context. In the court case, *Upstate Forever v. Kinder Morgan Energy Partners*, the Fourth Circuit U.S. Court of Appeals held that the Clean Water Act (CWA) regulates the discharge of pollutants from a point source that reaches traditional navigable waters through a direct hydrological connection to groundwater. In the Kinder Morgan case, the rupture of a pipeline of a subsidiary of Kinder Morgan spilled hundreds of thousands of gallons of gasoline, some which entered the groundwater. Environmental groups filed a citizen suit alleging gasoline that remained in groundwater seeped into nearby tributaries and wetlands in violation of the CWA. On appeal and relying on the Ninth Circuit decision in Hawaii Wildlife Fund v. County of Maui, the Fourth Circuit found that an indirect discharge to navigable waters through a direct hydrologic connection to groundwater violates the CWA.

EBID is dealing with a very similar situation to that in the Kinder Morgan case. In 2018, a buried Kinder Morgan gasoline pipeline ruptured in the vicinity of an EBID drainage ditch. Kinder Morgan, in conjunction with the State of New Mexico, is currently undertaking a clean-up of the site. EBID has significant ongoing concerns, including that: (1) gasoline has entered the underlying aquifer, and (2) gasoline will rise up into EBID's surface water delivery system when the ground is saturated and travel through the system into the Rio Grande, a Federal jurisdictional body. Given these circumstances, EBID appreciates the effort to craft the regulations to exclude groundwater permitting, including groundwater drained through subsurface drainage systems, to avoid imposing obligations on EBID that are not the direct result of EBID's activities. While EBID has concerns, we also understand that this process was limited to surface water, and in that

context, EBID advocates for avoiding confusion about permitting requirements by clearly excluding groundwater related activities from permitting activity here.

Finally, continuing in that regard, it is important to note that EBID is a passive receiver of water from multiples sources. The above example of the Kinder Morgan gas spill is not exclusive. Consider, for example, PFAS regulatory matters in the context of Surface Water Quality Permitting. EBID is not involved in the manufacture or intentional transportation or use of PFAS, and instead, is a passive receiver of media containing PFAS. The burden of compliance with water quality standards should not simply fall on the entity transporting the water, but instead, should get to the responsible parties, those who introduced the contamination. In many cases, such as arroyos, it is not quite so simple. Unless the above exemptions are provided, our state's water supply systems will most definitely be overwhelmed by permitting costs and the litigation expenses that follow. This increase in cost will only burden essential public service providers and the communities and residents we serve. Requiring water providers to engage in permitting or cleanup that was not the fault of its own system, but was instead passively received from another polluter, creates impossible circumstances for many. How can imposing this kind of burden on underprivileged communities be the solution to the problem? The State should be cautious about the unintended consequences of requiring permitting in circumstances such as EBID's.

In sum, EBID urges caution in moving forward with promoting regulations that will impose excessive burdens. EBID's existence, for more than 100 years, operating a system that is equally old, has revolved around the ability to efficiently and effectively deliver water to its members at a low enough cost to ensure they are able to produce agriculture products to support southern New Mexico's economy. Threatening costly permitting for simply existing threatens EBID's core, and threatens to bankrupt farmers. EBID urges caution to ensure that the State's interest in protecting the most vulnerable communities in New Mexico does not end up backfiring and imposing unduly burdensome constraints that can cause lasting damage in other ways. We look forward to continuing the conversation as the new proposed statutes and regulations continue to take shape.

EBID appreciates the opportunity to provide these comments and, should you require any further follow-up, please do not hesitate to contact me.

Sincerely,

BARNCASTLE LAW FIRM

By _____
Samantha R. Barncastle

SRB/kdb
XC: Client
Swq.pp@env.nm.gov

Los Alamos National Laboratory Written Input

File: LANL Triad Section 404 Dredge and Fill Comments 7 NOV 2024.pdf

LANL Triad Section 404/Dredge and Fill Comments 7 NOV 2024:

Below, I address the NMED questions as it regards the LANL Water Quality/404 program and what the state is developing. While specific to LANL in my text, this would for the most part be relevant state-wide. If you have any questions about these, please reach out.

1. From your perspective, what exemptions are important and why?

U.S. Army Corps of Engineers (USACE) has stated to Triad/LANL that they do not regulate tree thinning operations even when existing or new roads are built/maintained through ephemeral channels. Congruence between Federal and State programs is important, and it appears from the slide deck that this will remain the case for state waters. Stormwater BMPs are still used for non-permitted actions in ephemeral channels.

Prior to Sackett v. EPA, Triad/LANL pursued NWP permits for culvert cleanouts in ephemeral channels and abided by USACE that the open channel work (upstream and downstream of the culvert), as described, could fall under the Tulloch or "scoop and carry" rule (no permit necessary) and that the culvert clean out was best described under the Maintenance Nation Wide Permitting rules, NWP#3 because jet rod trucks discharged water to loosen up sediments before vacuum removal and deposition in upland areas. Post-Sackett, ephemeral channels are not jurisdictional, but what is NMED's intent regarding these maintenance activities going forward within open areas and "culverted" channels?

2. From your perspective what aspects of the Section 404 framework are most important to retain?

Protections of intermittent waters and proper identification of what constitutes intermittency. Pre- and Post Sacket, USACE instructed Triad/LANL to perform EPA's Streamflow Duration Assessment Methods ("SDAM"), of which NMED's Hydrology Protocol was considered a regional SDAM by EPA. USACE recognized that the SDAM/NMED-HP, and supplemented with gage data where available, were sufficient records to keep in project files when Triad/LANL's findings were ephemeral and not likely to need a 404 permit. However, USACE also stated that they are the agency that determines jurisdiction, so keeping SDAM/HP studies on file is not a JD per se., How would NMED's new program address preliminary determinations made by LANL when (a) the SDAM/HP agrees or does not agree with the dominant hydrology in the project area as defined in 20.6.4 NMAC?

Post-Sackett Triad/LANL has received varying verbal guidance on intermittency:

(a) Perform SDAM/HP—If ephemeral, store study in project file, no JD application submitted.
(b) If seasonal flows occur for consecutive days for "about" two weeks, stream is intermittent and therefore jurisdictional, but Triad/LANL needs assurance/guidance this would or would not apply when the water body does not have *relatively persistent surficial flow* to an indisputable WOTUS (Segment 114, Rio Grande).
(c) If within a Stahler stream order where a project occurs, a walkdown determines surficial flow to be >50% of linear reach, then the stream is Intermittent, and thus JD must be pursued, but see query in (b) regarding WOTUS connections. –This definition also presents problems as LA Canyon remains 10th order from just below Pajarito Ski Area and then all the way to White Rock turnpike (roughly 10 miles).

(d) USACE does not recognize NMED's hydrology determinations in 20.6.4 NMAC but will recognize results of SDAM/HP as supportive if not determinative for jurisdictional waters.

3. What adaptations would you suggest to improve efficiency or improve resource protections? (what has not worked well and how can it be improved?)

(a) Seek congruence between NMED and USACE on how to determine who has JD privilege.
(b) Some USACE JD methods (above) are not going to result in agreement with NMED at 20.6.4. NMAC
(c) Some USACE JD methods are not going to be in agreement with EPA6's JD determinations in support of the MS4 permit
(d) Perhaps require something akin to 401 conditioning when a permit is not necessary to protect ephemeral waters.
(e) Work with permittees on completion of hydrology determinations where current 20.6.4 NMAC assignments are possibly incorrect (Example: Ancho Cyn reaches the RG seasonally but is in segment 128 with ephemeral-only protections).
(f) EPA has released its regional SDAMs in beta format for two ecological zones relevant to NM; Arid West and Western Mountains. Will these preclude NMED's HP if fully adopted by the EPA and/or does NMED intend to adopt the regional SDAMs when it seeks rulemaking on 404?

4. What mitigation approaches would be most effective in NM?

Since LANL has deployed several mitigation actions and has learned much regarding stormwater controls in ephemeral channels, perhaps a workshop on mitigations might be in the offing.

Compensatory mitigation of wetland loss can be difficult in an arid environment, but (1) NPDES discharges have created wetlands on the plateau. Can past creation of wetland acreage be used as credit toward a wetland take? (2) If discharge is reduced or eliminated as per the NPDES program and it impacts a human-made wetland, is this a take?

5. What other suggestions or concerns do you have related to a state dredge and fill permitting program?

Cost and difficulty of permitting. It has happened that terms of USACE permits are granted but then money not "found" to execute within permit life. For maintenance of culverts and other potentially permitted actions where routine returns occur, a more open-ended approach might be warranted.

Natural Channel Design Engineering Presentation

File: Restoration-Dredge-and-Fill-Presentation.pdf

Typical Stream Restoration Examples:

- Repair headcuts and channel incision
- Reduce bank erosion
- Improve fish and wildlife habitat
- Increase floodplain connectivity
- Enhance riparian vegetation
- Improve form and function (often sediment transport)
- Increase water retention
- Often grant funded with very short, finite schedules

What we like about current CWA 404 permitting

- Nationwide permits help to guide projects to minimum impacts
- ACOE is basically a clearing house for coordination of multiple agency permit requirements
- Review of nationwide applications is a relatively predictable timeline that can be included in project timelines

Problems with current CWA 404

- Ephemeral channels are ecologically and physically important to mission of CWA and should be included for protection
- Requirements for SHPO and Biological Assessment are the very expensive and time consuming portions of the project, especially for smaller projects
- Monitoring requirements are often not in alignment with grant timelines and funding
- OHWM delineation may not provide any guidance for potentially adverse impacts further out in floodplain
- Despite predictability of the permit process it may be slow enough that emergency efforts are not adequately reviewed.

Some suggestions

- If any part of the project is within federal jurisdiction – CWA 404 rules have primacy and no need for state permit
- Projects that do not affect more than 10X active channel widths of stream likely don't need to be permitted
- Grade control or practices that are intended to retain current channel shape should not require review
- Restoration projects should be providing basic design analysis information (hydrology, channel size, vegetation goals etc.)
- Maintenance affecting less than 10X active channel lengths of stream should not be reviewed
- Farm practices do not need to be reviewed (including acequia management)
- Required monitoring beyond grant funding should be repeat photo monitoring only

NM Acequia Association, NM Wild, and Pueblo of San Felipe Presentation

File: 10.25 NMAA-NMWild-SanFelipe SWAP presentation.pdf

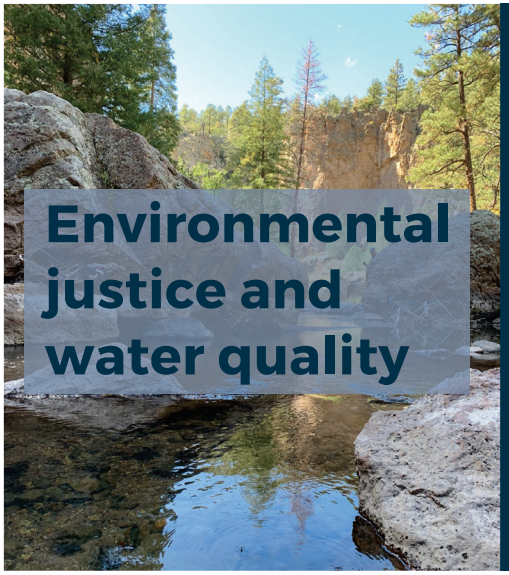
2024

WATER EQUITY AND ENVIRONMENTAL JUSTICE

Edmund Chavez
Pueblo of San Felipe

Vidal Gonzalez
New Mexico Acequia Association

Tricia Snyder
NM Wild



Environmental justice and water quality

- New Mexico is facing serious threats to our water
- Communities the least resourced to deal with these threats overwhelmingly bear the burden of their impacts
- Compromised waterways have serious consequences for communities that can take years to recover from
- In New Mexico, water is tied not only to industry but to culture and tradition. Communities cannot just move on if the water they depend on is degraded. These communities are tied to their land and water in culturally and economically significant ways
- Our state's unique multicultural makeup leaves us well positioned to serve as an example to the rest of the region when it comes to water equity and environmental justice. Our next steps as a state are critical if we wish to uplift communities

EPA definition of Environmental Justice

Environmental justice means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people:

- are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and
- have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

Equality

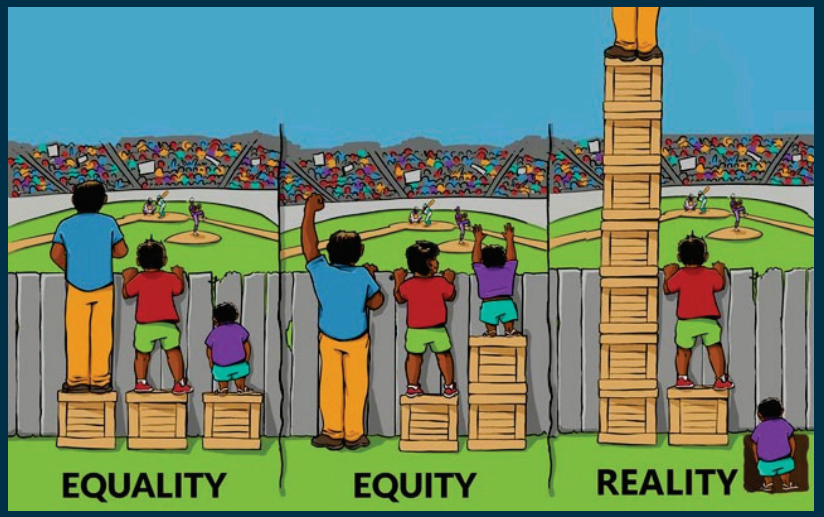
- Everyone is given the **same resources**
- Ability to succeed is directly tied to **disadvantages people and communities started with**
- Outcomes are **different for everyone**

Equity

- Everyone is given the **resources needed**
- Those who start at a disadvantage see increased **ability to succeed**
- Outcomes are **more equal for everyone**

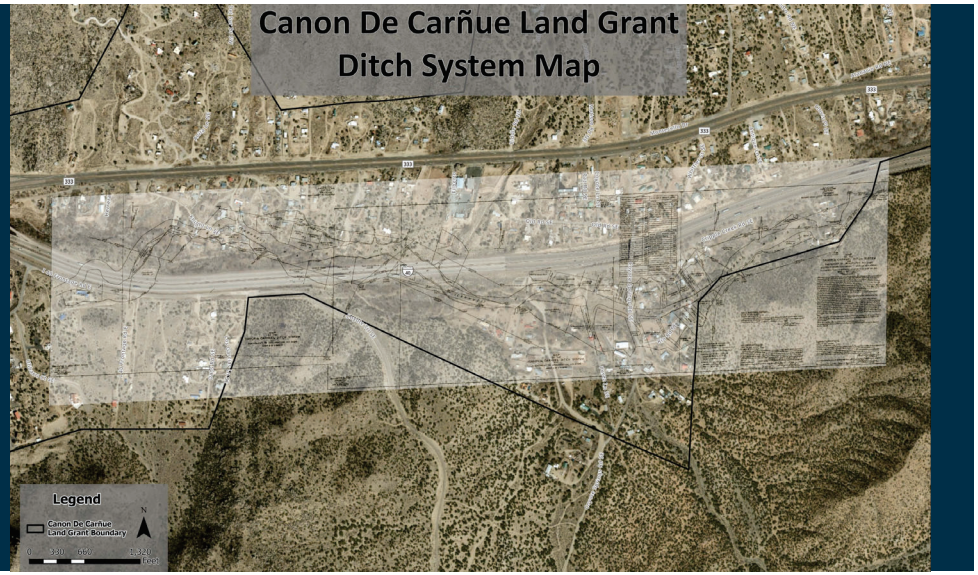
Justice

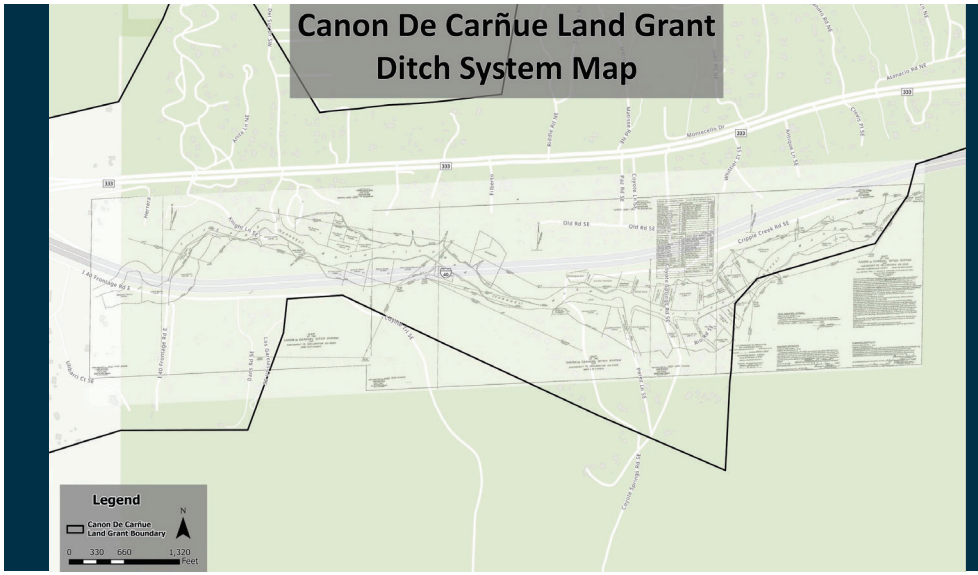
Work towards removing systems that limit access to resources, tools, and opportunities for specific groups and create unequal outcomes in the first place



HISTORICALLY ENVIRONMENTAL INJUSTICE AROUND WATER QUALITY HAS LOOKED LIKE

- Unequal enforcement of existing regulations
- Lack of investment in water infrastructure that increases risks of flooding and pollution as well as degradation to natural systems that protect quality and provide flood control
- Cumulative impacts of other environmental issues that affect communities
- Low income and communities of color bearing disproportionate burdens around water hazards
- Increased occurrences of sources of pollution in low income and communities of color
- Community voices and water needs excluded from policy development and implementation



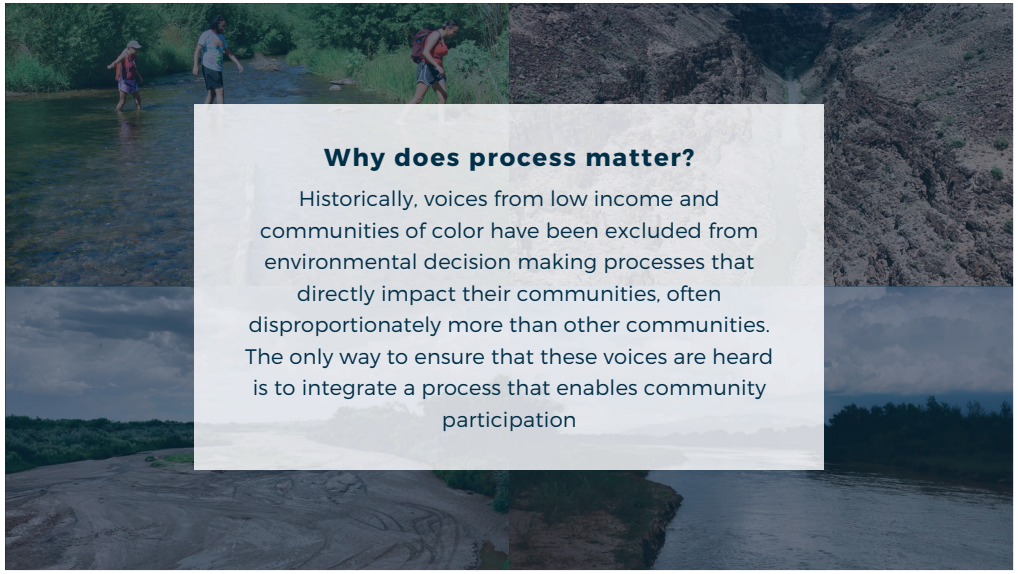


Acequia perspectives

- **Early and often meaningful engagement in project development and implementation**
- **Meet the community on their playing field**
  - **Understand that disadvantaged communities need greater/different engagement styles**
- **Build relationships**
- **Recognize and understand the complexity of the community**
- **Recognize the community's needs**
- **Compassion and inclusion**

Tribal perspectives

- **Pueblo Tribal Council involvement**
- **Government to Government protocols and standards**
- **Constant verbal litigations and communication to all Tribes of changing guidelines or rules**
- **Pueblo water technical staff active involvement**
- **Voice to be heard from a Pueblo standpoint**



Why does process matter?

Historically, voices from low income and communities of color have been excluded from environmental decision making processes that directly impact their communities, often disproportionately more than other communities. The only way to ensure that these voices are heard is to integrate a process that enables community participation

Sovereign to Sovereign Engagement

The collaboration and consultation between the State of New Mexico and Sovereign Nations across the state is inherently different and must be a separate process from engagement with other communities and constituencies

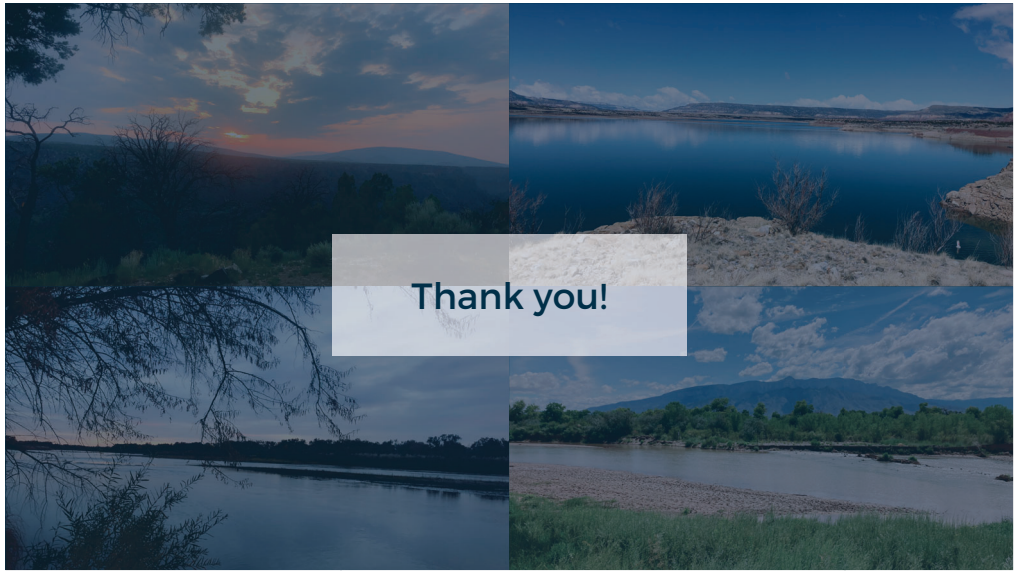
Community engagement

Meaningful engagement ensures timely opportunities to participate in decision-making, fully considers input received, and addresses barriers to participation for marginalized communities who may bear the largest burden of those decisions

Additions to state program to increase equitable engagement

- All permits, including NOIs for coverage under general permits, be mapped by the state with information accessible to the public
- Higher mitigation ratios in environmental justice communities (discussion needs to be had on how to define these communities)
- Proposed new or increased discharges into these communities receive more rigorous antidegradation review

Additional tools



Thank you!

NM Association of Conservation Districts Written Input

File: NMACD Comments for SWAP 2024-11-08.pdf

NEW MEXICO ASSOCIATION OF CONSERVATION DISTRICTS NMACD
163 Trail Canyon Road 575 361-1413
Carlsbad, NM 88220

November 8, 2024

RE: State Surface Water Permitting Program Comments

NMACD values water and soil health on both public and private lands. We have significant concerns about the new water permitting program being implemented. Many of the members we represent do not believe that increased regulation is the answer to our state's water management issues.

What is Working:

The existing water quality permits for city discharges are effectively ensuring that urban centers manage their wastewater responsibly, preserving downstream water quality. It is unclear to NMACD what is inadequate and nonfunctional, thus justifying the need for expansion or additional regulation and permitting.

Improvements or Adaptations:

Instead of expanding regulations and costly permitting, we should focus on optimizing the current system. More regulation could unnecessarily create an expensive compliance costs, increase bureaucracy, and slowdown/halt economic production such as agriculture and housing.

Additional Protections or Considerations

Voluntary Incentive-Based Programs: voluntary incentive-based programs, rather than new regulatory measures, should be the focus for encouraging landowners to improve wetlands and other water sources on their properties. Incentives and educational support should be offered to landowners, promoting proactive land and water stewardship without mandating compliance through new regulations. We should avoid fines and fees!

Positive Ways to Protect and Restore NM Waters

Collaboration and Funding: The New Mexico Environment Department (NMED) should prioritize working with landowners and providing funding to improve habitats along rivers and other critical areas. Programs should be designed to encourage voluntary participation, allowing landowners to access state and federal funds, like those from the USDA, without the imposition of new regulatory burdens. The 319 Nonpoint Source funding could be used to accomplish this.

Voluntary actions, driven by incentives and support rather than additional regulations, can foster a cooperative environment between water users and regulatory bodies. When landowners are given the tools and motivations to improve water and soil health, they are more willing to engage in beneficial practices without feeling the heavy hand of government oversight.

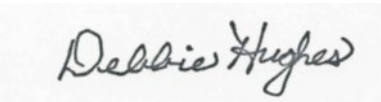
NEW MEXICO ASSOCIATION OF CONSERVATION DISTRICTS NMACD
163 Trail Canyon Road 575 361-1413
Carlsbad, NM 88220

Burden on Ranchers- Despite assurances from NMED that new regulations won't affect private landowners, the reality is that expanded regulatory powers will likely impact those managing both private and public lands. Many ranches in New Mexico include federal and state lands, meaning they will inevitably face increased oversight and compliance requirements under new regulations.

Uncertainty for Farmers: For farmers relying on surface water for irrigation, the potential introduction of new, undefined regulations from NMED creates significant uncertainty. This could disrupt their operations and affect their livelihoods without clear benefits to water or soil health. No Farmers…. No food.

Regulation of Arroyos and Intermittent Areas: Regulating arroyos, canyons, and other intermittently flowing areas could complicate land management practices across New Mexico. This additional layer of regulation would impose an unnecessary burden on all landowners, shifting focus away from effective land and water stewardship toward mere regulatory compliance.

Increased regulation is not the solution to managing our water resources effectively. By concentrating on enhancing existing voluntary, incentive-based programs and promoting cooperation between landowners and regulatory bodies, New Mexico can achieve better water and soil health outcomes. More regulatory measures will only create additional challenges and burdens for land stewards, without delivering proportional benefits. Collaborative, incentive-driven approaches offer a more balanced and effective path forward for managing the state's precious water resources.



Debbie Hughes, NMACD Executive Director

NM Chamber of Commerce Written Input

File: Chamber Point Source Breakout Groups Notes.pdf

Permit flexibility:

1. Key concerns
    a. Clear permit language, reporting forms, and requirements
    b. For MS4 -
        i. Making sure that existing permittees are given a chance to help develop/review the permits (not just during public permit review). There is a lot of knowledge at the permittee level that can help ensure clear, flexible, functional general permits.
        ii. We request more flexibility in the monitoring requirements. Wet-weather sampling in the arid southwest is a challenge. Many Phase II MS4s, especially those located outside of the Middle Rio Grande area, face additional monitoring challenges as staff and resources may not be locally available and samples will long drive times for testing. Consider flexibility in the monitoring program to meet MS4 permittee locations, challenges, and water quality goals. Consider and make clear the overall permit outcomes and how the monitoring program best supports these goals with meaningful data that can be realistically collected by MS4 permittees.
        iii. Signatories are a challenge for permittees – adds complications and time. This should be understood prior to the permit being issued.
2. questions for the department
    a. How is NMED working with OSE related to water rights and stormwater retention (GSI) to address water quality?
    b. will NMED be able to provide a map/resources that help permittees decide receiving water body? water of the state or WOTUS? This is a difficulty in many NPDES permits.
    c. will permits have similar signatory requirements as EPA has? How can and will this be handled digitally with E-reporting?
3. Examples of approaches that work well
    a. Watershed-based approach for MS4
    b. allowing cooperative monitoring and cooperative reporting - each permittee does not need to upload monitoring results.
4. example of innovative approaches
5. Any needed resources
    a. E reporting for MS4 (and training on the e-reporting) - clear direction on what needs to be reported and how to report should be provided in the permit.
    b. Map of urban area boundaries for MS4

CGP:

1. Key concerns
    a. receiving water is unclear to many during the NOI process. so #5 - map will be helpful resource.
    b. the current dewatering requirements of confusing to contractors and likely not being followed correctly. This will need more clarity and suggest flexibility and training.
    c. wind blown dust is a concern (safety) - NMDOT dust brochure. This should be make more clear in the CGP - that dust - not just erosion - is a concern.
    d. mass grading of sites should be discouraged (dust, erosion, soil health) - this should be clear in the permit and part of the training.
    e. clearer definition and permit language on "Owner" needs to file NOI and has obligations under the CGP.
    f. inspection report signatures requirements need more flexibility and clarity. Signatories are a challenge for permittees – adds complications and time. This should be understood prior to the permit being issued.
2. questions for the department
3. Examples of approaches that work well
4. example of innovative approaches
    a. maybe through could be incentives (carrots) vs. just sticks for well managed construction sites. Awards? Recognition? Money - credits?
5. Any needed resources
    a. training is needed for contractors and for SWPPP consultants. SWPPP consultants often push back on compliance (cost and keeping contractors happy) factors into their responsiveness
        i. there is a general lack of understanding on why sediment is a concern. With additional training, I think you would get better compliance.
    b. Map for SWOTS
    c. online database of active/open construction sites - clear to permittees and to public.
    d. Seeding and revegetation is very difficult in arid climate - provide flexibility, extended time lines, and resources on seeding practices/mixes.
    e. good flow charts on how to get coverage, how and when to inspect, how to create and update a SWPPP.

MS4

1. Key concerns

a. clear permit language.
b. making sure that existing permittees in given a chance to help develop/review the permits (not just during public permit review). There is a lot of knowledge at the permittee level that can help ensure clear, flexible, functional general permits.
c. clear reporting forms and requirements.
d. Request more flexibility in the monitoring requirements. Wet-weather sampling in the arid southwest is a challenge. Many Phase II MS4s, especially those located outside of the Middle Rio Grande area, face additional monitoring challenges as staff and resources may not be locally available and samples will long drive times for testing. Consider flexibility in the monitoring program to meet MS4 permittee locations, challenges, and water quality goals. Consider and make clear the overall permit outcomes and how the monitoring program best supports these goals with meaningful data that can be realistically collected by MS4 permittees.
e. make sure agriculture/irrigation is exempt - but permit language needs to acknowledge that irrigation return flow does contain stormwater flows historically in NM. Clarity on this will allow better cooperation within watersheds and ultimately better WQ.
f. If NMED has waters of the state permits at the same time that federal NPDES permits are still in place, that will be a lot. Many of the MS4s are still complying with the federal NPDES permits as they were written, which still includes compliance with conditions for waters that are no longer considered WOTUS (eg Upper Tijeras arroyo for BernCo, City, and NMDOT)

2. questions for the department
    a. GSI has been a focus of the EPA MS4 permit. GSI is one method to support improved WQ. How is NMED working with OSE related to water rights and stormwater retention (GSI) to address water quality? Also, NMED surface water and groundwater bureau should also collaborate to remove any barriers to using GSI.
    b. stormwater monitoring is already a large burden and cost for MS4s. How will NMED ensure that monitoring does not get expanded?
    c. municipal permits will have both WOTUS and state waters - there cannot be two MS4 permits for an urban area - in these cases. How will this be handled?
3. Examples of approaches that work well
    a. watershed-based approach for the MS4 permit

        i. allowing cooperative monitoring and cooperative reporting - each permittee does not need to upload monitoring results. Expand to - allow cooperative elements for all parts of the permit - public education & illicit discharge elimination have been successful as cooperative programs in watersheds.
    b. will NMED be able to provide a map/resources that help permittees decide receiving water body? water of the state or WOTUS? This is a difficulty in many NPDES permits.
4. example of innovative approaches
5. Any needed resources
    a. allow cooperative programs to leverage resources
    b. E reporting.

NM Department of Transportation Presentation

File: NMDOT_Challenges_2024.pdf

New Mexico DEPARTMENT OF TRANSPORTATION
ENVIRONMENTAL BUREAU

Challenges & Mitigation Post-Sackett

Trent Botkin, Natural Resources & NEPA Section Manager

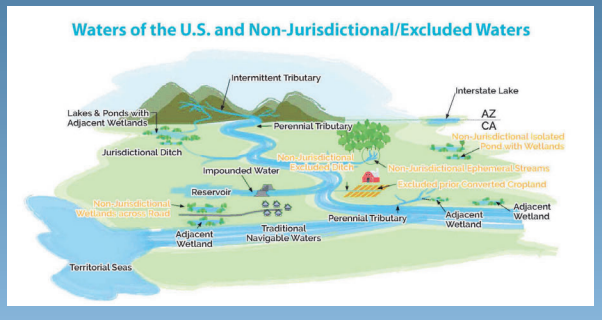
Design Challenges

Intermittent (WOTUS) vs. Ephemeral (SWOTS)

- Who Decides?
- Beta SDAM (Streamflow Duration Assessment Methods); 3 different SDAM Regions in NM

Unclear USACE Interpretation

- Continuous Surface Connection to jurisdictional waters (Doesn't have to be wet?)
- Relatively Permanent (Relative to what?)
- Wetland complexes (instead of adjacent?)



Environmental Stewardship Challenges

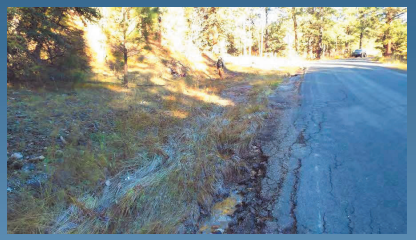
NMDOT Mission Statement

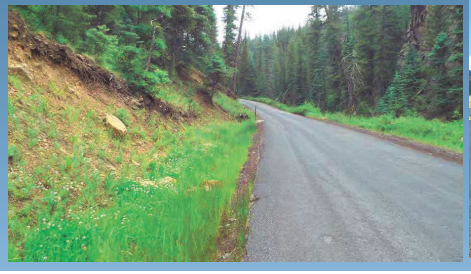
Provide a safe and efficient transportation system for the traveling public, while promoting economic development and preserving the environment of New Mexico.

How to protect ephemeral channels without regulatory oversight?

- Environmental Commitments to specify restrictions
- "Non-Notifying" NMED 401 (i.e. because we said so)

Non-Jurisdictional Wetlands





Mitigation Challenges

- National Wetlands Mitigation Action Plan (2002) Affirming Bush and Clinton Policies of “No Net Loss” of wetlands for Section 404
- FHWA Strategic Plan adopts “no net loss” for federally-funded projects, which remains in effect despite Sackett
- How would the FHWA/NMDOT mitigate wetland loss if not USACE jurisdictional and is it not required?
  - Other states have separate federal and state wetland mitigation programs
  - Project-specific mitigation projects, in lieu fee program, wetland banking

NM Farm & Livestock Bureau Written Input

File: NMFLB SWAP Comments Overall 2024-10-11.pdf

NEW MEXICO FARM & LIVESTOCK BUREAU
2220 N. Telshor Blvd • Las Cruces, New Mexico 88011 • (575) 532-4700 • Fax (575) 532-4710

October 11, 2024

RE: State Surface Water Permitting Program General Comments

On behalf of New Mexico Farm & Livestock Bureau, please find our general comments on the development of a state surface water permitting program and draft legislation. We appreciate the opportunity to provide comment granted by the New Mexico Environment Department and look forward to providing additional input.

Overall general comment

A surface water permitting program must consider BOTH "environmental protection **AND** economic viability (particularly for our rural communities)" in a balanced and fair approach.

Definitions

One of the major downfalls of the Obama-era 2015 Clean water rule was the inclusion of vague and expansive definitions. NMED should work to ensure that terms defined in statute and rule are concise and limited to only what is absolutely required to achieve reasonable surface water quality goals. If definitions included in the legislation and accompanying rule are too broad, this could lead to over regulation by NMED.

Respecting private property rights

The development of a state surface water permitting program via legislation and an accompanying rule must respect and honor private property rights. Private property is one of a producer's largest assets and directly contributes to the success of the overall farm or ranch operation.

The NMED should work to reduce burdens on private property owners when developing a state surface water permitting program.

- Previous burdens experienced under the implementation of WOTUS that the state should work to avoid in the creation of a state program include:
    - Increased jurisdiction over private land.
        - NMED simply doesn't have the manpower or resources to deploy an extensive inspection force to regulate all waters though out the state.
    - Excessive permitting requirements and costs.
        - Obtaining a permit should not require a team of lawyers and thousands of dollars. A permitting system should be simple, user friendly, timely, and within a reasonable cost.

Regulating ephemeral waters

We are particularly concerned with the potential regulation of ephemeral waters. The regulation of waters that only flow during and immediately after a precipitation event greatly expands the jurisdiction of a state surface water permitting program. We believe that ephemeral regulation will provides minimal impact to overall water quality, these waters, which only flow temporarily and are often geographically isolated from larger more significant water bodies should be omitted from the regulatory scope of the program.

Education vs. Regulation/ Voluntary and Incentive Based Approach

Draft legislation

Section 7. Civil Enforcement

- Insert a provision starting the department shall, work with the permit holder to ensure that the individual is educated on the requirements associated with the issuance of the permit
- 7(a)(1) issue a compliance order requiring compliance <u>which outlines actions for remediation,</u> modifying or terminating. . . . .
- Civil penalties mentioned in this section are high ($5000/day).

The environment department should approach the state surface water permitting program with a carrot (incentive based) approach in lieu of a stick (regulatory based) approach. NMED can achieve this by focusing on education and outreach before program implementation, work to build more trust within the regulated community, and provide incentives to help achieve compliance.

Education

There should be a heavy focus on education and outreach, we recommend the development and deployment of an ongoing series of statewide workshops where technical assistance and guidance can be provided.

Incentives

- NMED should work with the NM Department of Agriculture as well as the Natural Resource Conservation Service to determine areas for collaboration that help advance state water quality. Many agencies, particularly NRCS, have a multitude of programs available to assist producers with improving water quality. The NMED should consider seeking an appropriation to assist in the development of a cost share program to help permittees with incentive-based actions. Examples of tools farmers use to protect water ways and reduce runoff include: Buffer strips, strip cropping, and terraces.
    - NRCS offers voluntary financial and technical assistance programs to eligible landowners and agricultural producers to help manage natural resources in a sustainable manner. In FY24 alone NM's NRCS office has awarded 293 contracts valued at over $38.46 million dollars.

Maintain agricultural exemptions provided by section 404(f) of the Clean Water Act

Agricultural infrastructure

Maintain the agricultural exemptions provided under the clean water act specifically when referencing agricultural dirt tanks (also known as stock tanks or earthen tanks).

Dredge and fill

Farmers and ranchers often partake in land modification projects necessary to run their operations. The proposed legislation and accompanying rule should allow for the continuance of this practice without the without a burdensome permitting process.

Exempt activities per the US Army Corps of Engineers

1. Normal Farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting.

- includes: plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices
- MUST be a part of an established (on-going) farming, silviculture, or ranching operation. An operation is no longer established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations.
- For example, if a property has been used for cattle grazing, the exemption does not apply if future activities would involve planting crops for food; similarly, if the current use of a property is for growing corn, the exemption does not apply if future activities would involve conversion to an orchard or vineyards.
- If the activity does not occur within waters of the U.S., or if it does not involve a discharge of fill material, the activity does not require a Department of the Army permit, whether or not it is part of an established farming, silviculture, or ranching operation.

2. Maintenance Activities.

- includes: emergency reconstruction of recently damaged parts, of currently serviceable structures
- examples: dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures.
- DOES NOT include any modification that changes the character, scope, or size of the original fill design
- Emergency reconstruction must occur within a reasonable period of time after damage occurs to qualify for the exemption
- If a maintenance activity would involve ANY modifications to the original fill design, including the location of the fill, the type of material to be used, the amount of material used, etc., then the activity DOES not qualify for the maintenance exemption and a DA permit would be required. However, the activity may qualify for authorization under a Nationwide Permit 3, Maintenance.

3. Construction and maintenance of Farm ponds, stock ponds, or irrigation ditches or the maintenance of drainage ditches

- This exemption applies to the construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches.
- Discharges associated with facilities that are appurtenance and functionally related to irrigation ditches are included in the exemption (e.g. siphons, pumps, headgates, wingwalls, weirs, diversion structures, etc.)
- Regulatory Guidance Letter (RGL 07-02) provides additional information regarding this exemption for the construction and maintenance of irrigation ditches and maintenance of drainage ditches, including definitions for irrigation ditches, drainage ditches, construction and maintenance.

4. Construction of temporary sedimentation basins

- This exemption applies to the construction of temporary sedimentation basins on a construction site which does not include the placement of fill material into waters of the U.S.
- Construction site is any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of the structures. Also includes any other land areas which involve land-disturbing excavation activities, including quarrying and other mining areas, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

5. Any activity with respect to which a State has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C).

6. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment

- Roads must be constructed and maintained in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of waters of the U.S. are not impaired and that the reach of the waters of the U.S. is not reduced, and that any adverse effect on the aquatic environment are minimized.
- Roads shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silviculture or mining operations, and local topographic and climatic conditions
- Road fill shall be bridged, culverted or designed to prevent the restriction of expected flood flows
- The fill shall be properly stabilized and maintained during and following construction to prevent erosion
- Discharges shall be made in a manner that minimizes construction equipment in waters of the U.S. outside of the fill area
- Vegetative disturbance shall be kept to a minimum
- Construction and maintenance of crossing shall not disrupt the migration or other movement of aquatic life

- Borrow material shall be taken from upland sources where feasible
- The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species, or adversely modify or destroy the critical habitat of such species;
- Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided
- The discharge shall not be located in the proximity of a public water supply intake
- The discharge shall not occur in areas of concentrated shellfish production;
- The discharge shall not occur in a component of the National Wild and Scenic River System;
- The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and
- All temporary fills shall be removed in their entirety and the area restored to its original elevation.

NM Mining Association Written Input and Presentation

File: 2024-11-08 NMMA SWAP Comments.pdf

File: Member-Presentation-NMMA.pdf

From: Moellenberg, Dalva L.
To: Homer, Pam, ENV; swq.pp, ENV
Cc: Butzier, Stuart R.; Matthew Thompson
Subject: [EXTERNAL] Surface Water Advisory Panel
Date: Friday, November 8, 2024 4:27:09 PM

Dear Ms. Homer:

Thanks to the Surface Water Quality Bureau ("SWQB") for inviting us to participate in the Surface Water Advisory Panel ("SWAP") on behalf of the New Mexico Mining Association ("NMMA"). We compliment the SWQB for an informative series of meetings regarding the SWQB's proposals for both seeking delegation of the federal NPDES permit program and regarding permitting of discharges to non-Waters of the U.S. under New Mexico law. We also appreciate the participation and points of view expressed by the many other stakeholders who participated. That said, there are many unanswered questions regarding the development of the proposed programs, and the SWQB has not indicated how it intends to address the comments and suggestions made by the various SWAP members.

Now that the SWAP has completed its work, we present this letter to recap the points made on behalf of the NMMA during the SWAP process. Note that the NMMA and/or its members will have additional, and perhaps different, comments prior to and during the 2025 General Session of the New Mexico Legislation and during the rulemaking process as they evolve. We note that there are many additional details that need to be addressed through the legislation and/or the rulemaking process.

NMPDES Draft Legislation and Rules

During the SWAP process, we reviewed and discussed draft legislation that the Environment Department intends to present to the Legislature and draft rules to be considered by the Water Quality Control Commission as part of a package through which the Department intends to seek delegation of the federal NPDES permit program. We appreciate the Department's approach to both the legislation and the rules. In particular, we agree that legislation to authorize delegation of the NPDES permit program should be separate from the Water Quality Act ("WQA"), both for simplicity and to avoid conflicts with the non-federal permit programs under the WQA. We also agree with the structure of the rules to incorporate by reference the appropriate portions of the federal rules governing the federal NPDES program. This approach will harmonize the future state permit program with the federal rules and minimize changes for existing NPDES permit holders in New Mexico.

We provided a markup of the initial draft NPDES legislation provided by the SWQB during the SWAP process and wish to summarize the changes we suggested and some of the reasons for them. First, we suggested that the legislation include language allowing dischargers who discharge to a surface water that may not be a "water of the U.S." ("WOTUS") to "opt-in" to the NMPDES permit program. As the SWQB has noted, there are current or past holders of NPDES permits in New Mexico who obtained their permits based on their belief that the receiving waters are or were WOTUS. As discussed during the SWAP process, the criteria for classification of surface waters as WOTUS has changed several times and could change again in the future. Consequently, it makes sense to allow a discharger to "opt-in" to the NPDES

permit program to avoid future changes in permit status. Dischargers may prefer to hold an NPDES permit for other reasons as well. This approach also could simplify the approach to permits for surface water discharges to non-WOTUS under the WQA. In particular, we believe that many provisions of the federal NPDES permit program are unnecessary or inappropriate to include in the WQA permit program, such as federal effluent limitations guidelines.

We agree with the provisions in the draft NMPDES legislation to authorize general permits. This is essential to make it clear that the New Mexico program will include general permits, such as the stormwater Mult-Sector General Permit. However, we suggest some additional provisions and language, including a definition of "General Permit" and clarity regarding the process for the adoption and/or issuance of general permits. We believe that general permits could be adopted by the Water Quality Control Commission through its rulemaking procedures, and this would be the easiest and most suitable process. The other most likely approach would be through the Department's permit procedures under 20.1.4 NMAC, provided that appropriate public notice and comment and public hearing provisions for general permits of statewide or regional applicability are added to those rules. Under that process, a general permit issued by the Department would be subject to review by the Commission.

We also suggested additional language regarding the Commission's adoption of a schedule of fees. The language we offered is consistent with statutory language for other programs to ensure that the schedule of fees does not exceed the estimated costs of funding the NMPDES permit program.

Finally, we raised a concern with the language concerning criminal violations. These provisions are broader than necessary to comply with federal guidance. In particular, the proposed addition of "negligence" as a sufficient *mens rea* requirement for a felony conviction raises concerns, and at the very least, an element of uncertainty.

As we have not seen any updated draft of legislation reflecting these or any other SWAP member comments, the NMMA will continue to monitor and participate in the legislative process and may raise these or other concerns during that process.

Draft Water Quality Act Amendments and Program Development

The SWQB has identified relatively few amendments to the Water Quality Act. We understand that additional amendments to the WQA under consideration by the Ground Water Quality Bureau will likely be proposed as well, and the NMMA will be closely reviewing and considering all amendments to the WQA.

The draft WQA amendments offered by the SWQB include provisions regarding authorization for general permits. Our comments regarding the use of the rulemaking process for general permits under the NMPDES permit program also apply here. The draft language makes an effort to address the differences between public notice for general permits and individual permits, but we do not believe that the proposed notice provisions for general permits are adequate to provide effective statewide notice to all persons who may seek coverage under a general permit, which the rulemaking procedures under the WQA and the State Rules Act are designed to do. If the legislation does not provide for use of the rulemaking procedures for notice, hearings and adoption of general permits, then at the very least, the legislation should provide for notice through the New Mexico Register. In addition, statutory requirements for

stakeholder consultation during the development of general permits should be included, such as the advisory committee process specified in section 74-6-4(K), NMSA 1978.

We question whether the language proposed in various places regarding the "approval" of general permit coverage are appropriate. The federal approach is to provide general permit coverage upon notice and compliance with applicable general permit conditions, without any need for agency "approval" of general permit coverage. The approval language suggests that there would be an approval process, which raises other issues concerning public notice and participation in an "approval" process. We recommend that the "approval" language be dropped such that general permit coverage is obtained through notice and compliance with the applicable terms and conditions, which would include payment of any applicable fees.

The WQA amendments also include revised language concerning the Commission's authority to adopt a schedule of fees, which is similar to the language proposed for the NMPDES legislation. Our comments above regarding the fee language in that program also apply here. NMMA has an additional concern regarding this change in the WQA fee language as it also would affect the ground water discharge permit program.

There is a problem with the notice provision in section 74-6-5(N) with regard to general permits. In particular, the last sentence could require the Department to notify all persons who participated in adoption of a general permit action to receive notice when the Department takes action concerning an individual general permit holder. We also are considering whether the grounds for terminating general permit coverage under subsection M of that section are too broad.

We do not understand the need for the amendment to section 74-6-10, which already applies to penalties under the ground water program. There should be no different treatment for penalties collected under the ground water and surface water permit programs.

We also do not agree that the change proposed in section 74-6-12 is necessary or consistent with the Commission's anti-degradation policy, which we understand to be the reason for the revised language. In particular, the language referring to the requirements of federal law (including those governing surface water quality standards) already addresses the anti-degradation policy.

The draft legislation does not include a proposed statutory definition of "surface waters" to which the non-NPDES surface water permit program would apply. From the SWAP discussions, we understand that NMED's starting point is the definition of "surface waters of the state" as adopted by the Commission for purposes of the state surface water quality standards. We do not believe that the definition in 20.6.4 NMAC is suitable for a surface water permit program, particularly for discharges of dredged or fill material. Importantly, we question whether it is appropriate to require a state permit for discharges of dredged or fill material to ephemeral waters. If there is such a requirement, we believe that there should be reasonable limits defining those ephemeral waters to which a permit is required. As discussed during the SWAP process, additional criteria to define the upstream and lateral extent of waters not regulated under the CWA section 404 permit program will need to be identified or developed for state law purposes. The mapping work undertaken by NMED should be helpful, but may not be sufficient by itself to define surface waters to which the permit program will apply.

The draft WQA legislation provided to the SWAP covers only a few sections of the WQA and does not provide much guidance for the rules to govern new surface water permit programs for point source and dredged and fill material discharges. Additional guidance for such programs should be included in the legislation. For example, among other issues raised by the SWQB and discussed during the SWAP process was to what extent various components of the federal NPDES and section 404 permit programs should be incorporated into a state surface water permit program. We advocated that many of the federal components, such as federal effluent limitations guidelines, are not necessary, and that any new state surface water permit requirements could be greatly simplified compared to the federal permit program and would avoid the need for extensive state rules for a non-WOTUS discharge permit program. We have suggested one way to simplify the non-WOTUS discharge permit program for discharges who prefer to follow the federal program through the "opt-in" approach for the NMPDES legislation. We will be reviewing the WQA and may propose other language to guide the Commission in the development of rules for non-WOTUS surface water discharge permits.

As it relates specifically to mining, we also presented to the SWAP regarding the existing protections for surface waters provided under state and federal laws governing the permitting of mining operations. Based on the extensive existing regulation of mining operations under other laws, we believe that a statutory exemption or exclusion of mining operations should be provided from any dredged and fill material discharge permit program under the WQA. We urge the Department to include such an exemption in its draft legislation and would be happy to meet with the Department to discuss how to structure such an exclusion or exemption.

During the SWAP process we also advocated strongly against any new surface water permit requirements that would establish the need for a surface water discharge permit separate from existing ground water discharge permits that already regulate mining operations. As pointed out during the SWAP process, 20.6.2.1201 NMAC already requires a Notice of Intent to discharge water contaminants to ephemeral and other surface waters. Furthermore, under 20.6.2.3105.E NMAC, discharges to dry arroyos and ephemeral streams are not exempt from the existing permit requirements. Consequently, ground water discharge permits have been required for mining operations that may impact either or both ground water and surface water, and many ground water discharge permits for mining operations expressly address protection of surface waters. We believe that existing ground water discharge permits already provide sufficient protection of surface waters—including permit conditions prohibiting all or most discharges to surface waters.

Mining operations are already overburdened with permit requirements under numerous federal, state and local rules such that obtaining all of the necessary permits for mining operations often takes many years. This is particularly alarming because we are in a period when demand for minerals is increasing, requiring that the pace of development of mines must speed up to produce the minerals needed to meet climate change and other goals. Adding yet another separate and, we believe, largely unnecessary permit process would further complicate and delay needed mine development. Moreover, NMMA will continue to advocate for changes to permit procedures, including more specific timeframes for agency review of and action on permit applications and holding public hearings.

Conclusion

The surface water permit program should take into account existing regulatory and permit requirements already applicable to mining within New Mexico and should avoid duplication

and potential conflicts with existing laws and rules. The proposed changes to the Water Quality Act and future adoption of rules for a state surface water permit program have the potential to affect both existing mining operations and future mine development, and the NMMA will be watching closely and participating in future legislative and rulemaking activities.

Again, we greatly appreciate the SWQB's inclusion of the NMMA in the SWAP process and the productive discussions had during that process. That said, there are many important points that have yet to be addressed in the draft legislation and otherwise, and we hope that the SWQB will seriously consider these points. We would be happy to meet and provide additional information or clarity at your request.

Best regards,

Dal Moellenberg
Chair, NMMA Environment Committee

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New Mexico Mining Association
Mine Permitting in New Mexico

Presentation to Surface Water Advisory Panel

October 2, 2024

Presentation Overview

New Mexico's Mining Industry

Mineral Production is Vital

National and New Mexico Mine Permitting Challenges

Existing Mine Permitting Requirements

- New Mexico Mining Act and Rules
- Surface Mining Act and Rules
- Federal and State Public Lands
- Water Quality Act and Water Quality Control Commission Rules

Conclusion

New Mexico's Mining Industry

2022 total production value over $1.9 billion, direct employment of over 4200 statewide

- Potash (Eddy County): 1st in national production; $61MM annual payrol
- Copper (Grant County): 6th in national production; $96MM annual payroll
- Coal (San Juan, McKinley Counties): 13th in national production; $77MM annual payroll
- Aggregates (sand and gravel): $43MM annual payroll
- Industrial minerals (perlite, zeolite): $8MM payroll
- Other minerals produced: gold, silver, molybdenum, humate
- Other mineral deposits: uranium (2nd nationally in reserves), lithium, rare earth elements, other critical minerals

Sources Energy, Minerals and Natural Resources Department 2023 Annual Report: https://www.emnrd.nm.gov/officeofsecretary/wp-content/uploads/sites/2/emnrd-report-annual-2023-web.pdf; https://geoinfo.nmt.edu/resources/minerals/impact.html

Mineral Production from Mining is Vital

Energy:

- Coal and uranium for electric power generation
- Copper, silver, rare earths for electrical transmission, wind and solar generation, electric vehicles and equipment
- Lithium, vanadium, nickel, cobalt, graphite, manganese for batteries and energy storage
- According to the World Bank and others, mineral production will have to dramatically increase to meet decarbonization goals.

Link to World Bank Group: https://pubdocs.worldbank.org/en/961711588875536384/Minerals-for-Climate-Action-The-Mineral-Intensity-of-the-Clean-Energy-Transition.pdf

Agriculture:

- Potash is an essential nutrient (phosphates also mined, but not in NM)
- Humate mined in NM is a valuable soil amendment

Manufacturing and Construction:

- Metals, including iron and others for steel, copper
- Aggregates, limestone, clay, shale (for Portland Cement)

Mine Permitting Timeframes Inhibit Needed Growth in Mineral Production

- Standard & Poors recently reported that average lead time from discovery of a mineral resources to a producing mine will be around 18 years for mines started in 2020-2023
- According to the National Mining Association, the permitting phase alone is seven to ten years
- Current New Mexico experience shows even longer permitting timeframes
  - Copper Flat Project: permitting started in 2010 and is not complete

SI027RN Copper Flat Mine - Mining and Minerals (nm.gov)

Mine Permitting in New Mexico

- New Mexico Mining Act and Rules
  - Exploration—minimal impact, regular
  - Mining—minimal impact, existing mines, new mines
- Surface Mining Act
  - Coal mines subject to federal Surface Mining Control and Reclamation Act
- Water Quality Act
  - Ground Water Discharge Permits
- Clean Water Act
  - NPDES
  - Section 404 dredged and fill material discharges
- Air Quality Control Act
- Mining on Public Lands
  - Mineral leasing and lease terms (Coal, Potash)
  - BLM and Forest Service Rules
  - NEPA
- State Engineer Dam Safety Program (includes tailings dams)
- Other Laws: cultural resources protection; threatened and endangered species and other wildlife protections; water rights

Surface Mining Act and Rules (Coal)

- Surface Mining Act and Rules
  - Follows federal SMCRA Model: "one stop permitting" approach
  - Already protects surface waters:
    - Surface waters impacted by mining or to which mine may drain identified in permit application, along with studies of hydrologic and water quality impacts;
    - Plans showing measures to be taken to protect surface and ground water systems and to minimize disturbance of hydrologic regime; and
  - Public Participation
    - Public notice of applications and opportunity for review, comment and request for public hearing
    - Public notice of public hearings and permit actions

Surface Mining Act and Rules (Cont'd)

- Avoid or minimize impacts
  - Compliance with surface water quality standards
  - Minimize impacts to hydrologic balance
  - Regulation of diversions of surface waters before they enter a mine
  - Avoidance or minimization of impacts to wetlands and riparian areas
- Permit issued only on finding that mining will not materially damage the quantity or quality of water.
- Reclamation to restore lands to approximate original contour, support postmine land use, and protect hydrologic balance
  - Detailed reclamation plans reviewed by agencies

Because of SMCRA requirements, coal mines are exempt from ground water discharge permit requirements under Water Quality Act—20.6.2.3105(K) NMAC

New Mexico Mining Act and Rules

- Mining operations may impact surface waters
  - Must mine where mineral deposit is located
  - Economic mineral deposits are rare
- Potentially impacted surface waters identified in permit applications
  - Minimal Impact Operations: 19.10.3.302 (exploration) and 19.10.3.303 and .304 NMAC (mining)
  - Exploration: 19.10.4.402 NMAC
  - New mining operations: 19.10.6.602 NMAC (includes baseline data collection plan)
- Surface waters impact analysis required
  - Exploration: 19.10.4.406 NMAC
  - Existing mining operations permit modifications: 19.10.5.505 and .508 NMAC
  - New mining operations: 19.10.6.602
- Applications sent to NMED, including surface water quality bureau, for comments
  - NMED determines compliance with applicable water quality requirements: 19.10.5.508 and 19.10.6.606

New Mexico Mining Act and Rules (Cont'd)

- Public Participation
  - Public notice of applications and opportunity for review, comment and request for public hearing
  - Public notice of public hearings and permit actions
- Avoid or minimize impacts
  - Compliance with surface water quality standards
  - Minimize impacts to hydrologic balance
  - Regulation of diversions of surface waters before they enter a mine
  - Avoidance of or minimization of impacts to wetlands and riparian areas
- Reclamation to restore surface waters impacted by mining
  - Detailed plans reviewed by agencies

Water Quality Act

- Notice of Intent to Discharge: 20.6.2.1201 NMAC
  - Applies to "water contaminant discharge" (new or alteration)
- Release reporting and corrective action: 20.6.2.1203 NMAC
- Ground water discharge permit program: 20.6.2.3101 to -3114 NMAC
  - Applies to discharges of ground water that may affect gaining stream
  - Permit conditions often address surface water discharges, including monitoring and prohibitions on certain discharges to surface waters
  - Supplemental rules for copper mines: 20.6.7 NMAC
- Ground and surface water abatement rules: 20.6.4101 to -4113 NMAC

Conclusions

- The New Mexico mining industry is already overburdened with permitting requirements that affect the industries' ability to supply vital and critical minerals.
- As to NPDES primacy, regulation of mines should be consistent with existing federal requirements.
- There are few, if any, existing gaps in surface water protection for mines under New Mexico law due to existing permitting requirements.
  - There is no need for any separate surface water permit requirement for mines, either for point source or "dredged and fill material" discharges.
  - Gaps in surface water protection, if any, should be addressed through required ground water discharge permits; separate process would be wasteful and unduly burdensome.
- The existing exemption for permitted coal mines should apply to any new state surface water permit program.
- NMMA will have other comments on NPDES primacy and the proposed surface water permit program.

NM Oil and Gas Association Written Input and Presentations

File: Comments of the New Mexico Oil and Gas Association-state permits_r1.pdf

File: Member-Presentation-NMOGA NMPDES-Statute-Rule.pdf

File: Member-Presentation NMOGA-State Program.pdf

Comments of the New Mexico Oil and Gas Association (NMOGA)
on Proposed State Permits for Discharges to Surface Waters of the State (SWOTS)

November 1, 2024

NMOGA's comments follow the format of the presentations entitled State Surface Water Quality State Permitting Program General Principles and State Surface Water Quality State Permitting Program Options for Point Source Discharges, both dated September 11, 2024.

General Principles

1. The Proposed use of the NPDES program as a template for state permits for regulating discharges to SWOTS is appropriate and cost-effective.
2. It is unclear why non-point source (NPS) discharges are identified in the General Principles. Does NMED intend to propose some form of control for NPS discharges or is this just background information?
3. NMOGA assumes that the statement that both point source and dredge/fill discharges to SWOTS will be permitted does not imply that the format and content of the two types of permits will be similar. Permits for surface water discharges should be as close to NPDES permit format as practical and dredge/fill permits should follow existing U.S. Army Corps of Engineers (COE) formats.
4. Requiring monitoring and reporting on "emerging contaminants" is open-ended and highly subjective. There are thousands of "emerging contaminants" on somebody's list and without a clear description of how such pollutants are identified, this type of monitoring and reporting would become rapidly unworkable. NMED must have scientifically supportable guidelines to identify when a permit includes such monitoring and reporting and this policy must apply equally to all point source dischargers, e.g., industrial and municipal.
5. New Mexico is not unique in terms of having point source discharges to state waters that are not Waters of the United States (WOTUS). Nevada, Arizona, Utah, Idaho and Texas are just a few examples with state programs for point source discharges that are not into WOTUS. NMED should review the existing state permit programs for point source discharges to non-WOTUS state waters to take advantage of their experience.

Design

1. Integrating state water quality permits into the existing administrative process and using the same public participation process as for state-issued NPDES permits is appropriate and efficient.
2. The state permit program should include the use of General Permits wherever practical. General Permits should include both point source permits and dredge/fill permits. NMED should review General Permits issued by other states and not just those authorized by EPA. For example, Louisiana issues General Permits for small domestic sewage treatment plants and includes limits tailored to the type of receiving water.

3. The proposed inclusion of a requirement to "… disturb the smallest area possible" is presumably intended to apply to dredge/fill permits and not to point sources. This requirement is essentially a land use decision and is inappropriate for inclusion in a permitting program except as guidance to potential dredge/fill permit applicants. There does not appear to be any provision in the 20.6.2 NMAC that would authorize a land use regulation.

Implementation

1. The implementation of both the NPDES (NMPDES) permits and the state equivalent for non-WOTUS surface waters by a single agency is appropriate.
2. Transition from the NPDES permits to state permits should be simple and cost effective – the existing NPDES permits for discharges to what are no longer WOTUS (e.g., those in the Tularosa Basin such as the Village of Cloudcroft) can be reissued as interim state permits with no changes other than the permit number and cover page since NMED's plan is to adopt regulations for state permits that are essentially identical to the existing NPDES permits. NMED should consider this approach for expiring NPDES permits that EPA Region 6 has determined it will not reissue.
3. Using electronic platforms for permit applications, reporting, etc. is efficient and is the approach now used by many state programs. The electronic platform can be hybrid with the applicant completing the forms (either paper or electronic) off-line and then uploading them to NMED or can be structured in other ways, for example, on-line completion of the application form with attachment of required information (e.g., maps, flow diagrams), or it could allow the completed forms/attachments to be uploaded as portable document files (pdf).
4. NMED's proposal for 10-year duration permits is appropriate. Many NPDES permits are renewed requiring no changes from the expiring version and resulting in unnecessary work and costs for both the applicant and the permitting authority.
5. General Permits issued by other states (in addition to the General Permits authorized by EPA such as the Pesticides GP) that NMED should consider including these examples from other states:
    a. Concentrated animal feeding operations (CAFO);
    b. Hydrostatic test water (both new equipment and used equipment);
    c. Livestock manure composting;
    d. Evaporation pond;
    e. Concrete batch plants;
    f. Petroleum bulk stations and terminals;
    g. Conventional (potable) water treatment plants;
    h. Discharges from light commercial facilities;
    i. Discharges from sand and gravel extraction operations;
    j. Underground storage tank cleanup.

NMPDES Statute and Rule

NMOGA Representative
Lial Tischler
Tischler/Kocurek

Proposed NMPDES Statute and Rule

- The draft statute and rule appear to meet the requirements of 40 CFR 123 for state authorization to issue NPDES permits for discharges to WOTUS.
- The state delegation act should address and resolve jurisdiction for oil and gas production discharges that are subject to NPDES permits.
  - The separate jurisdiction in Texas (now resolved) was cumbersome for permittees and the state.
- NPDES permits for all discharges to WOTUS should be issued by NMED.

Proposed NMPDES Statute and Rule

- Proposed 20.6.5.102 NMAC B.(5) exempts stormwater runoff discharges from oil and gas exploration, production, processing, treatment operation or transmission facilities.
- Proposed 20.6.5.102 NMAC B.(5) does not include the exemption at 40 CFR 122.26(a)(2)(ii) for sediment discharges from "... activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities".
- This exemption, adopted by EPA in 2006, codified an amendment to the Clean Water Act that was enacted in the Energy Policy Act of 2005. The exemption should be added to proposed 20.6.5.102 NMAC B.(5).

Proposed NMPDES Statute and Rule

- Proposed 20.6.5.102 NMAC A. This proposed provision states that the submittal schedule for a Notice of Intent (NOI) required for General Permit coverage will be specified in each permit when it is adopted.
- The regulation should include a provision limiting the maximum length of time between filing of the NOI and the permit effective date (e.g., 30 days as specified for a proposed permit transfer).

Proposed NMPDES Statute and Rule

- Civil suit provisions are unnecessary.
  - NPDES permit enforcement should be by NMED, as provided for in 40 CFR 123.27.
  - The U.S. Environmental Protection Agency (EPA) has the authority to enforce noncompliance with individual permit limits and conditions if the state is determined to be inadequately enforcing its NPDES permits.
  - The Clean Water Act (CWA) authorizes civil suits against EPA if the agency does not adequately enforce NPDES permits, including those issued by authorized states, so citizens have recourse if state/EPA enforcement is inadequate.

State (WQA) Program

NMOGA Representative

Lial Tischler

Tischler/Kocurek

Proposed Permits for Surface Waters of the State (SWOTS)

- General Principles
  - Proposed use of the NPDES program as a template for regulating discharges to SWOTS is appropriate and cost-effective.
  - Requiring monitoring and reporting on "emerging contaminants" is open-ended and highly subjective.
    - NMED must have scientifically supportable guidelines to identify when a permit includes such monitoring and reporting.
    - This policy must apply equally to all point source dischargers, e.g., industrial and municipal.

Proposed Permits for Surface Waters of the State (SWOTS)

- General Principles
  - New Mexico is not unique in terms of having point source discharges to state waters that are not WOTUS. Nevada, Arizona, Utah, Idaho and Texas are just a few examples with state programs for point source discharges that are not into WOTUS.
  - NMED should review the existing state permit programs for point source discharges to non-WOTUS state waters to take advantage of their experience.

Proposed Permits for Surface Waters of the State (SWOTS)

- Design
  - Integrating state water quality permits into the existing administrative process and using the same public participation process as for state-issued NPDES permits is appropriate.
  - The state permit program should include the use of General Permits wherever practical. NMED should review General Permits issued by other states and not just those authorized by EPA.

Proposed Permits for Surface Waters of the State (SWOTS)

- Design
  - The proposed inclusion of a requirement to "… disturb the smallest area possible" is a land use decision and is inappropriate for inclusion in a permitting program for point source discharges.
  - There does not appear to be any provision in the 20.6.2 NMAC that would authorize a land use regulation.

Proposed Permits for Surface Waters of the State (SWOTS)

- Implementation
  - The implementation of both the NPDES (NMPDES) permits and the state equivalent for non-WOTUS surface waters by a single agency is appropriate.
  - Transition from the NPDES permits to state permits should be simple and cost effective.
    - The existing NPDES permits for discharges to what are no longer WOTUS can be reissued as state permits with no changes other than the permit number and cover page.
  - Using electronic platforms for permit applications, reporting, etc. is efficient and is the approach now used by most state programs

Sandia National Laboratories Written Input

File: SNL comments to SWAP 11-8-2024.pdf

Sandia National Laboratories

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John Kay
Stormwater Quality Program
Environmental Compliance & Monitoring

November 8, 2024

Ms. Pam Homer
Surface Water Quality State Permitting Program
Surface Water Quality Bureau
New Mexico Environment Department
PO Box 5469
Santa Fe, NM 87502-5469

Subject: **Comments from Sandia National Laboratories, New Mexico on the Proposed New Mexico State Water Permitting Program as Presented and Discussed During the Surface Water Advisory Panel (SWAP) Meetings, held Between September and November 2024**

Dear Ms. Homer:

As a member of the Surface Water Advisory Panel (SWAP) representing Sandia National Laboratories and other Department of Energy (DOE) entities in the State of New Mexico, I provide the below written comments on behalf of the Department of Energy, National Nuclear Security Administration, Sandia Field Office (DOE/NNSA/SFO) and National Technology & Engineering Solutions, LLC (NTESS). DOE is the owner, and NTESS is the operator of Sandia National Laboratories, New Mexico.

We greatly appreciate the New Mexico Environment Department (NMED) providing us the opportunity to participate in the development of the State Water Permitting Program (Program), which represents a substantial change in how surface water will be regulated within the State of New Mexico. In general, we are supportive of the Program, especially in light of the September 2023, Supreme Court Ruling on *Sackett vs. EPA* which clarified the definition of Waters of the United States (WOTUS). We agree with NMED's concern that the change in the WOTUS definition leave New Mexico's intermittent and ephemeral streams without adequate regulatory protection.

We have no major objections to the Program structure or implementation as presented during the SWAP meetings. However, most of the information presented was fairly high level, and we anticipate potential concerns with regulations and specific permit requirements once those are developed. We will, of course, actively participate in the public involvement processes to alleviate those concerns.
For your consideration, I would like to outline some general areas of question, along with recommendations for how to handle them.

Program Funding, Staffing and Implementation

As a member of the regulated stormwater community, one of the greatest difficulties we face is responsiveness and a sense of partnership from the Environmental Protection Agency. We have a distant and impersonal relationship with our Region 6 permit administrators; they have historically been hard to contact and communicate with, are rigid in their interpretation of permit requirements, and don't always seem to appreciate the challenges faced in an arid climate. Often, the "one-size fits all" approach presently implemented, without room for modification, fails to best address a particular situation here in New Mexico.

We are hopeful that the move to regulatory oversight by NMED will improve those conditions. That hope, however, is tied to whether the Program is adequately funded to provide the necessary number of qualified staff, appropriate software applications and reporting portals, as well as other support services, such as public outreach and permittee education and training. We share the concern of several other SWAP members, that a poorly funded and executed Program would cause more problems for both the regulated community and the state as a whole, than the new process would solve. Our recommendation is to ensure that NMED doesn't try to do too much with too little; if funding is a limitation, then scope of the program should be scaled back accordingly.

Proposed Program Costs and Fees

SNL/NM is generally in agreement that regulatory costs should be covered by the regulated community through permit application and annual permitting fees. As currently proposed, it appears that the majority of stormwater permit fees are anticipated to be provided by the construction community. There should be an effort to make stormwater permitting fees more proportional to the amount of stormwater being discharged by individual permittees. We recommend charging more to permit MS4s, with those fees based on the number of people the MS4 services or the volume of water discharged. Currently SNL/NM would pay the same MS4 permitting fees as the local municipalities and flood control authorities even though we discharge only a fraction of what they do. The disproportionate proposed fee is problematic.

Similarly, we recommend charging Construction General Permit and Multi-Sector General Permit fees based on the size of the construction project or facility. Currently, a housing development of over 200-acres in size would pay the same fee as an office building on 1-acre. At Sandia we permit 18 separate sites under the MSGP, but the total area is only around 20 acres. Under the proposed fee schedule, we would pay 18 times what a single 20-acre facility would pay.

Another consideration for permitting costs is where stormwater discharges occur. Discharges directly into a perennial stream might warrant more permitting and compliance scrutiny than a facility discharging into an ephemeral stream, closed basin, or far from any water body.

Definition of Waters of the State of New Mexico (WOSNM)

There are numerous ephemeral stream channels within the boundaries of SNL/NM, which range in size from the large Tijeras Arroyo to small washes that are only several feet wide. Some regulations that are appropriate for the Tijeras Arroyo may not be appropriate for smaller ephemeral channels. We suggest specific guidance and/or methods for determining which ephemeral channels qualify as Waters of the State of New Mexico (WOSNM), thus requiring permit coverage. This guidance should be easy to interpret and should be something that can be determined by permittees themselves, rather than needing the State to conduct case by case evaluations.

In addition, a scaled approach to regulating ephemeral waters (including closed basins) would be appropriate. Runoff from a large portion of SNL/NM facilities occurs as overland (sheet) flow and in relatively small volumes solely during intense rainfall, posing little threat to any waterways including ephemeral channels. Case specific consideration in determining which runoff to regulate and how it is regulated is appropriate.

Grandfather Clause for Existing Roads In Ephemeral Arroyos

SNL/NM recommends that grading and maintenance of existing dirt roadways and culverts that have been completed across or within ephemeral, non-WOTUS arroyos should be allowed to continue without the requirement to obtain a 404 permit.

Prioritization of Inspections and Compliance Activities

Facility inspections and compliance activities should be prioritized according to the potential for pollutant generation. This would include consideration to location of facilities to WOSNM, and the size and flow regime of the WOSNM. The purpose of inspections and compliance activities should be to protect the quality of WOSNM, not to focus on certain industries or sectors independent of their history or likeliness to pollute.

Use of Science Based Water Quality Standards for Contaminants of Emerging Concern

Water quality standards for contaminants of emerging concern should be based on risk to human health and environmental quality. Additionally, allowances for contaminants that are deposited through atmospheric deposition (blowing dust and precipitation) should be made.

Additional SWAP Meetings

SNL/NM would be happy to participate in additional SWAP meetings once regulations and permits are drafted. We feel that the collaborative idea sharing approach of the SWAP might be a useful addition to normal public and stakeholder involvement activities.

Thank you for including us in the SWAP process. If you have any questions or would like additional assistance, please feel free to contact me at (505) 415-2018.

Sincerely,

John Kay

John Kay

Copy:

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Richards, Dori	DOE/NNSA/SFO	dori.richards@nnsa.doe.gov
Williams, Sherry	DOE/NNSA/SFO	sherry.williams@nnsa.doe.gov

Appendix E: SWAP Member Comments on Draft Report

Submitted Document List

Albuquerque Bernalillo County Water Utility Authority

File: ABCWUA Draft SWAP Report.pdf

Conservation Voters New Mexico

File: CVNM – Draft SWAP Report

Natural Channel Design Engineering

File: Natural Channel Design – Draft SWAP Report.pdf

NM Mining Association

File: NMMA Draft SWAP Report.pdf

NM Oil and Gas Association

File: NMOGA Draft SWAP Report.pdf

San Juan Water Commission

File: SJWC – Draft SWAP Report.pdf

Southern Sandoval County Arroyo Flood Control Authority

File: SSCAFCA Draft SWAP Report.pdf

USDA Forest Service Southwestern Region

File: USDA-USFS SWAP Draft Report 12-13-2024_rlj_Final.pdf

ABCWUA Comments on Draft SWAP Report

File: ABCWUA Draft SWAP Report.pdf

From: Shuryn, Danielle
To: Homer, Pam, ENV
Cc: swq.pp, ENV
Subject: RE: [EXTERNAL] RE: REMINDER: Draft SWAP Report for Review
Date: Tuesday, December 31, 2024 3:05:28 PM
Attachments: image002.png
image006.png
image001.png
image004.png

Thanks Pam,
I appreciate your flexibility and the extra time. After reading it, I don't think that it is helpful to make specific comments at this point because it is so general in how it is written. There are a couple of items I have concerns with, such as allowing flexibility in pollutant testing for emerging contaminants because of significant laboratory proprietary issues, but we will just see how it all shakes out in the upcoming regulations so we are just spending time on issues that make it to the final draft.
Thanks again!
Danielle

Danielle Shuryn

Compliance Division Manager
Albuquerque Bernalillo County Water Utility Authority
PO Box 568 | Albuquerque NM | 87103
505-289-3382 (ofc) | 505-803-1970 (cell)
www.abcwua.org

From: Homer, Pam, ENV <pam.homer@env.nm.gov>
Sent: Monday, December 30, 2024 8:33 AM
To: Shuryn, Danielle <dshuryn@abcwua.org>; swq.pp, ENV <swq.pp@env.nm.gov>
Subject: RE: [EXTERNAL] RE: REMINDER: Draft SWAP Report for Review

[CAUTION: This email was received from an EXTERNAL source]

Hi Danielle,
Glad you got some time off.
Sure – you can have another day or two.

Pam E. Homer
NMED Surface Water Quality Bureau
Cell: (505) 690-2863

From: Shuryn, Danielle <dshuryn@abcwua.org>
Sent: Sunday, December 29, 2024 3:11 PM
To: Homer, Pam, ENV <pam.homer@env.nm.gov>
Subject: [EXTERNAL] RE: REMINDER: Draft SWAP Report for Review

Conservation Voters New Mexico Comments on Draft SWAP Report

File: CVNM – Draft SWAP Report

From:	Douglas Meiklejohn
To:	Homer, Pam, ENV
Cc:	fox@westernlaw.org; Rachel Conn; Tricia Snyder; Steven Fry; Paula Garcia; Dan Roper; Vidal Gonzales
Subject:	[EXTERNAL] Re: REMINDER: Draft SWAP Report for Review
Date:	Sunday, December 29, 2024 3:21:24 PM
Attachments:	image001.png

Good afternoon Pam,

I hope that you are enjoying a nice holiday break.

Conservation Voters New Mexico has the following suggestions for changes in the Draft SWAP Report. I would appreciate it if you would acknowledge receipt of these comments.

On page 1:
In the fifth line of the first paragraph, change "the majority" to "95%".
In the second paragraph, list acequias separately as a sector that was represented. Also list Pueblo governments with tribal governments. That is a change that should be made throughout the document. *See* pages 5, 7, 9, 14, 16, and 17.
In addition, list notice as one of the areas emphasized by SWAP members.
In the last bullet point on the page, list acequias, Pueblos, and environmental organizations as stakeholders.
On page 2:
In the paragraph on NPDES delegation, list enforcement generally and citizen suits specifically as issues that were raised.
List enforcement as an issue raised in the bullet point on the State Surface Water Permitting program.
On page 5:
In the second paragraph, include acequias and Pueblos among the sectors represented.
In the third line of the third paragraph, substitute "95% of" for the word "many".
On page 9:
Include Pueblo governments in the second bullet point.
Include enforcement as an issue in the bullet point list.
In the heading denominated as B, include Pueblo Engagement.
In the next to the last paragraph, include limited internet access as a factor that limits public participation.
On page 14:
Add avoiding impacts to downstream Tribes and Pueblos to the list of mitigation requirements.
On page 16:
Add consideration of Outstanding National Resource Waters to the paragraph about antidegradation policies and procedures.
In the last bullet point on the page, add Pueblos to "downstream states and tribes".
On page 17:
In the second bullet point, add Pueblo to "Tribal and State waters".
In the last line on the page, replace "southwestern" with "New Mexico".
On page 20:
In the first indented line, add "of impacts" after the word "Avoidance".
On page 22:

In the paragraph on Notices of Violation (NOV), add language indicating that ability to pay must not be considered.

On page 24:

In the second line of the process summary, there is an incomplete sentence. It ends with the word "who" but there is nothing after that.

In the third paragraph of the process summary, add enforcement generally and citizen suits specifically as elements of the federal framework that should be retained.

In the list of participants, I am listed as working for Conservation Voters of New Mexico. The proper name is Conservation Voters New Mexico; the word "of" is not in the organization's name.

Finally, Conservation Voters New Mexico notes that the schedule provided by the Environment Department for review of the Draft Report was unreasonable. The Department distributed the Draft Report in the afternoon on December 23rd and requested comments by 8:00 a.m. on December 30th, thus requesting review and comments during a time when many offices are closed for the holidays. It would have been much more appropriate for the Department to have extended the time for comments to include at least several days in the week of January 6th when people are back at work.

Please do not hesitate to contact me if you have questions about these comments.

Doug

On Mon, Dec 23, 2024 at 3:18 PM Homer, Pam, ENV <pam.homer@env.nm.gov> wrote:

> Dear SWAP Participants,
>
> This a reminder to review the email below and please submit any comments you have on the DRAFT SWAP Report (attached) **no later than 8 AM next Monday, December 30.**
>
> It is also an opportunity to wish you good cheer over the holidays!
>
> Kind regards,
>
> Pam
>
> *Pam E. Homer*
>
> NMED Surface Water Quality Bureau
>
> Cell: (505) 690-2863

From: Homer, Pam, ENV
Sent: Friday, December 13, 2024 2:21 PM
To: swq.pp, ENV <swq.pp@env.nm.gov>
Subject: Draft SWAP Report for Review

Greetings SWAP Members and Alternates,

Please see attached the Draft Surface Water Advisory Panel (SWAP) Report synthesizing your input. Please review and submit any comments **no later than 8 AM on Monday, December 30**.

We will make your comments available along with the report, either as an appendix or as a stand-alone document. Considering length and readability, please compile your comments in a separate document rather than as comment bubbles in the report.

Thank you in advance for your review. Let me know if you have any questions or concerns.

Kind regards,

Pam

Pamela E. Homer, Team Lead

Surface Water Quality State Permitting Program

Surface Water Quality Bureau

New Mexico Environment Department

Cell: (505) 690-2863

Pam.Homer@env.nm.gov / swq.pp@env.nm.gov

https://www.env.nm.gov/surface-water-quality/

Science | Innovation | Collaboration | Compliance

Natural Channel Design Engineering Comments on Draft SWAP Report

File: Natural Channel Design – Draft SWAP Report.pdf

From: Allen Haden
To: Homer, Pam, ENV
Subject: [EXTERNAL] Re: Draft SWAP Report for Review
Date: Wednesday, December 18, 2024 4:16:49 PM
Attachments: image001.png

Pam , et al.
Thanks for the opportunity to participate and to review the summary report. It looks like a great summary to me. The only thing that sticks out as missing or possibly under represented is a discussion that I recall on the last day. My recollection is that many of the panelists were very interested in further support for the project, possibly in the form of follow up once a more specific framework is in place to comment on.
I may be miss remembering or it may be inappropriate to continue receiving guidance from this group at that point.

cheers
ah

Allen Haden
Natural Channel Design Engineering Inc.
o: 928-774-2336 c: 928-600-6649

From: Homer, Pam, ENV <pam.homer@env.nm.gov>
Sent: Friday, December 13, 2024 2:20 PM
To: swq.pp, ENV <swq.pp@env.nm.gov>
Cc: LucasKamat, Susan, ENV <Susan.LucasKamat@env.nm.gov>; Lemon, Shelly, ENV <Shelly.Lemon@env.nm.gov>; McGraw, Maryann, ENV <maryann.mcgraw@env.nm.gov>; Salazar-Archuleta, Beatriz, ENV <beatriz.salazar-archuleta@env.nm.gov>; Weatherly, Christal, ENV <Christal.Weatherly@env.nm.gov>; Knight, Andrew, ENV <Andrew.Knight@env.nm.gov>; Scott, Brecken, ENV <brecken.scott@env.nm.gov>; Moander, Chris, EMNRD <Chris.Moander@emnrd.nm.gov>; Ogaz, Zachary, ENV <zachary.ogaz@env.nm.gov>; Rader, Kelsey, ENV <kelsey.rader@env.nm.gov>; Armstrong, Jonas, ENV <Jonas.Armstrong2@env.nm.gov>
Subject: Draft SWAP Report for Review

Greetings SWAP Members and Alternates,

Please see attached the Draft Surface Water Advisory Panel (SWAP) Report synthesizing your input. Please review and submit any comments **no later than 8 AM on Monday, December 30**.

NM Mining Association Comments on Draft SWAP Report

File: NMMA Draft SWAP Report.pdf

From:	Moellenberg, Dalva L.
To:	Homer, Pam, ENV; swq.pp, ENV
Cc:	LucasKamat, Susan, ENV; Lemon, Shelly, ENV; McGraw, Maryann, ENV; Salazar-Archuleta, Beatriz, ENV; Weatherly, Christal, ENV; Knight, Andrew, ENV; Scott, Brecken, ENV; Moander, Chris, EMNRD; Ogaz, Zachary, ENV; Rader, Kelsey, ENV; Armstrong, Jonas, ENV
Subject:	[EXTERNAL] RE: Draft SWAP Report for Review
Date:	Monday, December 30, 2024 12:43:20 PM
Attachments:	image001.png

Pam and all,

The NMMA thanks the Department for the opportunity to participate on the SWAP. We also appreciate the summary report. We understand the difficult of trying to synthesize numerous comments into a concise and readable report. However, we do have some concerns relating to the impressions that readers who did not participate on the SWAP may take report the report, particularly relating to the understanding that the SWAP process was not designated or intended to see consensus.

1. While the report summary is useful, NMED should take care to caution readers of the report on the limitations and rules for the SWAP process and to clearly caution readers against drawing any conclusions from the summary report regarding any points of agreement or consensus. Although NMED made it clear that the SWAP process was not intended to seek consensus, the SWAP report picks and chooses and points of emphasis and may give the impression that consensus, or at least a majority view, was reached on numerous issues. Importantly, the summary report provides only highlights of the discussion selected by NMED and omits numerous key points raised by individual participants. The SWAP report should make it clear to readers not involved in the SWAP process that nothing in the report should suggest that agreement or consensus was reached on any particular point or issue.
2. The SWAP report Executive Summary and section 1.1, Background and Rationale, emphasizes the *Sackett* decision as the driving force behind a need to establish state-law protection of surface waters independent of the Clean Water Act. NMMA points out, however, that many surface water features were not subject to regulation under the Clean Water Act prior to the *Sackett* decision, including surface waters in closed basins and many ephemeral waters. There is evidence for this in numerous jurisdictional determinations by the Army Corps of Engineers and case law decisions finding that various surface waters were not regulated under federal law prior to *Sackett*. NMED's overstates the effect of *Sackett* as the driving force for new state law surface water protections. Moreover, NMED has provided very few specific examples where the lack of federal regulation of discharges to surface waters has created significant concerns that warrant extensive additional state regulation of surface waters.
3. During the SWAP process, NMMA pointed out that existing Water Quality Control Commission rules already require a permit for discharges of water contaminants to

surface waters that are not "waters of the United States." Consequently, it also is an overstatement for NMED to assert that surface waters not regulated under federal law are unprotected. NMMA's comments and discussion regarding how mines already are comprehensively regulated under state law is omitted from the discussion, particularly in section 1.1 and 3.3.A. The point is briefly mentioned and largely obscured in section 3.3.A(2).

4. The executive summary discussion on public engagement and communication omits points raised by NMMA regarding the need for clear rules regarding public notices required of permit applications, considering the need for certainty and avoidance of litigation over notice procedures, and the need for public notice and engagement requirements to consider the need for prompt review, consideration and action on permit applications. Same comment for section 3.1.B
5. The executive summary discussion on sector-specific operational considerations states that stakeholders "emphasized flexibility and practical permitting timelines to accommodate operational realities." Again, NMMA emphasized the need for greater certainty and timely action on permits, rather than "practical" timelines.
6. Section 3.1.C omits the presentation from NMMA regarding how potential mining impacts to surface waters already are comprehensively regulated under various state and federal laws and the need to avoid duplication and conflicting regulation through a new surface water permitting program.
7. Section 3.4.C(4) notes that some members suggested that penalties be deposited in the Water Quality Management Fund rather than the general fund. This section omits the opposing point of view by other SWAP members. Again, nothing in the SWAP report should be viewed as indicating agreement or consensus on this or any other point.

Thank you for considering these comments. We also appreciate your including the NMMA written comments and presentation in the report.

Best regards,

Dal

1239 Paseo de Peralta
Santa Fe, New Mexico 87501-2758
(505) 982-9523 | gknet.com

Dalva L. Moellenberg
Attorney Profile
DLM@gknet.com
(505) 989-7278

From: Homer, Pam, ENV <pam.homer@env.nm.gov>
Sent: Friday, December 13, 2024 2:21 PM

NM Oil and Gas Association

File: NMOGA Draft SWAP Report.pdf

From: Lial Tischler
To: Homer, Pam, ENV
Subject: [EXTERNAL] SWAT Draft Report
Date: Monday, December 30, 2024 9:35:53 AM
Attachments: image001.png

Pam

I have reviewed the DRAFT SWAP Report and it accurately describes the deliberations of the SWAP. I have no comments/changes to the draft report.

On behalf of NMOGA I appreciate the efforts of you and other NMED staff to describe the proposed development/implementation of a state wastewater permit program and the proposed authorization for NPDES permitting of point source discharges to water in the state. NMED's effort to include a wide range of stakeholders' suggestions and concerns in the regulatory process is important and will be valuable in the drafting of the proposed rules.

NMOGA will continue to be an active participant in the development of the permitting programs and we appreciate NMED's continued stakeholder outreach during the rulemaking

Sorry to be a bit late – planned on sending Friday but forgot.

Lial Tischler, Ph.D., P.E., B.C.E.E.
Tischler/Kocurek
107 South Mays Street
Round Rock, TX 78664
(512) 244-9058
(512) 388-3409 FAX
(575) 687-3081 New Mexico

San Juan Water Commission

File: SJWC – Draft SWAP Report.pdf

From: Aaron Chavez
To: Homer, Pam, ENV
Subject: Re: [EXTERNAL] Re: FW: Draft SWAP Report for Review
Date: Thursday, December 19, 2024 9:31:52 AM

Pam,

Below are a few suggestions I have regarding the Draft SWAP Report.

Page 5

The last sentence in the second paragraph under "1. Introduction" refers to the need for the development of the state permitting program to "foster equity." I'm not sure what that means in the context of this sentence. I would propose the following change:

"Their collective feedback will inform the program's development – how to address regulatory gaps, ~~foster equity~~ ensure transparency, and promote sustainable water quality management tailored to New Mexico's unique environmental and operational needs."

Pages 16-17

The last paragraph on page 16, which carries over onto page 17, addresses training sessions for stakeholders (permittees). I'm not sure this point really belongs under the heading: "B. Public Process, Public Engagement, and Environmental Justice." I propose that the paragraph be included under an additional topic heading: "Stakeholder Outreach and Training."

Page 22

Paragraph (5), first bullet, second sentence: I believe "treatment plan" should be "treatment plant."

Page 24

Section 4.1, the first sentence has an extra word that should be removed: "Over three months, the SWAP process included robust and collaborative discussions among diverse stakeholders~~, who~~."

Those are the only suggestions I have. If you have any questions, please let me know.

Aaron Chavez
San Juan Water Commission

On Tue, Dec 17, 2024 at 4:59 PM Homer, Pam, ENV <pam.homer@env.nm.gov> wrote:

> Thanks Aaron!
>
> Get Outlook for iOS
>
> ---
>
> **From:** Aaron Chavez <achavez@sjwc.org>
> **Sent:** Tuesday, December 17, 2024 4:15:35 PM
> **To:** Homer, Pam, ENV <pam.homer@env.nm.gov>
> **Subject:** [EXTERNAL] Re: FW: Draft SWAP Report for Review
>
> CAUTION: This email originated outside of our organization. Exercise caution prior to clicking on links or opening attachments.
>
> Good afternoon Pam! It is good to hear from you, I did receive your email and attachment.
>
> Aaron
>
> On Tue, Dec 17, 2024 at 3:32 PM Homer, Pam, ENV <pam.homer@env.nm.gov> wrote:
>
> > Hello Aaron,
> >
> > Would you mind confirming that you received the email below? The attachment was large (not attached here). I did get one bounce so knew that one didn't go through. I'm not sure I would always get a bounce message, though, so I'm checking with a couple of people.
> >
> > Thanks!
> >
> > *Pam E. Homer*
> >
> > NMED Surface Water Quality Bureau
> >
> > Cell: (505) 690-2863

Southern Sandoval County Arroyo Flood Control Authority

File: SSCAFCA Draft SWAP Report.pdf

From: David Gatterman
To: Homer, Pam, ENV
Subject: [EXTERNAL] RE: REMINDER: Draft SWAP Report for Review
Date: Thursday, December 26, 2024 1:20:31 PM
Attachments: image001.png
Pages from Draft SWAP Report 2024-12-13 - dg comments.pdf

Good afternoon, Pam. Thank you very much for the opportunity to review the SWAP report. I have attached a pdf of the pages I had comments on.

I very much look forward to the opportunity to participate with the NMED as part of the SWAP as the agency moves forward in developing rules for implementing any changes to the WQA. I hope that NMED continues to leverage the knowledge of the SWAP members as this process continues.

If you have any questions or need any additional information from me, please feel free to reach out.

Thanks!
Dave

Dave Gatterman, P.E.
Executive Engineer
Southern Sandoval County
Arroyo Flood Control Authority
1041 Commercial Dr. S.E.
Rio Rancho, New Mexico 87124
505-892-RAIN (7246)
505-892-7241 (Fax)
email: dgatterman@sscafca.com
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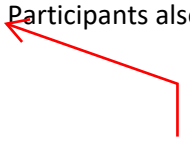
hydrological variability, and differences in infrastructure capacity while minimizing duplicative requirements where other state programs already regulate certain aspects.

- **Sustainable Funding**: Various SWAP members expressed concern about NMED's capacity to administer the program and considered various funding mechanisms. Suggestions included proportional fee structures to avoid placing undue burdens on smaller entities and alternative funding sources (e.g., expedited permitting fees, reallocated enforcement penalties). Overall, the panel input pointed towards establishing a balance of fairness, affordability, and funding for the resources needed to run an effective, state-administered program with long-term viability.
- **Consistency, Transparency, and Resource Allocation**: The SWAP's input underscored the critical importance of consistency with federal processes, transparent decision-making, and the efficient use of resources. Members indicated that these principles would foster trust and ensure the permitting process does not overburden any single sector or community.
- **NPDES Delegation**: Some members viewed the potential delegation of NPDES authority as an opportunity to streamline processes and tailor permitting to local conditions. Input included adopting electronic reporting tools, ensuring appropriate staffing and training, and retaining practical components of existing federal processes to simplify compliance and transitions, while adapting others for state needs. Members noted the need for careful attention to transition planning, focusing on phased implementation, building administrative capacity, training staff, and permittees, and using electronic reporting platforms (e.g., EPA's NetDMR) to streamline operations and help mitigate potential disruptions. Members provided feedback on draft legislation and rules.
- **State Water Quality Act (WQA) Program Development**: SWAP input focused on clarifying scope and jurisdiction, retaining or adapting exemptions, addressing emerging contaminants, considering antidegradation protections, and using best practices from other states. The panel's discussion included suggestions for the Notice of Intent process, general permits, mitigation strategies, long-term monitoring, and methods to streamline permitting by leveraging geospatial mapping tools and standardized procedures. Members provided feedback on draft WQA amendments.
- **Dredge and Fill Activities**: Input included tiered permitting levels for discharges of dredged and fill material and emphasized basing mitigation requirements for impacts to wetlands and other aquatic resources on functional ecosystem values rather than acreage alone. Many members supported balancing operational feasibility with robust environmental protections and incorporating avoidance and minimization strategies into project designs.
- **Construction and Stormwater Permitting Specifics**: SWAP input acknowledged the distinct challenges of stormwater permitting in arid environments, including managing dust, sediment, and intermittent flows. Suggested approaches included retaining low erosivity waivers for minimal-impact projects, integrating dust control measures, and applying both qualitative and quantitative benchmarks. Participants also recommended improved training programs for inspectors and operators.



It is also recommended that construction general permit closeout requirements take into account our arid environment with respect to stabilization requirements at closeout.

between permittees, permit writers, and enforcement staff that could also lead to alternative compliance solutions.

C. Permit Denial and Modification Criteria

To enhance environmental protection and/or adaptability, some panel members suggested:

- Denying permits where compliance with downstream water quality standards cannot be ensured.
- Specifying the criteria for modifying or terminating permits.

D. Transition

Managing the transition from EPA-administered NPDES permits to a State-led program was identified as critical to minimizing disruptions. Some panel members noted that thoughtful consideration and communication during the transition period would ensure that regulated entities remain compliant while the State phases in the NPDES program elements.

Some panel members raised concerns about the potential for small businesses and rural communities to overcome disproportionate impacts during the transition to a State-led program. Certain panel members recommended targeted outreach to these groups to ensure they are well informed and supported during the transition. Additionally, phased fee structures were proposed to minimize financial burdens on smaller entities while ensuring program sustainability.

It was noted during the discussion of fees that the EPA administers the NPDES program without charging fees and that excessive fees from the state could create pushback

E. Modernizing Application and Reporting Processes

Adopting electronic platforms for permit applications and reporting was a recurring theme among SWAP participants. Tools like EPA's NetDMR were highlighted as effective solutions to improve efficiency, accountability, and accessibility. Panel members acknowledged that modernizing these processes would require investments in training and support, particularly for smaller entities and those unfamiliar with digital tools. However, the long-term benefits, including streamlined workflows and reduced processing times, were seen as outweighing these initial challenges.

F. Alignment With Federal Requirements and Processes

Some on the panel emphasized aligning with existing federal requirements and processes to ensure consistency and minimize disruption. Specific recommendations included:

- Aligning NOI procedures with EPA requirements to simplify transitions for permittees.
- Coordinating NOIs for groundwater and surface water permits
- Ensuring State database compatibility with federal systems to maintain continuity and streamline reporting processes.
- Using the EPA general permit program as a starting point since it is well-developed, functional, and effective.

Discussion feedback included suggesting a process for facilities without specific Standard Industrial Classification (SIC) codes to apply for stormwater general permit coverage if their operations align with existing regulated activities.

Additionally, sampling exemptions or special procedures for facilities with infrequent discharges, such as sand and gravel operations, were suggested for consideration to reduce unnecessary burdens.

I don't recall this conversation, but incorporating an air quality requirement into a stormwater regulation seems problematic

Some members provided the following detailed recommendations for construction and stormwater permits to address New Mexico's unique environmental conditions:

- Low Erosivity Waivers: Retaining these waivers for small construction projects, recognizing their role in reducing administrative burdens for low-impact activities.
- Dust Control Requirements: Incorporating dust control measures into construction permits to address air quality concerns specific to New Mexico's arid climate.
- Qualitative Benchmarks for Stormwater Permits: Including qualitative benchmarks for stormwater discharges to increase flexibility and encourage watershed-based approaches, providing regulated entities with adaptable compliance pathways; and ensuring that qualitative benchmarks complement quantitative ones to encourage compliance while focusing on meaningful water quality improvements.
- Robust training programs for Stormwater Pollution Prevention Plan (SWPPP): Including a tiered training structure, as seen in other states like California and Georgia, to enhance inspector capabilities and improve compliance; providing certification options or recognizing equivalent credentials to ensure consistency and improve regulatory outcomes.
- Monitoring/inspection requirements for MS4 permits: Including flexibility to accommodate the logistical challenges of sampling in ephemeral channels and sampling/inspections during wet-weather events, especially in arid regions.
- Including *de minimis* acreage thresholds for construction general permits, a setback from SWOTS, and other considerations, including the land disturbance size versus the drainage basin size, cumulative impacts, geology and grade, implementation of the United States Department of Agriculture (USDA) Revised Universal Soil Loss Equation (RUSLE) program to calculate potential soil erosion and infiltration studies.

D. Dredged and Fill Material Discharges.

Panel discussions included consideration of how to balance operational feasibility and environmental protections and several other key topics.

General and Individual Permits

Panel members commented that a general permit for minor discharges could be used to retain permit protections but not require notifications. The size of the activity and the size of the

I'm unclear how, if avoidance is practiced, NMED would have any jurisdiction whatsoever

Avoidance and Minimization

Panel members made various comments throughout meeting discussions on avoidance and minimization of dredged and fill material discharges included here:

Encouraging Avoidance: Avoidance should be the first step in the mitigation hierarchy, focusing on preventing impacts on high-value wetlands, riparian areas, and ephemeral streams. Incentives for avoidance could include streamlined permitting for projects demonstrating significant design-based avoidance measures or reduced mitigation ratios for avoided impacts. By encouraging avoidance, the State can reduce ecological disturbance and preserve critical environmental functions of wetlands and aquatic systems.

Design-Based Strategies: Project proponents should be encouraged to incorporate avoidance strategies into their designs, such as increasing bridge spans or altering project footprints to bypass sensitive areas. These proactive measures not only minimize resource use but also reduce permitting complexity.

Integration with Buffers: Tailored buffer requirements can support avoidance by clearly delineating areas where impacts should be minimized or avoided entirely. Buffers should vary based on the ecological function of the stream or wetland and reflect New Mexico's unique hydrological conditions.

The comments of meeting discussions included the need for easy-to-determine buffer requirements to protect against resource impacts. To balance environmental protection with program feasibility, member comments include that buffer requirements should be tailored to the function and type of stream (e.g., ephemeral vs. perennial). For example, a buffer distance could be calculated based on stream width. A concern was raised that overly restrictive buffers could cause the program to fail.

Yes, this is concerning. In essence, the SWOTS would include not just the channel/stream/etc, but the buffer as well, since there seems to be a regulatory hook within buffers

Mitigation

Panel members commented that mitigation for ephemeral channels should prioritize functional assessment over simple acreage thresholds, focusing on environmental resources being lost. Some panel members recommended trend-based monitoring and climate-resilient designs, such as drought-adaptive restoration, to ensure long-term success. It was further suggested that NMED evaluate mitigation ratios based on State-specific conditions and ecological priorities and that confidence ratios be used primarily with high mitigation ratios when continuing costs may not be needed to achieve positive outcomes. Some members encouraged NMED to allow flexibility and best professional judgment to assess the meeting of goals.

E. Feedback Highlights on State WQA Program

Key feedback themes included:

- Using general permits for minor discharges.
- Integrating Section 404 dredge and fill permitting considerations.

USDA Forest Service Southwestern Region

File: USDA-USFS SWAP Draft Report 12-13-2024_rlj_Final.pdf

Forest Service

Southwestern Region
Regional Office

333 Broadway SE
Albuquerque, NM 87102
505-842-3255

File Code: **2500; 2530** **Date:** **December 28, 2024**

Subject: **Response to NMED SWAP Draft Report**

To: **Pamela E. Homer, Team Lead**

Hello Pam,

Thank you for inviting the USDA Forest Service Southwestern Region (Forest Service) to participate on the NMED Surface Water Advisory Panel (SWAP). NMED is to be commended in moving forward with convening the diverse group of technical, operational, and policy insightful participants to inform development of a New Mexico (State)-led surface water permitting program. We acknowledge this program is being considered in response to the narrowing scope of Federal jurisdiction under the Clean Water Act (CWA), including changes resulting from the Supreme Court's *Sackett v. EPA* decision, which left the majority of surface waters in the State—such as ephemeral streams and wetlands—unprotected at the Federal level. By creating a State specific permitting framework, New Mexico aims to ensure comprehensive protection of these waters while reflecting local ecological conditions, hydrologic realities, and stakeholder priorities.

The Draft Report of the in-person meetings, held during August thru October of this year, were extremely well organized, attended, productive, and representative of the diverse parties in the State that will be potentially impacted because of the changes mentioned above. The biggest change being decreased protections for our precious water-based resources.

You are no doubt familiar, the Forest Service has a long history of working collaboratively with the NMED, as documented by our decades-old Memorandum of Understanding (MOU), aka New Mexico Water Quality Protection Agreement: NMED #23-667-2090-27688; FS # 23-MU-11031600-095.

Captured in the Draft Report are many actions NMED could address moving forward. A few I see as essential early starters include:

- Outreach: public meetings, hands on trainings & seminars, young ambassadors, etc.
- Resource data collection standards: encourage sharing for analysis, reporting & tracking.
- Best Management Practices: administrative and technical.
- Avoid straying from EPA Clean Water Act program guidance, as it has served us well.
- Continue rallying partners, including the Forest Service, to assist with the heavy lifts.

Thank you again for inviting the USDA Forest Service to participate.

Respectfully,

Roy Jemison, PhD
Regional Hydrologist