

LFC Requester:	Davidson
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**AGENCY BILL ANALYSIS
2025 REGULAR SESSION**

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original	<input type="checkbox"/>	Amendment	<input checked="" type="checkbox"/>	Date	<u>3/4/2025</u>
Correction	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Bill No:	<u>SB21CSAAAA</u>

Sponsor:	<u>Wirth</u>	Agency Name and Code	<u>667 – Environment Department</u>
	<u>Water Quality Act and NM</u>	Person Writing	<u>Jonas Armstrong</u>
Short Title:	<u>Pollution Discharge Elimination System Act</u>	Phone:	<u>505-670-9050</u>
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SECTION II: FISCAL IMPACT

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$0	\$0	\$7,100	\$7,100	Recurring	Permit Fees and/or General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB22

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: The Senate Judiciary Committee Substitute for Senate Bill 21 and Senate Bill 22 (SB21) supports the Governor’s 50 Year Water Action Plan by modernizing the Water Quality Act to improve water quality protections and expand regulatory authority to promote water reuse, protect state surface waters that are no longer protected by the federal Clean Water Act, and to clean up and monitor polluted groundwater that is not covered by the federal Superfund law.

SB21 also creates the New Mexico Pollution Discharge Elimination System (NMPDES) Act to provide needed authorities to obtain and retain authorization from the U.S. Environmental Protection Agency (U.S. EPA) to implement and enforce the federal National Pollutant Discharge Elimination System (NPDES) program in New Mexico. The NPDES program is part

of the federal Clean Water Act, which enables the U.S. EPA to authorize states to implement the permitting program upon meeting specific federal requirements. The NMPDES Act does not change who would be regulated for discharges into waters of the United States but instead would change who is responsible for administering and enforcing the program in New Mexico.

FISCAL IMPLICATIONS

Surface Water Permitting Program: At full program implementation of a comprehensive surface water permitting program for waters of the U.S. and other waters of the state, the Department estimates annual program costs to be approximately \$8 million with 60 FTEs. Full implementation will not occur until FY27 at the earliest. The Department currently has 10 FTE to perform this and other surface water work, which costs approximately \$900 thousand per year, to assist the U.S. EPA and U.S. Army Corps of Engineers (USACE) with regulating discharges to surface waters pursuant to the federal Clean Water Act and related administrative expenses. Therefore, the Department would need an additional \$7.1 million per year and an additional 50 FTEs to implement the permitting, compliance, enforcement, dredge/fill, data management and stewardship, outreach and training, and administrative responsibilities of a comprehensive, state-administered program. This cost estimate includes the federal NPDES program, and the complimentary state program authorized by the Water Quality Act amendments in this bill (*see* Conflict, Duplication, Companionship, Relationship section below).

Funding can be achieved through a 100% fee-based program, a 100% legislative appropriation (General Fund), or a combination of fees and appropriations sufficient to implement the program.

Neglected and Contaminated Sites Program: NMED anticipates adding 7 FTEs to staff the new program, costing \$1 million annually for personnel and \$200 thousand in other costs. The Department expects costs of about \$3.3 million annually for contracted site work (initial assessments, detailed assessments, planning, and clean up) once the program is established. The bill's Neglected and Contaminated Sites Fund and related funding in the House Appropriations and Finance Committee version of House Bill 2 would support these costs. While the \$50 million initial investment is a significant step, NMED estimates successfully addressing these contaminated sites could cost at least \$300 million to facilitate long term success.

SIGNIFICANT ISSUES

The bill's Water Quality Act amendments fill regulatory gaps, enhance public involvement, and ensure stronger public health and environmental safeguards while addressing feedback from stakeholders and aligning with federal standards. Key provisions include creating a surface water discharge permitting program, including dredge and fill activities, authorizing the issuance of general permits to cover a group of similar discharges (like construction, oil and gas, mining, etc.), introducing "compensatory mitigation" for unavoidable impacts to aquatic resources, modernizing communication and notification methods, strengthening protections to maintain high-quality surface waters, shifting oversight of oil and gas discharges to surface waters to NMED, establishing authority to respond, investigate, and remediate water pollution and soil contamination, clarifying groundwater liability and liability protections, and expanding regulatory authority to promote potable water reuse.

The U.S. EPA requires and must accept the NMPDES Act legislation for New Mexico to assume authority over the federal permitting program. This legislation complies with Clean Water Act

requirements for the assumption of the National Pollutant Discharge Elimination System (NPDES) program, and coupled with subsequent regulations, is crucial for EPA authorization of New Mexico to assume authority over the federal NPDES program. After legislation is enacted and regulations adopted, the Environment Department will prepare and submit a program application to EPA to request authorization of the NPDES program and prove the state has the capacity, funding, and framework necessary to implement the NPDES program successfully. To date, 47 states have completed this process and received U.S. EPA approval to implement the NPDES program within their jurisdictions.

See also below under “WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL.”

PERFORMANCE IMPLICATIONS

None identified.

ADMINISTRATIVE IMPLICATIONS

Creating, hiring, and training 50 full-time employees (FTE) will be a significant undertaking for the Department. Creating a regulatory program will increase the number of support staff needed to help implement the program, including administrative, IT, human resources, financial, and legal staff. Funding from program fees would be able to support these related expenses. These costs are included in the fiscal analyses above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None identified.

TECHNICAL ISSUES

None identified.

OTHER SUBSTANTIVE ISSUES

None identified.

ALTERNATIVES

None identified.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Surface Water Permitting Program: Following the 2023 U.S. Supreme Court ruling in *Sackett v. EPA*, up to 95% of our state's surface waters have lost federal protection under the Clean Water Act. See *Sackett v. EPA*, 598 U.S. 651 (2023). The Water Quality Act amendments are necessary to enact a state surface water discharge permitting program for surface waters of the State that are not “waters of the U.S.” (non-WOTUS) and to fully protect rivers, streams, lakes, and wetlands from the discharge of pollutants, including dredged-and-fill materials. Failure to enact these amendments will place many surface waters throughout New Mexico at risk from contamination and degradation. Water used for drinking, irrigation, recreation, livestock watering, and aquatic habitat will be vulnerable to pollution. The cost to treat water for drinking or other uses will increase as the water becomes more polluted.

In addition, the NPDES program will remain at status quo. The U.S. EPA, not New Mexico, will administer, and enforce the NPDES program to protect surface water quality in the State. New Mexico will have to continue to rely on the EPA to continue to be the permitting authority for

discharges of contaminants into federal jurisdictional waters within New Mexico as they see fit. Permit application and annual fees will not be collected by the State. Penalties and fines related to dischargers who violate surface water quality protections in New Mexico will go to the federal government.

Groundwater response, investigation, and remediation: New Mexico has more than 300 neglected contamination sites across the state. The program, fund, and funding mechanism are necessary to address abatement of water pollution and contamination of soil and soil vapor at sites without a responsible party or where liability is unresolved, and the site does not meet the ranking qualifications for the federal Superfund program or other federal remediation funding. Failure to enact these groundwater protection amendments will cause contamination to remain unaddressed at hundreds of sites throughout New Mexico, threatening human health and precious environmental resources.

Groundwater liability and liability protections: There are currently 97 sites in the State Cleanup Program (the NMED program that requires assessment and abatement of groundwater pollution and contamination of soil and soil vapor). If the Water Quality Act amendment to clarify the liability framework is not enacted, all 97 of these sites may be able to challenge any requirement for further assessment and abatement of contamination. Failure to enact this amendment to the Water Quality Act will lead to uncertainty for property owners and prospective purchasers, potential and prolonged litigation, and delays or failure to achieve abatement of pollution and protection of human health.

Groundwater discharge permit conditions: NMED manages more than 700 active groundwater discharge permits. Clarifying the scope of conditions that may be imposed upon permits for monitoring devices is necessary to determine if other/additional parties are responsible for observed groundwater contamination or if observed concentrations represent natural conditions. Failure to enact this amendment will make it difficult to determine if a permitted entity, or another party, is required to treat groundwater to applicable water quality standards or if they are warranted protections from liability.

AMENDMENTS

SB21 Senate Floor Amendment 02/26/2025

Senate Floor Amendment 1 (Sen. Wirth) to Senate Judiciary Committee Substitute for SBs 21 and 22 addresses the distribution of fees.

Fees for permits and approvals of general permit coverage to support the cost of developing and implementing permitting rules shall be deposited in the Water Quality Management Fund, as are fees for the operation of a permitted facility.

Money collected for surface waters shall be deposited in the General Fund, not the Neglected and Contaminated Sites Fund. Fines for violation of the New Mexico Pollutant Discharge Elimination Act are also to be deposited into the General Fund.

SB21 Senate Floor Amendment 2 02/26/2025

Senate Floor Amendment 2 (Sen. Sharer) to Senate Judiciary Committee Substitute for SBs 21

and 22 is a cleanup amendment that provides additional definitions that have been agreed upon by the Environment Department, industry and environmental organizations to clarify other portions of the bill:

"abatement costs" means costs incurred in accordance with an abatement plan prepared and approved in accordance with rules adopted by the Commission

"aquatic resources" means wetlands, streams, lakes, rivers and other bodies of water, riparian habitats and the organisms that live in them and the ecological functions, services and values they provide

"dredged material" means material that is excavated or dredged from a surface water

"fill material" means material that is placed in a surface water where the material has the effect of replacing any portion of a surface water with dry land or changing the bottom elevation of a surface water; "fill material" does not include trash, garbage or incidental fallback resulting from excavation activities when small volumes of material fall back to substantially the same place as the initial removal

"point source" means a discernable, confined and discrete conveyance, including a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system or vessel or other floating craft from which water contaminants are or may be discharged; "point source" does not include a discharge composed entirely of return flows from irrigated agriculture or agricultural storm water runoff

"surface water discharge" means: (1) the addition of a water contaminant or combination of water contaminants to a surface water from a point source, including surface runoff collected or channeled by human effort, discharges through pipes, sewers or other conveyances owned by the state, a municipality or another person that do not lead to a treatment works and discharges through pipes, sewers or other conveyances leading into privately owned treatment works, but does not include the addition of water contaminants from an indirect discharger; or (2) the addition of dredged or fill material into a surface water from excavation of a surface water or from filling in a surface water in a manner that replaces the surface water with dry land or changes the bottom elevation of the surface water but does not include incidental fallback

SB21 Senate Floor Amendment 3 02/26/2025

Senate Floor Amendment 3 (Sen. Sharer) to Senate Judiciary Substitute for SBs 21 and 22 represents agreements between the Environment Department, industry and environmental organizations.

The Water Quality Commission is to adopt rules to be administered by the Department of Environment for surface water discharges, including:

(1) for discharges from point sources, the rules shall not require a permit for a point source

discharge for which a permit is issued under Section 402 of the federal Clean Water Act or the New Mexico Pollutant Discharge Elimination System Act; provided that in adopting rules related to this paragraph, in addition to the factors to be considered under Subsection F of this section, the commission may:

(a) identify exemptions from a discharge permit requirement when water contaminants in discharges are subject to effective and enforceable water quality requirements in state or federally issued permit, unless there is a hazard to public health or the environment that may result or an applicable state water quality standard will not be achieved; and

(b) consider requirements for permits and general permits that are consistent with the requirements of similar permits issued under Section 402 of the federal Clean Water Act; and

(2) for discharges of dredged or fill material, the rules shall not require a permit for discharges of dredged or filled materials for which a permit or authorization is issued under Section 404 of the federal Clean Water Act; provided that the rules shall include avoidance and minimization to the maximum extent practicable of adverse impacts to wetlands, streams and other aquatic resources and may require compensatory mitigation for unavoidable adverse impacts that remain after appropriate and practicable avoidance and minimization measures have been achieved; and provided further that in adopting rules related to this paragraph, in addition to the factors to be considered under Subsection F of this section, the commission may:

(a) identify exemptions from a discharge permit requirement when a discharge is subject to effective and enforceable water quality requirements in a state or federally issued permit, unless there is a hazard to public health or the environment that may result or an applicable state water quality standard will not be achieved; and

(b) consider the requirements for permits and general permits that are consistent with the requirements of similar permits issued under Section 404 of the federal Clean Water Act.

This amendment replaces the substitute's exemptions for surface water discharge permits to clarify which exemptions apply to permits for point sources and which exemptions apply for permits for discharges of dredged or fill material:

"U. The only exemptions from surface water discharge permits for point sources are:

(1) return flows composed entirely from irrigated agriculture;

(2) stormwater runoff from a mining operation or an oil and gas exploration, production, processing or treatment operation or transmission facility that is composed entirely of flows that are from conveyances or systems of conveyances, including pipes, conduits, ditches and channels, used for collecting and conveying precipitation runoff and that are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste product located on the site of the operation or facility; provided that oil and gas exploration, production, processing or treatment operations or transmission facilities include activities necessary to prepare a site for drilling and for the

movement and placement of drilling equipment, whether or not the field activities or operations may be considered to be construction activities;

(3) runoff resulting from the following silviculture activities conducted in accordance with standard industry practice: (a) nursery operations; (b) site preparation; (c) reforestation and subsequent cultural treatment; (d) thinning; (e) prescribed burning; (f) pest and fire control; (g) harvesting operations; (h) surface drainage; and (i) road construction and maintenance

(4) discharges and water contaminants that are subject to effective and enforceable surface water quality requirements in a state or federally issued permit, unless there is a hazard to public health or the environment that may result or an applicable state water quality standard will not be achieved.

V. The only exemptions from surface water discharge permits for discharges of dredged or fill material are:

(1) normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products or upland soil and water conservation practices

(2) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways and bridge abutments or approaches and transportation structures

(3) construction or maintenance of farm or stock ponds, acequias or irrigation ditches or the maintenance of drainage ditches

(4) construction of temporary sedimentation basins on a construction site that does not include placement of fill material into the surface waters

(5) construction or maintenance of farm roads, forest roads or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that: (a) flow and circulation patterns and chemical and biological characteristics of the surface waters are not impaired; (b) the reach of the surface waters is not reduced; and (c) any adverse effect on the aquatic environment will be otherwise minimized; and

(6) discharges that are subject to effective and enforceable surface water quality requirements in a state-issued or federally issued permit, unless there is a hazard to public health or the environment that may result or an applicable state water quality standard will not be achieved.

W. The exemptions provided in Subsection V of this section shall not apply if the discharge resulting from the activities contains any toxic pollutant as set forth in rule by the commission or if a new activity brings a surface water of the state into farm production where the area of the surface water has not previously been used for farming.

The amendment provides that references to a surface water permit should be to a surface water *discharge* permit.

It clarifies that, except for a surface water discharge for which a permit is required, the Water Quality Act does not apply to an activity or condition subject to the authority of the Oil Conservation Commission pursuant to the Oil and Gas Act and other laws conferring power on the Oil Conservation Commission to prevent or abate water pollution.

Finally, the amendment provides that no ruling shall be made on any application for a draft permit without opportunity for a public hearing where all interested persons can submit evidence, data, views, or arguments.

SB21 Senate Floor Amendment 4 02/26/2025

Senate Floor Amendment 4 (Sen. Sharer) to Senate Judiciary Substitute for SBs 21 and 22 makes the following changes:

Expands the power of constituent agencies to respond to, investigate and remediate water pollution and contamination in soil and soil vapor; provided that in its investigation, the Department of Environment shall identify responsible parties and shall prepare a written report of the investigation; and provided further that prior to remediation of water pollution and soil contamination in soil and soil vapor, the Department shall:(1) prepare a work plan consistent with rules adopted by the Water Quality Commission; (2) issue public notice of the work plan; and (3) provide opportunities for public comment and participation in accordance with rules adopted by the Commission.

Adds liability defenses of a responsible party:

- an act authorized by and in compliance with a permit issued pursuant to the Water Quality Act
- a party that holds only a security interest in property where there has been water pollution
- a party who is an innocent purchaser or a bona fide prospective purchaser as defined in 42 U.S.C. 9601
- a party who owned or operates property where water pollution has migrated onto the property from a property not owned or operated by that party
- a party acting as a fiduciary in accordance with its fiduciary duty for property where there has been water pollution.

Replaces provisions in the substitute relating to contribution claims for liability with the following language:

“Any person who incurs costs associated with an abatement plan as approved by the department consistent with the rules adopted by the commission may file an action in district court to seek contribution from any other person who is liable or potentially liable with respect to the release of water contaminants pursuant to the Water Quality Act. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution under any other law. The department may bring an action in

district court against any responsible party to recover response or remediation costs. The department may settle the liability of any responsible party for response or remediation costs through an administratively or judicially approved settlement.”