

New Mexico Natural Resources Partnership

Surface Water Permitting Program:

Implementation and Rulemaking

Water and Natural Resources Committee

July 14, 2026

Dal Moellenberg, Gallagher & Kennedy, P.A., Santa Fe NM

Who Is the NM Natural Resources Partnership?

- The New Mexico Natural Resources Partnership was formed by aligned industry trade organizations who will be affected by the surface water permit program.
 - New Mexico Mining Association
 - New Mexico Oil & Gas Association
 - Dairy Producers of New Mexico
 - Dairy Farmers of America
 - New Mexico Cattle Growers' Association
 - New Mexico Farm & Livestock Bureau

What Are NMNRP's Chief Concerns with the Surface Water Permit Program?

- Lack of clarity and criteria in the rule and undefined agency discretion-- consistency with federal regulation
- What “surface waters” will be regulated, particularly for ephemeral waters
- What discharges will be covered by “general permits” and the permit requirements
- Large application and annual fees for individual permits
- Permitting timelines and delays affecting project development
- Overlap with and duplication of other permit programs
- Temporary authorization of discharges until general permits are issued

Lack of clarity and criteria in the rule and undefined agency discretion

- Many key terms and provisions, such as the definition of “surface waters” and provisions for compensatory mitigation, lack clarity and criteria for agency decision-making
 - The Environment Department proposes to leave details out of the rule in favor of Department-developed future “guidance” documents.
 - Guidance can be appropriate and can add to regulatory certainty, but the Department also opposes proposals by both NMNRP and other parties to reference and utilize existing federal guidance and has not committed to a transparent process with stakeholder involvement to develop guidance.
 - There are many technical judgments to be made and past experience with the Clean Water Act indicates high potential for inconsistent and arbitrary decisions by agency staff if the rules lack even basic criteria to guide agency decisions.
- In contrast to the NM proposed rules, Colorado recently adopted a rule of well over 100 pages to address issues in detail.

What “surface waters” will be regulated, particularly for ephemeral waters

- The Environment Department proposes to include “ephemeral streams” and other ephemeral waters, such as “playa lakes” as “surface waters.”
 - Ephemeral waters are areas that are normally dry but where water may flow or accumulate temporarily in direct response to precipitation.
 - The Department has proposed a distinction between “ephemeral streams” and “erosional features” but has not agreed to criteria to distinguish between the two or to criteria for measurement.
 - This is a critical distinction to define what areas are “surface waters” versus areas treated as “uplands” or dry land.
- Many ephemeral streams in New Mexico have never been federally regulated for discharges of dredged and fill material.

What discharges will be covered by “general permits” and the permit requirements

- Most activities requiring surface water permits are expected to be covered by “general permits” and not individual permits.
 - Stormwater discharge permits for construction sites, industrial facilities, and large municipal stormwater systems (and perhaps small ones under the NM program)
 - Dredged and fill discharge permits for stream crossings (including crossing ephemeral streams) by transportation, energy and other infrastructure and for other projects with temporary or otherwise minimal impacts on surface waters
- NMNRP proposed to require the Department to issue general permits with coverage equivalent to the federal program.

Large application and annual fees for individual permits

- The Department's proposed rule includes fees estimated to cover the total annual cost of the surface water permit program estimated at \$8.37M.
 - The fees include both application and annual fees.
 - Annual fees for individual permit holders would exceed \$100,000 per year in several instances.
 - The proposed annual fees can be adjusted for any legislative funding of the program, but this approach and other aspects of the rule have created a legal issue whether the fee rule as proposed meets the requirements for a "schedule of fees."
 - The proposed fees are multiples higher than fees in neighboring states and compare to zero fees currently paid for federal NPDES permits.

Permitting timelines and delays affecting project development

- Project permitting timelines in New Mexico are relatively lengthy and uncertain compared to neighboring states.
 - Permitting requirements are less certain and more open to agency discretion.
 - Permit time limits in rules can be unenforceable or avoided by requests for additional information.
 - Public participation requirements tend to be broader and public hearing requirements can be more extensive, including trial-like proceedings rather than public comment sessions.
 - For a new permit program there are delays due to staff hiring and training and other program stand-up issues.

Overlap with and duplication of other permit programs

- The proposed surface water permit program may cover activities already extensively regulated under existing permit programs.
 - The groundwater discharge permit program regulates activities such as mining, oil & gas, and dairies with detailed requirements to prevent discharges to surface waters.
 - The Mining Act and Surface Mining Act regulate all surface disturbances associated with mining.
 - Senate Bill 21 allows an exemption for discharges subject to effective and enforceable surface water quality requirements in a state or federally issued permit with certain exceptions.
- The proposed rules contain language acknowledging the exclusion.

Temporary authorization of discharges until general permits are issued

- The proposed rules would prohibit discharges without a permit shortly after the rules go into effect, but it likely will take a few years for the Department to issue general permits.
 - As a result, activities not covered by federal permits could need to apply for individual permits even if they would be covered by general permits expected to be issued in the future.
 - NMNRP proposed a “temporary authorization” provision to allow activities that would qualify for a federal general permit to be temporarily authorized under the state program subject to notification to the Dept.
- The Department and other parties generally agree with this addition to the proposed rules.