

FEDERAL CLEAN WATER ACT AND THE *SACKETT* DECISION



NEW MEXICO
WATER EDUCATION

The stated objective of the 1972 Federal Clean Water Act (CWA; 33 U.S.C. §§ 1251–1387) is to “restore and maintain the chemical, physical and biological integrity” of the waters of the United States.

Water Quality Standards

The CWA requires states to develop water quality standards for individual segments of surface waters. These standards consist of three parts: designated uses, criteria to protect those uses, and an antidegradation policy. For each surface water segment, states define one or more designated uses, including aquatic life, recreation, drinking water, agriculture, or other uses. The standards then establish water quality criteria, which set a limit on the levels of various pollutants that may be present without impairing the designated use. The criteria vary depending on the use—water quality needed for agriculture is not the same as for drinking water. The New Mexico Water Quality Control Commission has adopted water quality standards (20.6.4 New Mexico Administrative Code [NMAC]) for New Mexico surface waters.

Surface water segments that do not meet the water quality criteria for the designated uses are listed as “impaired waters.” For each impaired water segment, states must establish “total maximum daily loads” (TMDLs) for those pollutants causing the water to be impaired, allowing for a margin of safety. Impaired waters that do not meet the standards have been identified by the New Mexico Environment Department (NMED), and TMDLs have been established for many New Mexico streams and rivers. The TMDLs set water quality goals for a stream or lake that will allow the water to be used for drinking, agriculture, or another designated use.

Permits

The National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 requires any entity that discharges a pollutant into waters of the United States from a point source to obtain an NPDES permit from the Environmental Protection Agency (EPA) or a delegated state. A point source is defined as “any discernible, confined, and discrete conveyance,” such as a pipe, ditch, or conduit. NPDES permits include effluent limitations. While states can be approved to implement the federal NPDES program, New Mexico currently does not have this authority, and discharge permits are issued by the EPA.

The CWA also establishes a permitting program under Section 404 to regulate discharges of “dredged or fill material” into water bodies and adjacent wetlands (33 U.S.C. § 1344). The program is administered primarily by the U.S. Army Corps of Engineers (Corps) and applies to projects such as housing or commercial construction, dams, roads, or other infrastructure.



Nonpoint Sources

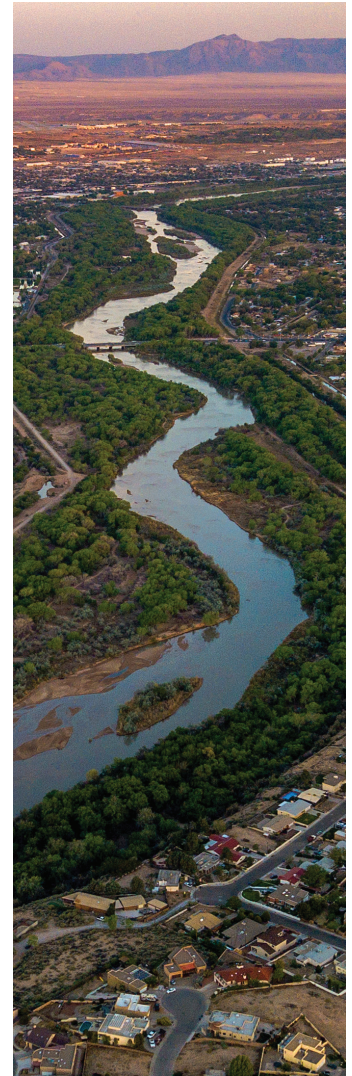
The CWA also addresses nonpoint sources of pollutants, which are pollutants that come from diffuse sources, such as runoff from agricultural land or urban areas, rather than discrete point sources like pipes. Nonpoint sources are primarily addressed through voluntary management measures. The EPA provides training resources and funding for implementing nonpoint source management measures in some circumstances.

Waters of the United States

The CWA applies to all “waters of the United States” (WOTUS)—which is not defined in the CWA. But in 1979, EPA promulgated regulations defining the term. The early definition, interpreted and implemented by both EPA and the Corps, remained settled for many years. Beginning in 2001, there were several challenges to the U.S. Supreme Court by parties that did not think they should be under the jurisdiction of the CWA, and the Court ruled on the validity of the definition as interpreted by EPA and the Corps. In its 2006 decision in *Rapanos v. United States* (547 U.S. 715 [2006]; consolidated with *Carabell v. U.S. Army Corps of Engineers*), the Court held that CWA jurisdiction extends to waters having a “significant nexus” to a navigable water. In 2008, EPA and the Corps issued guidance that considered *Rapanos* to determine federal CWA jurisdiction.

Sackett Decision

In 2023, the U.S. Supreme Court made a ruling that further changed the definition of WOTUS. The *Sackett* ruling significantly restricted protections for wetlands and for ephemeral and intermittent streams (streams that flow only in response to storms or only part of the year, or dry out in some reaches). In September 2023, the Corps and EPA released a revised definition of WOTUS to conform to the ruling. The new definition includes only “relatively permanent” bodies of water that have a “continuous surface connection” to a traditional navigable water. Though the *Sackett* case was focused on wetlands and under what circumstances they are protected under the CWA, the change in the definition of WOTUS also affects streams, rivers, and other waters. Under the new decision, many streams that do not flow all the time may no longer be protected.



Rio Grande through southern Albuquerque

Protecting New Mexico Waters

In New Mexico, 88% of streams are ephemeral and 8% are intermittent, leaving 96% of our waterways at risk of losing federal protections—even though they connect with our perennial waterways, and discharges may be washed into perennial water bodies during intermittent or stormwater flows. These water bodies may no longer be subject to federal NPDES or Dredge and Fill Permits.

Regardless of the federal definition, states have the authority to define surface waters more broadly and to provide greater protection within the state’s boundaries. The NMAC already includes WOTUS in its definition of surface water(s) of the state along with all other surface waters, including but not limited to lakes, rivers, streams (including intermittent and ephemeral streams), wetlands, playa lakes, reservoirs, natural ponds, and all tributaries of these waters, including adjacent wetlands.

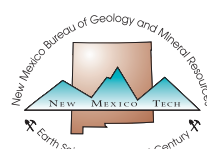
Though the current New Mexico definition of surface waters clearly intends for broad protection of intermittent and ephemeral streams, wetlands, and other waters, the federal permitting that is used to enforce CWA protections has been scaled back due to the *Sackett* decision.

Beyond creating its own state permitting program for non-WOTUS waters, New Mexico can address water quality protections through local land use regulation, monitoring and assessment, funding of voluntary conservation and restoration programs, implementing its nonpoint source management program, or by other means.

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Learn more at
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