



# New Mexico Environment Department

## Surface Water Discharge Permitting Primacy

Shelly Lemon, Surface Water Quality Bureau Chief

September 29, 2022





# To Begin...

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

Luna Leopold,  
First Chief Hydrologist of the USGS



# Existing Laws and Programs to Protect Surface Water Quality



- In 1972, the **Clean Water Act (CWA)** made it illegal to discharge pollutants into “*waters of the United States,*” or WOTUS, without a permit.
- **"Waters of the US" refers to surface waters that are protected under the federal Clean Water Act.**
- The National Pollutant Discharge Elimination System (NPDES) program is the federal program that controls water pollution through permit requirements. [CWA §402]
- 47 out of 50 states are currently authorized to implement and administer the federal NPDES program.
- **New Mexico is NOT authorized.**
- New Mexico’s **Water Quality Act** allows the State to issue permits for the discharge of pollutants to waters. [NM Stat § 74-6-5 (2021)]



# Why is a permit program needed now?

- **Scope of federal jurisdiction** under the Clean Water Act is limited to “waters of the US”
  - ▣ No clarification to this phrase was given in the enacting language
- **Uncertainty** created by shifting federal politics
  - ▣ Trilogy of Supreme Court cases concerning the meaning of “waters of the US” (1985, 2001, 2006)
  - ▣ **USEPA Rulemakings: 2015** = Obama-era Clean Water Rule; **2020** = Trump-era Navigable Waters Protection Rule; **2021** = Biden-era Proposed Rule to re-codify pre-2015 definition updated to consider Supreme Court
  - ▣ **2022** Supreme Court decides to hear Sackett case



# What does this mean for New Mexico?

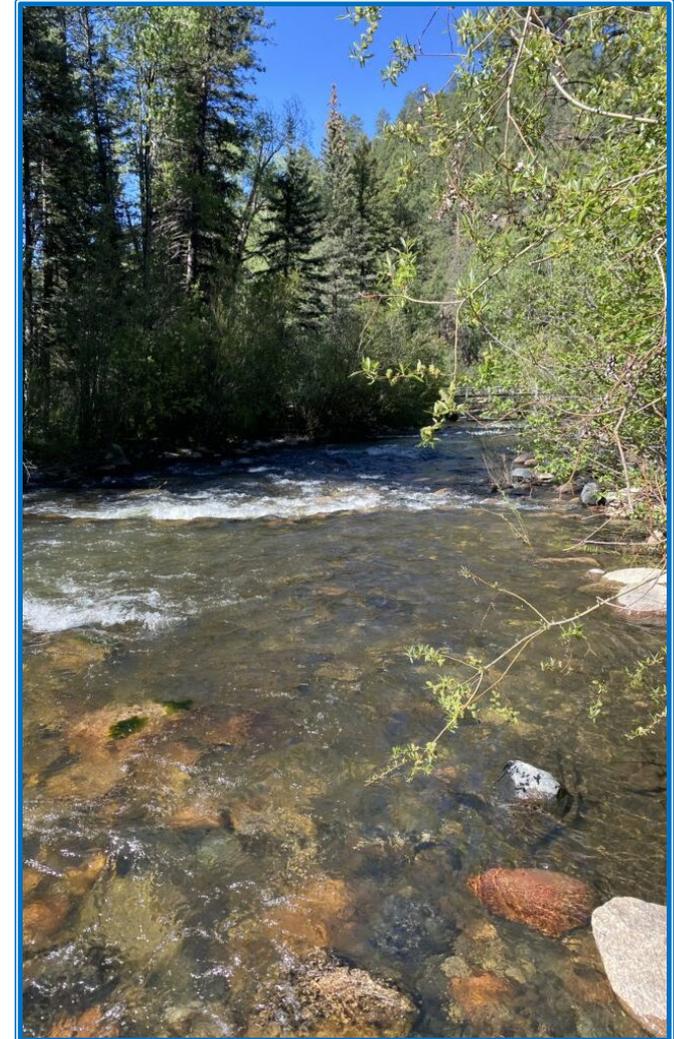
- Will ephemerals and other non-perennial waters be excluded from Clean Water Act protections? TBD.
- "Surface Waters of the State" are more inclusive than "waters of the US"
- Under pre-2015 WOTUS definition, permits were issued for discharges to ephemerals (arroyos) and other non-perennial waters.
- Narrower WOTUS definition will result in ephemerals and other non-perennials being excluded from federal protections – up to 93% of all river and streams in NM.
- Without a surface water quality permitting program, New Mexico cannot fully protect its waters from contamination and degradation.





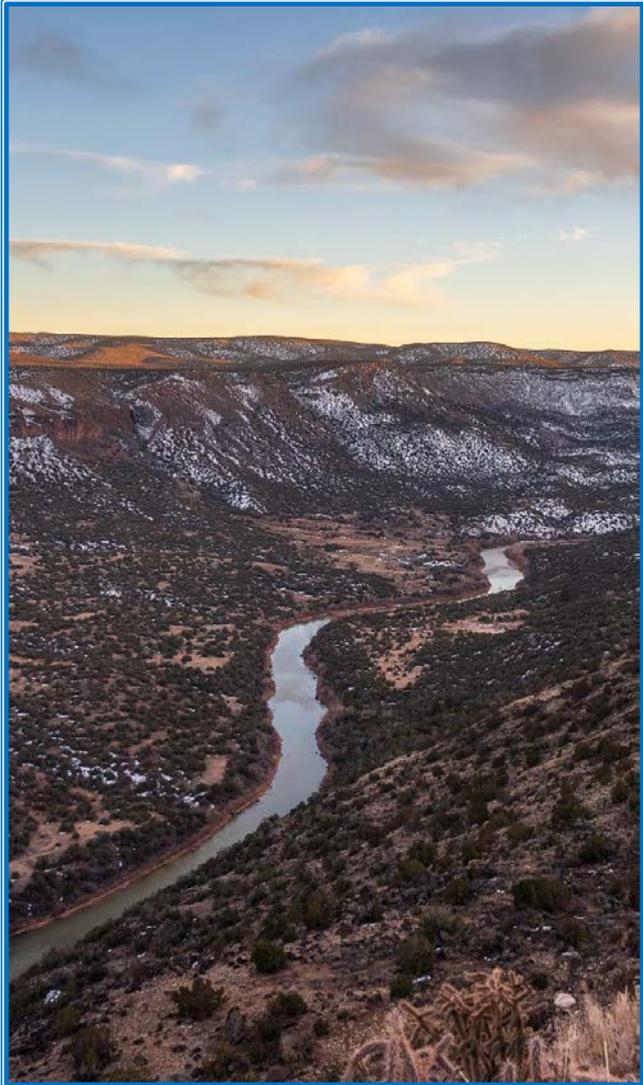
# What are the benefits of a State Water Quality Permitting Program?

- ❑ **More certainty** – not dependent on changing definition of "waters of the US"
- ❑ **More certainty** – protects all waters of the state not just "waters of the US"
- ❑ **More certainty** – only one regulating authority
- ❑ Local administration
- ❑ Greater flexibility
- ❑ Fees and penalties stay in NM
- ❑ Better integration with other NMED programs and state agencies





# Permitting Program and Necessities



- New Mexico's federal NPDES permitting universe consists of **approximately 3,955 permittees.**
- **A state permitting program to protect "waters of the state" (beyond NPDES) will result in additional permits.**
- NMED must build capacity in (1) permit writing, (2) pretreatment program implementation, (3) compliance monitoring, (4) enforcement, and (5) data management and handling.



# Planning and Resources



- 44 FTE = Staffing for a permitting program.
- \$5.9 million per year (in 2021 dollars) = Projected program costs
- Current funding is about 1/10 that amount (~\$550,000).
- At full implementation, NMED would fund the program through a combination of permit application fees and annual fees, and possibly supplement with general fund.

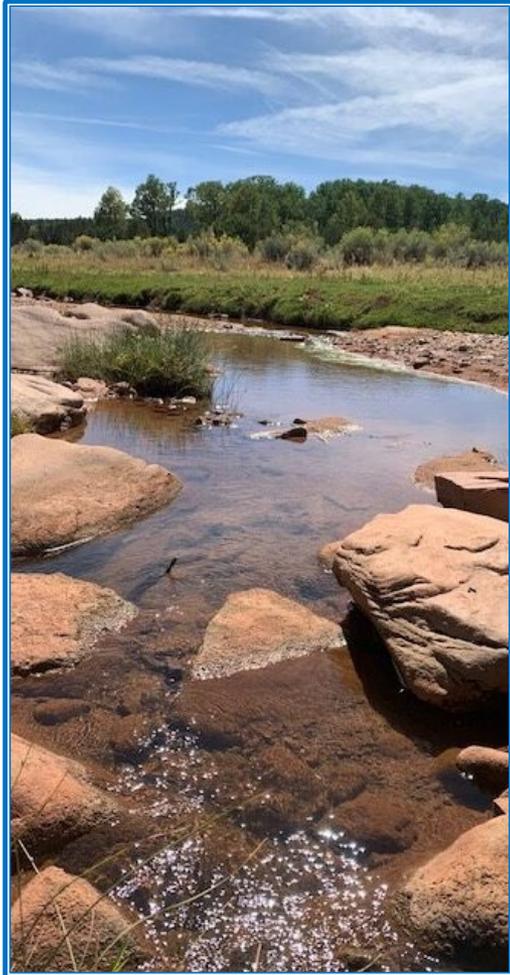


# Planning and Resources

- Phase I – Outreach; Regulations and Statutes; Program Outline; Funding Strategy (hire 3 FTE)
- Phase II – Guidance, SOPs, Templates; Rulemaking and Legislation; EPA Application (hire 3 FTE)
- Phase III – Staff Recruitment, Hiring, and Training; State/EPA MOA; Application Package (hire 7 FTE)
- Phase IV – Phased Implementation of Permitting Program over 5 years (hire 24 FTE)
- Timeline to Full Program Implementation: 8-10 years for NMED to obtain full program implementation (municipal, industrial, stormwater, etc.).



# Planning and Resources

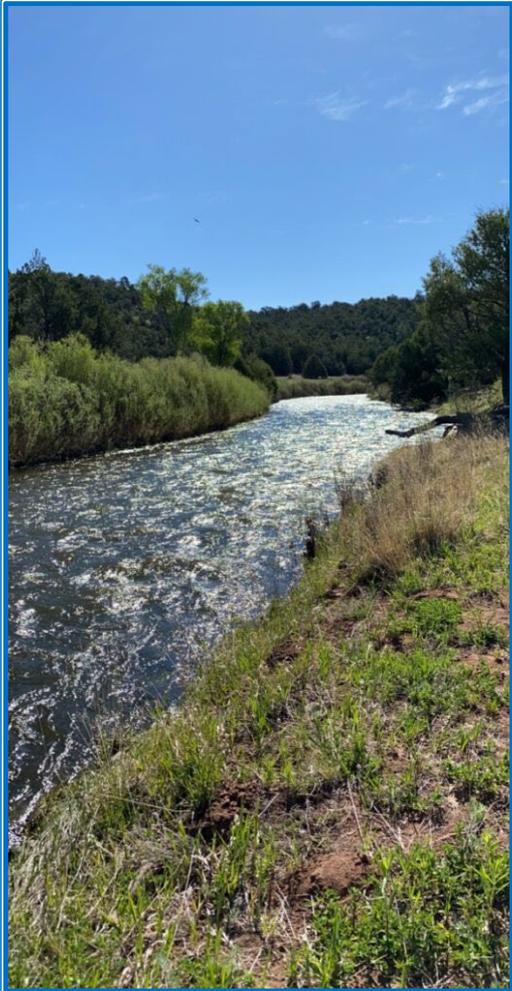


Many activities are necessary to support water programs and ensure a safe and sustainable water supply for all New Mexicans.

- ❑ Planning and goal setting
- ❑ Developing appropriate regulations with robust public involvement
- ❑ Monitoring, sampling, analysis, and assessment
- ❑ Developing mechanisms to protect high quality waters
- ❑ Ensuring permits are protective and enforceable
- ❑ Implementing projects to restore water quality and remediate contamination



# Planning and Resources



- In FY2024, fund NMED to develop a state surface water quality permitting program as follows:
  - Fully fund the water protection program at Executive request level
  - Support NMED's targeted non-recurring funding requests for needed staff and contractor support for Phase 1



# In Summary...

*“You cannot escape the responsibility of tomorrow by evading it today.”*

*– Abraham Lincoln*



# Contact Information

**Rebecca Roose**

**Deputy Cabinet Secretary of Administration**

New Mexico Environment Department

[Rebecca.Roose@state.nm.us](mailto:Rebecca.Roose@state.nm.us)

**John Rhoderick, Acting Director**

Water Protection Division

New Mexico Environment Department

[John.Rhoderick@state.nm.us](mailto:John.Rhoderick@state.nm.us)

**Shelly Lemon, Bureau Chief**

Surface Water Quality Bureau

Water Protection Division

New Mexico Environment Department

[Shelly.Lemon@state.nm.us](mailto:Shelly.Lemon@state.nm.us)