

LFC Requester:

Austin Davidson

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

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

Date Prepared: 3/4/2025

Check all that apply:

Bill Number: SJC/SB 21 & 22

Original ☐

Correction ☐

Amendment ☐

Substitute ☒

Sponsor: Senate Judiciary Committee
Substitute – sponsors not
listed

**Agency Name and
Code Number:** 305 – New Mexico
Department of Justice

**Short
Title:** POLLUTANT DISCHARGE
ELIMINATION SYSTEM
ACT

Person Writing

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis:

Senate judiciary committee substitute for Senate Bills 21 & 22 (hereinafter “the Bill”) merges Senate Bill 21, enacting the Pollutant Discharge Elimination System Act, and Senate Bill 22, making various amendments to the Water Quality Act.

Sections 1 through 4 and 6 through 8 of the Bill contain provisions from SB 22, with some revisions as described below. Sections 5 and 9 of the Bill contain new material not in either previous bill. Sections 10 through 20 of the Bill contain provisions from SB 21, with revisions as described below.

As a general matter, the bill language does not replicate all of the substantive requirements for program delegation as provided in the Clean Water Act at 33 USC 1342, but does provide key definitions and categorical authorities, and requires the WQCC to adopt rules to implement and enforce the program as necessary and appropriate to obtain and sustain authorization from EPA.

Section 1 of the Bill amends the Definitions under 74-6-2 NMSA to add new definitions and alphabetize all definitions. The major substantive difference from the definitions provided in SB 22 is the definition of Responsible Party. SB 22 defined this term by reference to section 107(a) of the federal CERCLA statute. The Bill’s definition of Responsible Party eliminates the reference to CERCLA and instead contains textual provisions modeled after the CERCLA definition by including owners and operators of facilities, arrangers of disposal or treatment, and transporters of water contaminants. The other definitions are unchanged from SB 22, except for the addition of “vessel or watercraft” to the definition of “facility,” and the addition of the articles “a” or “an” before the various types of enumerated facilities.

The most recent substitution adds additional definitions, including, among others, “abatement costs”, “aquatic resources”, “point source”, and “dredged” and “fill” materials.

Section 2 of the Bill amends the Duties and Powers of the WQCC under 74-6-4. The amendments are largely unchanged from those in SB 22 with the following exceptions: (1) A new subsection break is inserted to divide current Subsection E into Subsections E and F, with the new subsection F consisting of the facts and circumstances the commission shall consider in making rules. In this section, the language in SB 22 referencing CERCLA regulations related to responsible parties and defenses has been deleted, consistent with the fact that the terms are now

defined in the Bill.

In the new substitution, Subsection R, formerly Q, has been modified to include separate rulemaking schemes for discharges from point sources versus discharge of dredged or fill material. In the subsection requiring rules for point source discharges, language requiring the WQCC to give weight to factors in Subsection F has been re-added. The addition includes additional considerations, such as whether existing permits are adequate to protect water quality, and whether requirements for new permits are consistent with the requirements of the CWA. The subsection also includes standards for discharge of dredged or fill material, including that no permit will be required where a CWA permit is already in place, new permits shall be consistent with the CWA, and all new permits shall protect water resources to the maximum extent possible.

WQCC promulgation of rules for state response and investigation have been made discretionary by replacing “shall” adopt with “may” adopt. (4) In subsection (T), the word “domestic” is inserted before “wastewater for potable reuse.

Section 3 of the Bill amends the requirements for Permits at 74-6-5 NMSA. Substantive changes from SB 22 include: (1) provisions regarding public notice have been separated out into separate sections for groundwater discharge permits and surface water permits. The new substitution adds the word “discharge” between “surface water” and “permits” throughout this section. It also alters the structure of activities exempt from permits, recategorizing section U as providing exemption for point source and section V as providing exemptions for surface water discharges for fill and dredged material. A new section, section W, clarifies that the exemptions in section V do not apply if the materials contain any toxic pollutants or if the new activity would use surface water for agriculture where it had not previously been used for agriculture.

Section 4 of the Bill amends the Water Quality Management Fund at 74-6-5.2 NMSA. The amendments are unchanged from SB 22.

Section 5 of the Bill contains an amendment to the Powers of Constituent Agencies at 74-6-9 NMSA to add the power to “respond to, investigate and remediate water pollution and contamination in soil and soil vapor.” The new substitution provides that the department shall identify a responsible party and prepare a written report of the investigation. It shall also prepare a work plan and issue public notice before engaging in any remediation work.

Section 6 of the Bill amends the Penalties and Enforcement provisions at 74-6-10 NMSA. The new substitution, K., provides that all penalties collected pursuant to this section shall be deposited into the general fund.

Section 7 of the Bill amends the Limitations at 74-6-12 NMSA. These amendments are the same as in SB 22.

Section 8 of the Bill enacts a new section of the Water Quality Act establishing a Neglected and Contaminated Sites Fund. These amendments are largely the same as in SB 22, except that subsections regarding Appropriation, Severability, and Emergency have been omitted. (However, Section 21 adds back in the Emergency provision). The substitution strikes “penalties” from the list of funding sources for the fund.

Section 9 of the Bill enacts a new section of the Water Quality Act entitled Liability – Scope – Defenses. This section is new and was not included in SB 22. The provisions in this section are

modeled after the liability and defense provisions in Section 107 of CERCLA, 42 U.S.C. 9607. The substitution allows any person who incurs costs associated with an abatement plan to seek contribution from other potentially liable parties, similar to the potential responsible party structure of CERCLA. NMED is likewise empowered to bring suit against a responsible party to recover response or remediation costs, and may enter into an administrative or judicial settlement.

Section 10 of the Bill enacts the New Mexico Pollutant Discharge Elimination System Act. (NMPDES). This is the same as provided in SB 21, except that “New Mexico” has been added to the beginning of the title.

Section 11 of the Bill provides definitions. These are largely as in SB 21, except that the definition of “business information” is deleted and a definition for “confidential business information” is added. In addition, definitions of “knowingly,” “negligently,” and “willfully” have been deleted. Another substantive change is that drilling fluids, produced water and other energy industry wastes have been deleted from the definition of pollutant. Also, in the exemption from the definition of pollutant for oil and gas water disposed of in a well, language has been added to provide that well use must be approved by the applicable state authority, and that the state must determine that the disposal will not result in degradation of ground or water resources.

Section 12 of the Bill establishes when a NMPDES Permit is required. It provides in subsection E exemptions not contained in this section of SB 21, but which were listed in the Limitations section of SB 21 (at section 11 of that bill). The substitution adds subsection F, which provides that no ruling shall be made without opportunity for a public hearing.

Section 13 of the Bill provides for Commission duties under the NMPDES act.

Section 14 of the Bill Provides for NMED Duties and Powers.

Section 15 of the Bill enacts a section on Administrative and Civil Enforcement. This section is substantially similar to SB 21, except that: (1) a limit of \$20,000 per day per violation has been added, and (2) “the attorney general” has been added to the subsection governing the determination of penalty amounts. The substitution provides that this penalty shall be deposited in the general fund.

Section 16 of the Bill enacts a section on Criminal Enforcement. It is substantially similar to SB 21, except that (1) the mens rea for a fourth-degree felony has been changed from “willfully or negligently” to “knowingly,” (2) a new section creating a third-degree felony for a knowing violation that causes substantial environmental impact is added (in addition to the similar provision for a violation creating a substantial danger of death or serious bodily injury), (3) a new subsection F is provided adding a \$10,000 penalty per day of violation of applicable standards, limitations, or permit conditions, or violation of a filing requirement, (4) a new subsection G provides for a \$5000 per day penalty for violations for false statements or falsification of monitoring data, and (5) a new subsection I provides that the Attorney General has authority to enforce the section on criminal penalties.

Section 17 of the Bill provides a new section on Appeals to the Commission.

Section 18 of the Bill provides for a new section Judicial Review.

Section 19 of the Bill provides for a new section on Limitations.

Section 20 of the Bill adds a new section on Availability of Records.

Section 21, Emergency, provides that the act will take effect immediately.

FISCAL IMPLICATIONS

N/A.

SIGNIFICANT ISSUES

The new section on Liability and Defenses (Section 9 of the Bill) adapts provisions of CERCLA to the surface water permitting context. While this provides much greater clarity than the cross reference to CERCLA in original SB 22, some ambiguities remain. Specifically:

- The first sentence of subsection A is passive – it states that “liability exists,” but does not specify who is liable. Although it may be inferred from the second sentence that liability applies to “responsible parties,” it might be desirable to include “responsible parties” in the first sentence as well.
- The elements of liability at subsection B uses the terms “removal,” “remedial action” and “response” which are defined terms in CERCLA (see 42 U.S.C. 9601 (23), (24), (25)) but are not defined in the definition section of the Bill.
- With respect to liability for natural resource damages at Section 9B(3), it is not clear to whom liability exists – i.e. to whom damages are due. In contrast, CERCLA provides liability for natural resource damages in 42 U.S.C. 9607(a), and then separately delineates to whom liability is owed in section 42 U.S.C. 9607(f). In this case, liability is presumably to the State of New Mexico, but it may be desirable clarify to whom damages must be paid – to NMED, or to the Office of Natural Resources Trustee, who is authorized to recover similar damages under CERCLA.
- The definitions of willfully and negligently have been deleted, but the terms are still used in Section 16(F).

PERFORMANCE IMPLICATIONS

N/A.

ADMINISTRATIVE IMPLICATIONS

Pursuant to 33 USC 1342(b), a statement from the Attorney General, or from an attorney for NMED, that the laws of the state provide adequate authority to implement the NPDES program will be required at the time the Governor requests EPA approval of the program.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to SB 21 and SB 22, which this bill replaces.

TECHNICAL ISSUES

The word “including” on page 21, line 21, is somewhat disjointed. Recommend deleting “including” and the preceding comma, to place the new colon after “discharges.”

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

N/A.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

N/A.