

SURFACE WATER PERMITTING

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Water and Natural Resources Committee
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FEDERAL CLEAN WATER PROTECTIONS IN NEW MEXICO STRIPPED AWAY



3 US Supreme Court decisions have put New Mexico's waters at risk.

- US Supreme Court decisions in **2001 (SWANCC)** and **2006 (Rapanos)** removed Clean Water Act protections from much of New Mexico's waterways.
 - Closed basins, isolated wetlands, playa lakes, cienegas, and smaller isolated streams no longer protected.
 - Estimates had between 80-90% of New Mexico's waterways no longer protected.
- The May 2023 US Supreme Court ruling in **Sackett vs. EPA** was final blow.
 - Stripped federal protections for even more of New Mexico's waters – up to 96%
- For the past 20 years Clean Water Act regulations have swung back and forth creating regulatory uncertainty.

NEW MEXICO TAKES ACTION

- **SB 21**, passed in 2025, put New Mexico on the leading edge nationwide in responding to these Supreme Court by authorizing the state to develop a state surface water permitting program to protect state waters no longer federally protected and to obtain primacy to issue Clean Water Act permits for point sources discharges.
- The **Surface Water Quality Permitting Rulemaking** to implement SB 21 has been underway this Spring and Summer – a hearing was held June 8-18th
- **Water Protection Organizations** – Amigos Bravos, New Mexico Acequia Association, and New Mexico Wild, represented by Western Environmental Law Center and New Mexico Wild **support** the efforts of the New Mexico Legislature, Governor Lujan Grisham, and NMED to protect New Mexico's surface waters in the face of substantial federal deregulation.
- WPO is proposing amendments to **both** the sets of regulations at issue in this rulemaking **20.6.2 NMAC** and **20.6.5 NMAC**.





Different types of permits:

- **Point Source Permits:** Permits that control the discharges of pollutants from discrete conveyances such as from pipes, tunnels, etc. into surface waters. Includes discharges from wastewater treatment facilities and factories. National Pollutant Elimination System (NPDES) permits are point source permits for Waters of the United States (WOTUS).



- **Dredge and Fill Permits:** Permits that regulate the removing or adding of materials to wetlands, lakes, rivers, and streams. Fill materials include sand, dirt, and gravel.

PRE SB 21

Point Source Discharges

Waters of the
US (WOTUS)



EPA

NM Waters that
aren't WOTUS



Unpermitted

Dredge and Fill

Waters of the
US (WOTUS)



US Army Corp of
Engineers (USACE)

NM Waters that
aren't WOTUS



Unpermitted

SB 21

Point Source Discharges

Waters of the
US (WOTUS)



NMED

NM Waters that
aren't WOTUS



NMED

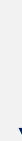
Dredge and Fill

Waters of the
US (WOTUS)



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NMED

RULEMAKING

- **2 Rules:**
 - One rule for discharges into State Waters that are no longer Waters of the US (**20.6.2 NMAC**)
 - One rule for assuming primacy of the National Pollutant Discharge Elimination System (NPDES) and issuing permits for discharges into waters that remain Waters of the US. (**20.6.5 NMAC**)
- **Surface Water Advisory Panel (SWAP)** co.
- **18 parties** – NMED, 3 conservation focused parties, 2 pro se parties, and 12 discharger focused/industry parties.
- April 15th pre-filed direct testimony
- May 15th pre-filed rebuttal testimony
- Hearing June 8-18th





KEY ISSUES

- **Scope.**

- There were various proposals from industry parties to narrow the scope of the program and protect fewer state waters – waters that had historically been protected under the Clean Water Act.
- Industry proposals would remove protections from New Mexico's closed basins (20% of land area of the state) and many wetlands and smaller streams. Water Protection Organizations oppose narrowing the scope of the program.

- **Fees.**

- Wastewater treatment facilities provide a public good. Priority is to make sure that small communities are not overburdened.
- The state's fee proposal funds 100% of the program, with the ability for fees to be reduced if legislature allocates funds.

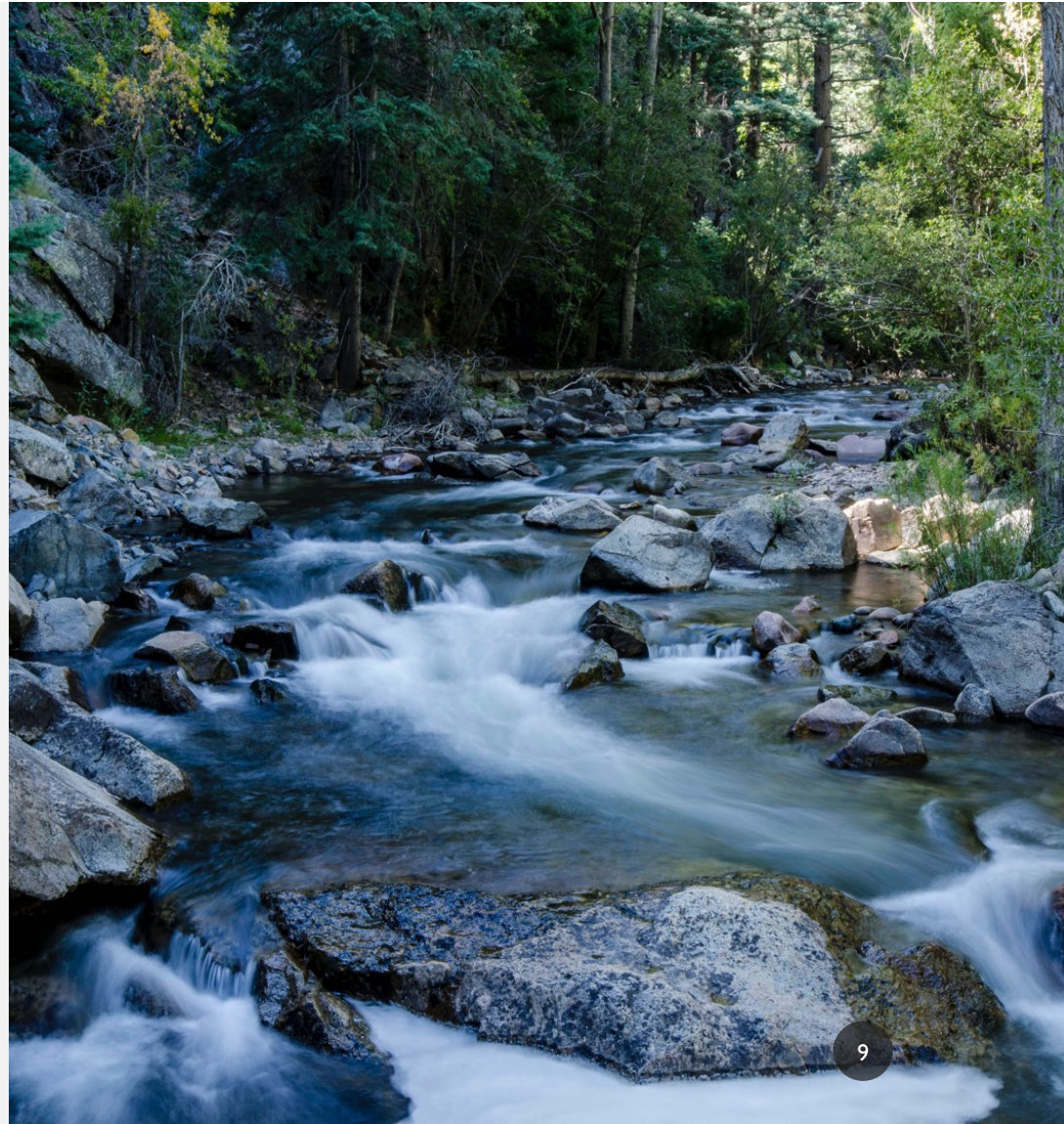
KEY ISSUES CONT.

- **Protection of Downstream Tribal Water Quality.**
- **Requirements at Least as Protective as Lost Federal Requirements.**
- **Clear and Protective General Permit Provisions.**
- **Consideration of Impacts to Wildlife.**



KEY ISSUES CONT.

- **Establishment of a Restoration General Permit.**
- **Strong Avoidance and Minimization Provisions.** Require applicants first adequately demonstrate they are working to avoid damage or destruction to a wetland or waterway before minimization and mitigation is considered.
- **Robust Compensatory Mitigation Requirements.** Establish a minimum 2:1 mitigation ratio and establish a framework for mitigation guidance.





STRONG PUBLIC SUPPORT

- 112 members of the public showed up to give a total of 6 hours of public testimony on the draft rules. 109 were in support of strong rules.
- Comments in support were from Tribal Governments and community members, acequias, public health advocates, faith voices, hunters and anglers, and members of the general public.
- 2,089 New Mexicans signed petition in support of a surface water permitting program that applies to ALL waters of the state.

RULEMAKING NEXT STEPS

- Post hearing submittals - **October 5th**
- Water Quality Control Commission
Deliberations and
Decision – **November 9-10**
- **First permits issued in 2027**





WHAT CAN THE LEGISLATURE DO?

- In 2027 continue to support program development by **appropriating nonrecurring funds to NMED** to finish building out the program.
- Prioritize recurring program funding when program is fully operational to **offset fees for smaller municipalities.**