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% feebased 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