



New Mexico Environment Department

Surface Water Quality Discharge Permitting Program

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Cuyahoga River & the Clean Water Act



CUYAHOGA RIVER

Ca. 1960s

present day

Cuyahoga River water quality improvements in recent years reflect the effects of requirements of the CWA 1972 amendments.

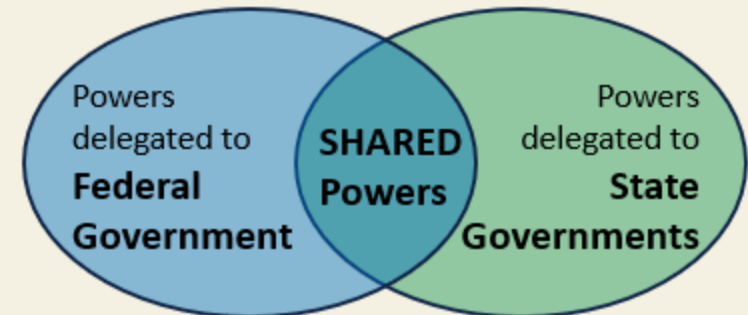


Federal Clean Water Act

- ❑ Prevent, reduce, and eliminate pollution to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
- ❑ Improve water quality such that the Nation’s waters are “fishable” and “swimmable.”
- ❑ Eliminate the discharge of pollutants into WOTUS (by 1985).
- ❑ Water quality has improved under the authority of the CWA, which has had direct benefits for drinking water, public health, recreation, wildlife, & local economies.

Federalism in the Clean Water Act

1. States determine water quality standards (WQS) and plans to meet those standards.
2. EPA approves state WQS.
3. States decide how to implement the WQS.
4. If courts determine states cannot meet standards, the EPA can use judicial measures to punish violators and make sure





Federal Clean Water Act



- Under the **Clean Water Act (CWA)**, 33 U.S.C. § 1251 *et seq.*, it is illegal to discharge a pollutant through a point source into a “*water of the United States*,” or WOTUS, without a permit.
- “Waters of the US” refers to surface waters that are protected under the federal Clean Water Act.

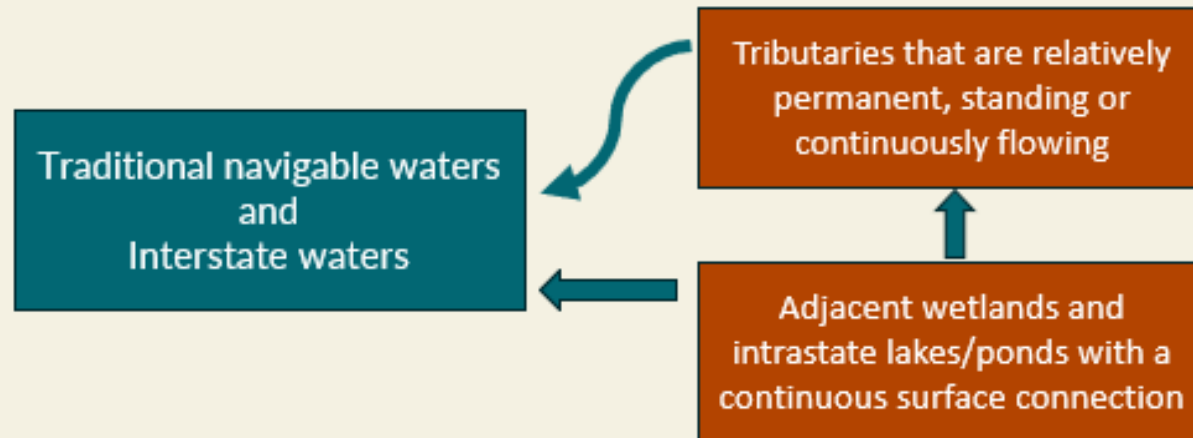


What is a WOTUS

- **Scope of federal jurisdiction** under the Clean Water Act is limited to “waters of the U.S.”
- **Trilogy of U.S. Supreme Court Cases** concerning meaning of “waters of the US”
 - *U.S. v. Riverside Bayview Homes* (1985) – “The transition from water to solid ground is not necessarily or even typically an abrupt one.” 474 U.S. 121, 132. “...the Corps must necessarily choose some point at which water ends and land begins.”
 - *SWANCC v. Corps* (2001) – “Non-navigable, isolated, intrastate waters... are not included as waters of the U.S.” and
 - *Rapanos v. U.S.* (2006) – attempted to provide clearer jurisdictional boundaries but unable to reach a majority opinion
 - “relatively permanent” in the plurality opinion (Scalia) and
 - “significant nexus” in Kennedy concurrence

U.S. Supreme Court – *Sackett v. EPA*

- On May 25, 2023, the U.S. Supreme Court in *Sackett v. EPA* held that the CWA applies to "relatively permanent bodies of water" that "have a continuous surface connection" with a traditional navigable water or interstate water.
- What's still included in WOTUS? The revised rule:



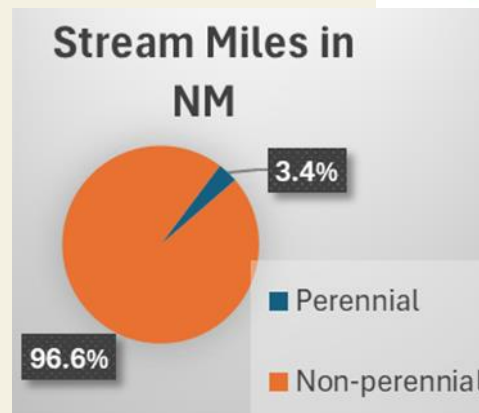
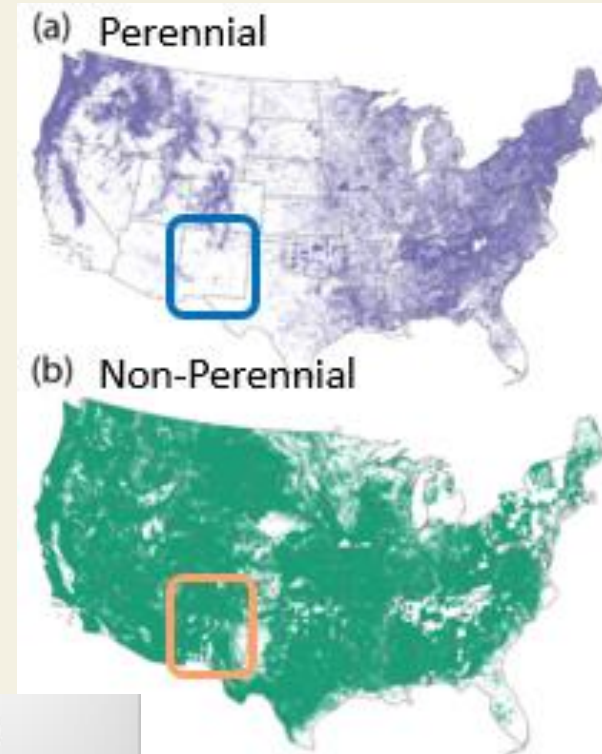
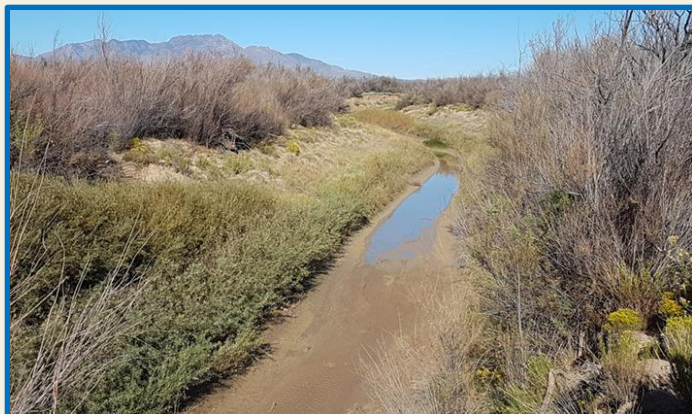


Impact of *Sackett* on New Mexico

Many of NM's waters are likely no longer subject to federal CWA permit requirements.

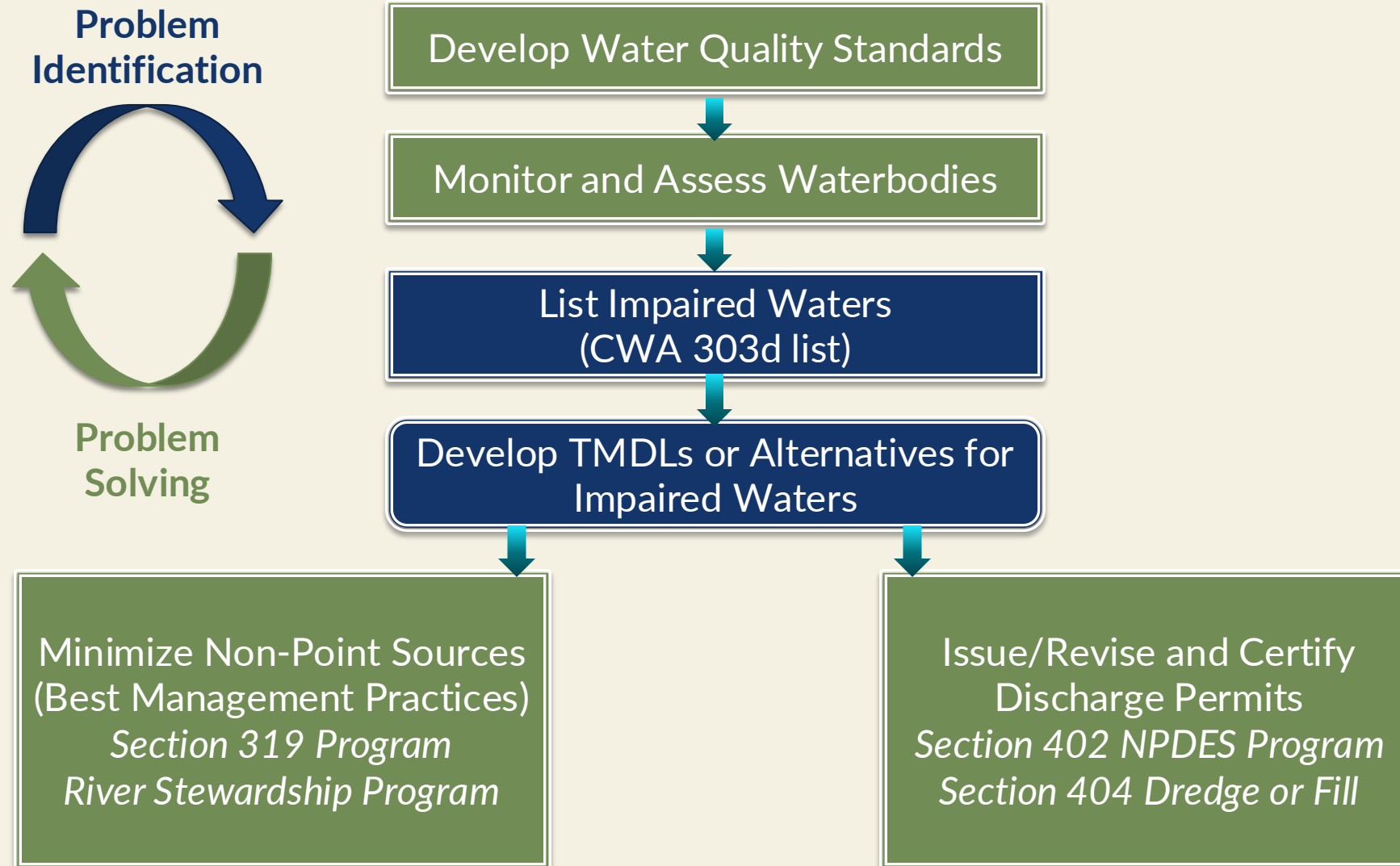
Likely OUT

- ✗ Ephemeral waters
- ✗ Wetlands without continuous surface connection (dike, road)
- ✗ Isolated wetlands (playas, springs, fens)
- ✗ Isolated ponds/lakes
- ✗ Interrupted stream reaches?
- ✗ Intermittent waters?





Surface Water Quality Framework





New Mexico Water Quality Act



- ❑ Provides authority for water quality management in NM.
- ❑ Establishes the Water Quality Control Commission as the “state water pollution control agency” for all purposes of the CWA.
- ❑ Adopt water quality standards that protect public health and welfare, enhance the quality of water, and serve the purpose of the Act.
- ❑ Prevent, reduce, and abate water pollution.
- ❑ May adopt regulations for surface water discharges.



Where are we now?

- No authority (“primacy”) to issue federal CWA permits.
- The Section 402 NPDES permit program is administered by USEPA.
- The Section 404 Dredge or Fill Permit Program is administered by the U.S. Army Corps of Engineers.
- New Mexico does issue Section 401 Certifications of NPDES Permits.
 - Section 74-6-4(F) of the NM WQA states that NMED “...shall provide technical services, including certification of permits pursuant to the federal [CWA]....”
 - Section 74-6-5(B) of the NM WQA states that the Water Quality Control Commission (WQCC) “...shall adopt regulations establishing procedures for certifying federal water quality permits.”
 - 20.6.2 NMAC articulates the procedures for certification of NPDES and Dredge or Fill permits, as well as other federal permits.



Where are we now?

Concerns related to surface water quality in NM:

- Chemical: arsenic, aluminum, mercury, nutrients (nitrogen and phosphorus), uranium, organic compounds, etc.
- Biological: *E. coli* and other bacteria, diatoms and algae, harmful algal blooms (HABs), didymo (rock snot), etc.
- Physical: temperature, sediments, geomorphology, climate change, wildfires, floods, droughts, etc.
- Emerging Contaminants: PFAS (forever chemicals), personal care products, pharmaceuticals, microplastics, etc.
- Stormwater Runoff: motor oil, gasoline, plastic bags, fertilizers, fire retardant, sediments, detergents, pesticides, animal wastes, etc.

These concerns pose significant threats to aquatic ecosystems, public health, wildlife habitat, recreation, agriculture, and cultural resources.

Key Actions to take to improve surface water quality: fixing or replacing aging infrastructure, building (green/nature-based) stormwater infrastructure, and [implementing a state permitting program](#).



Scope of Proposed Permitting Program

"The commission ... may adopt regulations to be administered by the department of environment for surface water discharges."

NM Water Quality Act, Section 74-6-4(Q)

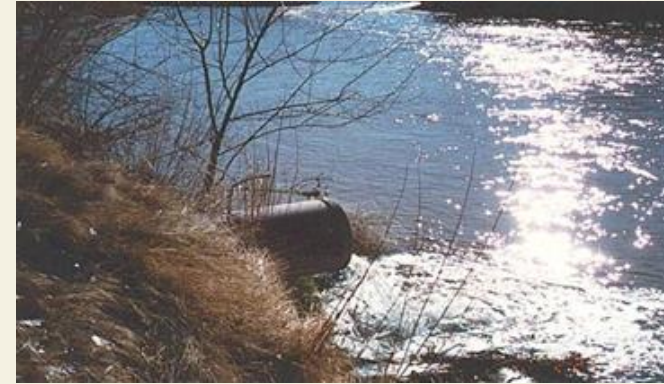
"Commission" refers to the Water Quality Control Commission (WQCC)

- Waters of the U.S. (Clean Water Act)
 - ▣ Seek delegation from EPA for the NPDES program for point source discharges
 - ▣ Do not seek authorization for the Section 404 discharge program: U.S. Army Corps of Engineers will continue to regulate discharges of dredged and fill materials to waters of the U.S.
- Surface waters of the state (Water Quality Act)
 - ▣ Create a State program to fill the gaps left by *Sackett* that covers both point source discharges and discharges of dredged and fill materials in surface waters of the state
 - ▣ The program will not apply to tribal waters, but NMED will be responsive to tribal concerns



Regulate Point Source Discharges

- Any single identifiable source of pollution from which pollutants are discharged, such as a pipe, ditch, ship or factory smokestack.
- Examples include sewage treatment plants, industrial facilities, stormwater drainage systems, livestock operations, and other dischargers.
- Under Section 402 of the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) permit program helps address water pollution by regulating point sources that discharge pollutants to waters of the United States.





Regulate Dredge or Fill Discharges

- ❑ 40 CFR 232.2 defines **Dredge Material** as “material that is excavated or dredged from waters of the US”
- ❑ **Fill Material** is defined as “material placed in waters of the United States 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.
 - ▣ Examples include: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining, etc.
 - ▣ Does not include trash or garbage.
- ❑ Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged and fill materials into waters of the United States, including wetlands.
- ❑ NMED is creating a surface water discharge permitting program that includes discharges of dredged or fill materials to SWOTS.





Steps to Program Approval

NPDES Primacy

- Engage stakeholders.
- Draft statute & rule.
- Enact statute.
- Conduct rulemaking hearing.
- Prepare and submit program application to EPA .
- Effective upon EPA approval.
- *Phased implementation.*

State “Gap” Program

- Engage stakeholders.
- Draft rule.
- Conduct rulemaking hearing.
- Effective upon rule adoption.
- *Phased implementation.*



Surface Water Advisory Panel



The discharge of pollutants into a surface water is not a right.

- Provide technical information, practical considerations, and policy perspectives from a wide range of stakeholders
- Inform NMED's development of legislation and rules for consideration by the Water Quality Control Commission
- NMED will post additional information and updates here:

<https://www.env.nm.gov/surface-water-quality/swap/>



Legislation Needed

NMPDES Delegation Act:

- Authorize a permit program (“NMPDES”) that complies with the Clean Water Act, 33 U.S.C. § 1251 et seq.

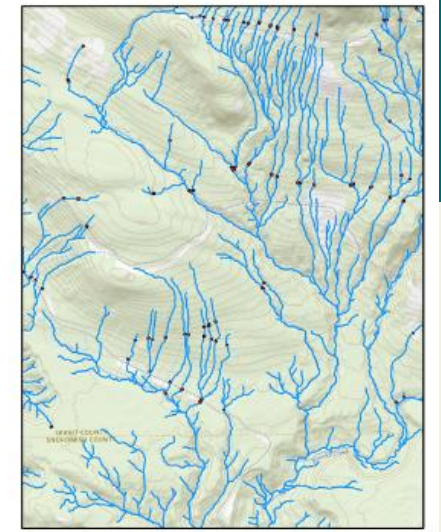
NM Water Quality Act amendments:

- Authorize the use of general permits
 - stormwater, dredge and fill, pesticide, wildfire, etc.
- Update/Modernize public notification requirements
- Allow the requirement to mitigate for unavoidable adverse impacts to water quality/water resources
- Incorporate antidegradation provision to protect high-quality waters
- Amend oversight responsibility for discharges to surface water currently under Oil Conservation Commission jurisdiction

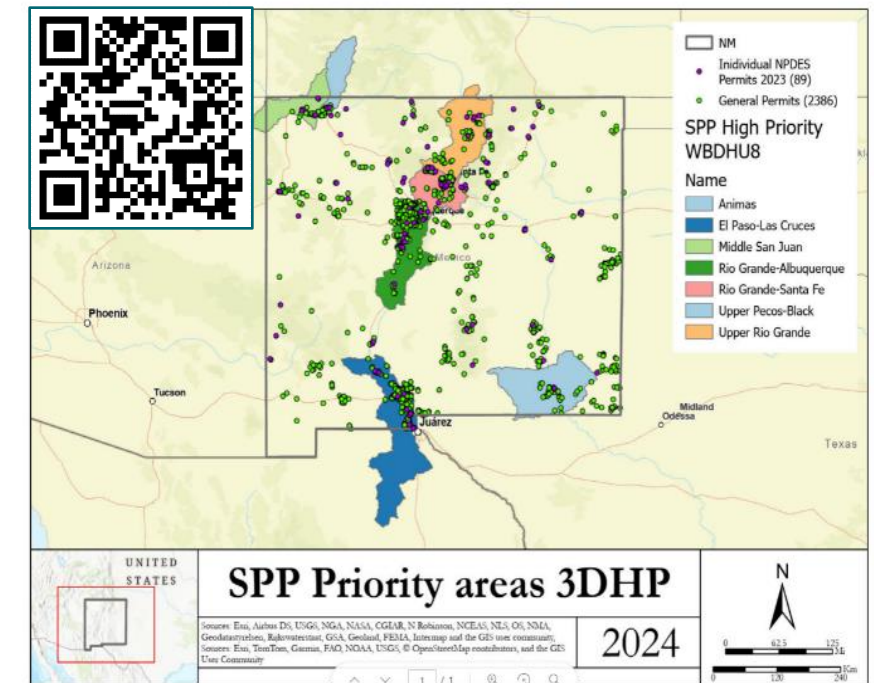


Mapping

- ❑ Assist with jurisdiction questions.
- ❑ Help determine a discharge's impact on a surface water.
- ❑ Assist the regulated community in determining if they need a permit or not.
- ❑ The U.S. Geological Survey is replacing previous hydrography datasets with the "3D Hydrography Program" (3DHP).
- ❑ Improved hydrography data will benefit management and protection of flows, water quality, water resource planning, flood risk, restoration, conservation, wildlife and habitat, infrastructure, etc.
- ❑ 3DHP will improve the ability to track information related to water (like streamflow permanence).
- ❑ 3DHP will support hydrologic modeling.



To learn more about the 3D Hydrography Program, visit: <https://www.usgs.gov/3DHP>





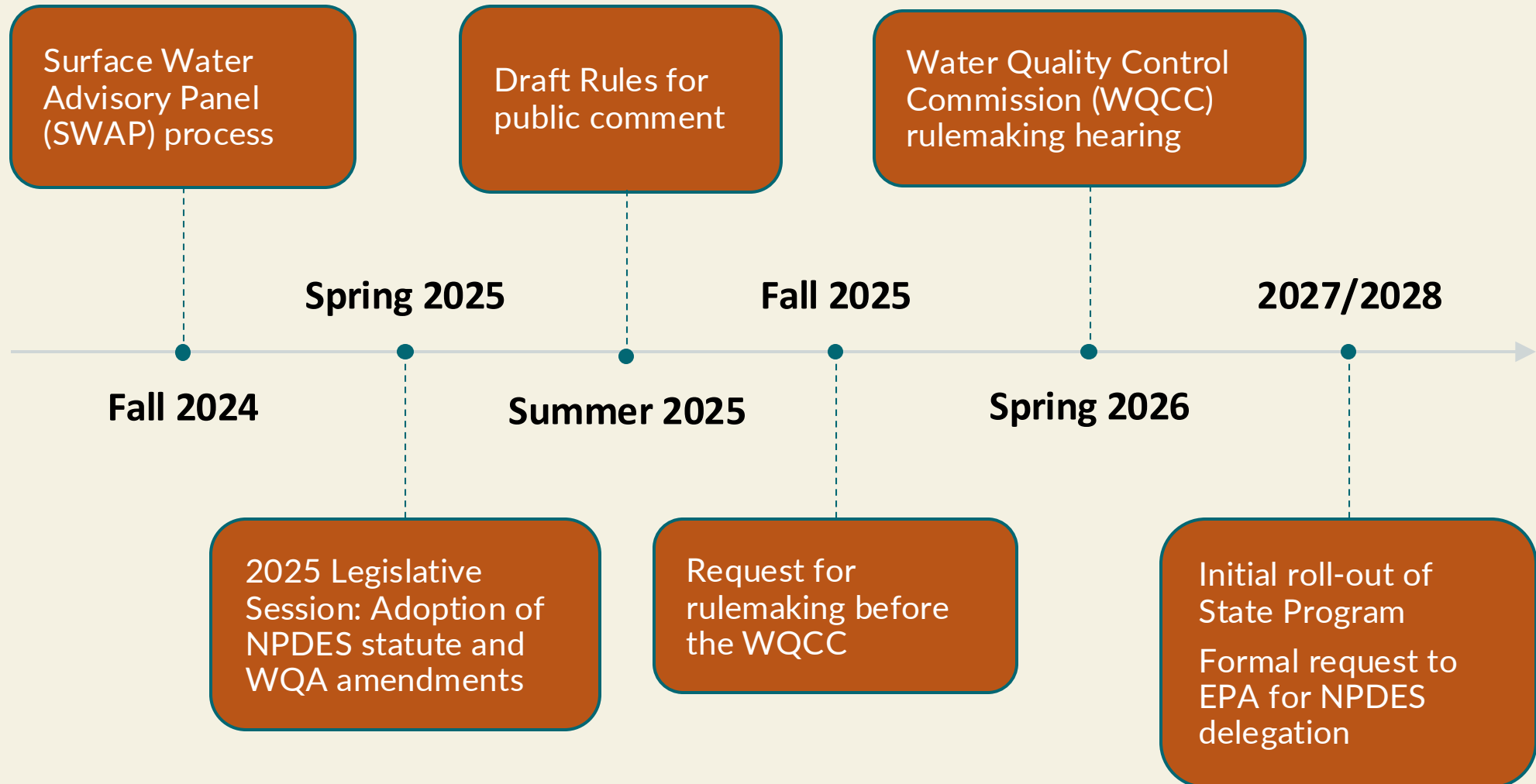
Estimated Program Costs & Revenue Options



- ❑ 40-60 additional FTE for permitting, compliance, enforcement, data management, & support staff (attorneys, financial, HR, admin) – *10-12 existing FTE*
- ❑ \$7M-\$8M additional per year = Projected program costs for implementation by FY28
- ❑ *Current costs approx. \$900,000*
- ❑ Funding/Revenue options:
 - 100% fee-based
 - 100% legislative appropriations (general fund)
 - Combination of fees and general fund
 - Investment fund



Timeline



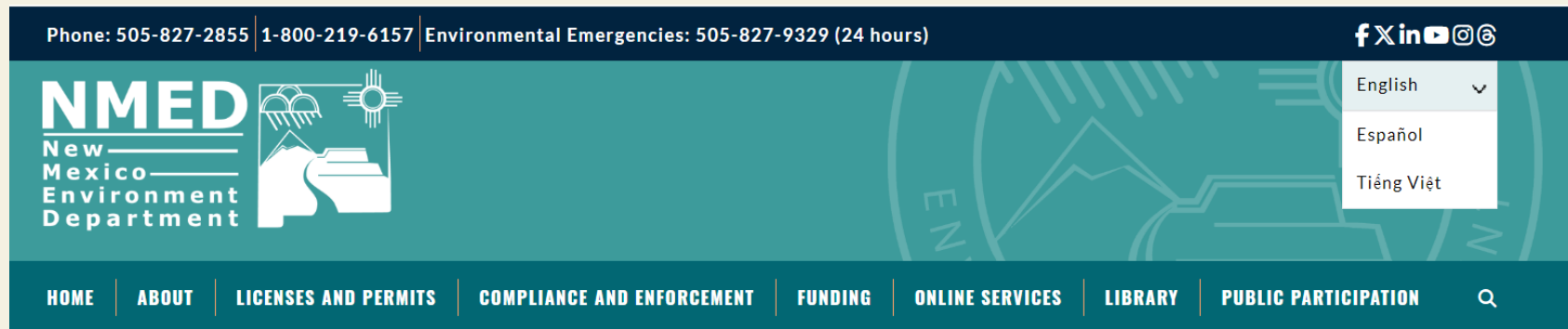


Contact Us / Learn More

Email: swq.pp@env.nm.gov

SWQB website: www.env.nm.gov/surface-water-quality/spp

SWAP website: <https://www.env.nm.gov/surface-water-quality/swap/>



Home / Surface Water Quality Bureau



Surface Water Quality State Permitting Program



Contact us

Ph: 505-827-0187 Find a list of Surface Water Quality staff contacts [here](#).



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WOTUS vs. SWOTS

Waters of the U.S. (WOTUS)

- (1) Traditional navigable waters (TNWs), territorial seas, and interstate waters.
- (2) Impoundments of these waters.
- (3) Tributaries of these waters that are **relatively permanent**, standing, or **continuously flowing** bodies of water.
- (4) Adjacent wetlands that are **relatively permanent**, standing, or **continuously flowing** and have a **continuous surface connection** to waters in #1-3.
- (5) Additional intrastate lakes and ponds that are **relatively permanent** with a **continuous surface connection** to waters in #1-3.

Surface Waters of the State (SWOTS)

NM's definition of "Surface Waters of the State" is more inclusive than WOTUS.

- ▣ lakes, rivers, streams (**incl. intermittent and ephemeral streams**), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, reservoirs, and natural ponds.
- ▣ **all tributaries of such waters, including adjacent wetlands**, manmade bodies of water that were originally created in a SWOTS, and any WOTUS not included in the preceding description.
- ▣ NOT private waters
- ▣ NOT waste treatment systems
- ▣ 20.6.4.7(S)(5) NMAC