



Thursday, June 22, 2023

**Notice of potential state regulatory impacts resulting from the U.S. Supreme Court
Sackett v. U.S. Environmental Protection Agency (EPA) decision**

The New Mexico Environment Department (NMED) is hereby providing notice to Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permittees in response to the recent U.S. Supreme Court decision in the matter of *Sackett v. EPA (Sackett)* as it relates to operations in New Mexico.¹

Currently, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (ACE) are reviewing the Supreme Court's decision in order to determine their next steps. In *Sackett*, the U.S. Supreme Court ruled that wetlands that do not have a continuous, indistinguishable surface connection with "waters of the United States" (WOTUS) are not federally protected under the CWA. Consequently, NPDES permittees may have questions regarding jurisdictional issues, including whether you are required to retain your NPDES permit based on the *Sackett* decision.

To the extent a federally issued NPDES permit is no longer required as a result of the *Sackett* decision, you should consult legal, regulatory, and technical professionals to determine the applicability of other state and federal statutory and regulatory requirements.

Under New Mexico state law, an industrial or municipal wastewater treatment facility may be required to obtain a groundwater discharge permit pursuant to New Mexico Ground and Surface Water Protection regulations (see 20.6.2 New Mexico Administrative Code (NMAC)). If a NPDES permit is no longer in effect, this may change the terms and conditions of an existing groundwater discharge permit or require the issuance of a new groundwater discharge permit. In either scenario, a modified groundwater discharge permit or new groundwater discharge permit must be obtained from NMED prior to discharging. A facility may not discharge without a permit, and it may take six months to a year to obtain a final, state-issued groundwater discharge permit. NMED has the authority to issue or deny these permits. NMED is also responsible for compliance and enforcement of groundwater discharge permit terms and conditions as well as enforcement against unauthorized discharges of water pollutants, contaminants, and refuse, including all unwholesome materials into New Mexico's surface and groundwaters.

Under federal and state law, the federal Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act (HWA) may apply to your wastewater treatment plant, tanks/tank systems, associated wastes, and all discharges. The RCRA and HWA exempt wastewater treatment units (WWTU) from regulation if, in addition to several other conditions, those units discharge effluent

¹ See https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

Notice to NPDES permittees in New Mexico following *Sackett v. U.S. EPA*
June 22, 2023

pursuant to a NPDES permit (see 42 U.S.C. § 6903(27) and *HWA citation*)². Without a NPDES permit, the WWTU exemption would no longer apply, resulting in the immediate applicability of RCRA/HWA requirements.


In the event a RCRA/HWA treatment, storage, and disposal facility (TSDF) permit is necessary, such permits require: development of emergency plans, obtaining insurance and financial assurance, and employee training. TSDF permits also include specific facility requirements, such as land disposal requirements and groundwater monitoring requirements. TSDF permits also require corrective action where the owner/operator must investigate and clean up contaminated soil, groundwater, and surface water. A TSDF facility cannot operate without a TSDF permit, and it may take six months to a year to obtain a final TSDF permit. NMED has the authority to issue or deny TSDF permits and is responsible for compliance and enforcement of such permits.

While this notice alerts you to some of the possible outcomes relating to the sunset of a federally issued NPDES permit in New Mexico, this notice is not exhaustive. Further, NMED anticipates that in the coming months, the U.S. EPA may further clarify the regulatory framework resulting from the U.S. Supreme Court decision in *Sackett*.

While regulatory questions may abound as a result of the U.S. Supreme Court's decision, science and New Mexico law dictate that New Mexico must increase its protections of our limited and precious water supply. Aridification resulting from climate change and contamination from emerging contaminants like per- and polyfluoroalkyl substances (PFAS) are just two examples of the many threats to our vital surface and groundwaters. NMED will take all steps possible to protect our water supply and we ask you to do the same. Protecting our water supply is far more efficient and less expensive than cleaning it up.

Questions regarding your federally issued NPDES permit should be directed to your permit writer at the U.S. EPA Region 6 office in Dallas, Texas and Susan Lucas Kamat, NMED Point Source Regulation Section Manager, at (505) 946-8924.

For questions related to NMED programs mentioned in this letter, please contact Justin Ball, Chief, Groundwater Quality Bureau, at (505) 231-3773, for groundwater discharge permit questions or Ricardo Maestas, Acting Chief, Hazardous Waste Bureau, at (505) 690-6148, for TSDF permit questions.


James C. Kenney
Cabinet Secretary

² A WWTU is a device that: (1) Is part of a wastewater treatment facility subject to regulation under either Section 402 or 307(b) of the CWA; (2) Receives and treats or stores an influent wastewater that is a hazardous waste as defined in 40 CFR § 261.3, or that generates and accumulates a wastewater treatment sludge that is a hazardous waste as defined in 40 CFR § 261.3, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in 40 CFR § 261.3; and (3) Meets the definition of a tank or tank system in 40 CFR § 260.10.