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BEFORE THE NEW MEXICO WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:
Proposed Amendments to 20.6.2 NMAC and Proposed New Rule 20.6.5 NMAC
WQCC No. 25-74 (R)

FORMAL PUBLIC COMMENT / TESTIMONY

Submitted by: Pattern Energy
Date: May 8, 2026

I. INTRODUCTION

Pattern Energy Group LP (Pattern Energy) respectfully submits these comments on the New Mexico Environment Department's (NMED) proposed amendments to 20.6.2 NMAC and adoption of new Rule 20.6.5 NMAC, which together establish a state surface water quality permitting program (the "Proposed Rule"). We recognize and appreciate the State's efforts to respond to recent federal changes in the jurisdiction of the Clean Water Act (CWA) and to ensure continued protection of New Mexico's important water resources. As noted in the rulemaking record, the proposal is intended to address regulatory gaps created by the narrowing of federal jurisdiction over certain waters, including ephemeral streams, and to implement Senate Bill 21. At the same time, we are concerned that the Proposed Rule, as currently structured, will have unintended consequences for the timely development of renewable energy infrastructure in New Mexico and the effective administration of the contemplated state surface water permitting regime. Therefore, we are providing public comment that reflects the protection of aquatic resources while balancing the goals set forth in NMSA 62 Article 16.

Pattern Energy is invested in the success of NMED's Proposed Rule. While Pattern Energy commends NMED for undertaking this rulemaking to ensure protection of surface water resources in New Mexico that may not be protected by federal surface water permitting regimes, Pattern Energy does believe that the regulatory structure of the U.S. Army Corps of Engineers (USACE) has effectively balanced and make workable the requirements for programmatic permit and individual permit programs. Pattern Energy is concerned that, in the process of protecting these resources, NMED may be crafting a regulatory program that is difficult to effectively implement both on the side of the permittee and the regulator.

II. INTEREST OF COMMENTER

Pattern Energy is actively involved in the development and operation of utility-scale solar, wind, transmission, and energy storage infrastructure across the southwestern United States, and particularly in New Mexico. Our energy generation and transmission facilities deliver reliable, affordable power. Pattern Energy is already responsible for New Mexico's largest renewable power investment and we are expanding. We have invested over $30 billion in New Mexico over the last 10 years.

III. GENERAL SUPPORT FOR WATER QUALITY PROTECTION

We support the State's objectives of:

- Protecting surface and groundwater quality
- Providing regulatory certainty following federal jurisdictional changes
- Establishing a consistent, state-administered permitting framework

We agree that New Mexico's water resources—including ephemeral and intermittent streams and isolated wetlands—play important ecological and hydrological roles and warrant appropriate protections. We support reasonable, efficient, and transparent mitigation of material permanent impacts to surface waters. However, the regulatory approach must remain:

- Science-based,
- Proportional to actual environmental risk,
- Predictable and implementable, and
- Easy to implement in practice for regulated parties and the NMED.

IV. KEY CONCERNS WITH THE PROPOSED RULE

1. No "self-certification" Process

The USACE's Nationwide Permit program has been effective in the past because it provides for streamlined permitting for projects obtaining coverage under the program and below certain thresholds (e.g., below 0.10 acres) through self-certification. For projects exceeding 0.10 acres in permanent impacts and triggering a number of regional and general conditions (e.g., potential impact to species protected by the Endangered Species Act), a preconstruction notification (PCN) is required but coverage under the Nationwide Permit Program. Self-certification allows easy coverage for activities able to implement significant avoidance measures with minimal administrative burden for permittee and regulator. Projects able to obtain coverage under a Nationwide Permit but requiring a PCN require substantial documentation with the USACE but without the significantly more involved permitting process of individual permit coverage.

The Proposed Rule is lacking a self-certification process. It defines thresholds for General Permits vs Individual Permits for the discharge of dredge or fill into surface waters, but both definitions require some level of review from staff. If a General Permit is truly a General Permit, it should be programmatic in nature so long as the project can prove it meets permit conditions including appropriate avoidance and minimization measures. Requiring some level of approval for each permit creates both a burden on staff and a potential timing constraint for projects that would otherwise have a de minimis impact on surface waters. There should also be a clear, concise process for maintenance activities once the construction permit is closed out without having to reapply. Likewise, there should be clear criteria for what triggers reporting and monitoring requirements.

Furthermore, each Individual and General Permit requires: the installation, use, and maintenance of monitoring devices to track and verify water quality, assess treatment or best management practice effectiveness, or track the success of minimization and mitigation efforts; continuation of monitoring *after cessation of operations* to confirm there are no residual adverse impacts to water quality or aquatic resources from the discharge or project; a system of monitoring and reporting of results and information to verify that the discharge is achieving the expected results and confirm permit compliance. The requirements for a General Permit and an Individual Permit should be meaningfully different, as should the requirements for impacts to an ephemeral resource and a perennial resource. Similar to the above, this would assume enough staff availability to review and approve monitoring reports for every single project, which would cause administrative delays or require additional staff. It would also be difficult to assume quality monitoring on a stream that only flows after a rain event.

A stringent but practicable self-certification program incentivizes stringent impact minimization. We anticipate that a General Permit program that does not provide for self-certification for projects able to minimize impacts under clearly stated criteria, will have the practical effect of increasing the amount of regulated permanent fill within the bounds of a General Permit.

2. Lack of Clarification between Temporary and Permanent Disturbances

The proposed rule doesn't define temporary vs permanent impacts. Temporary impacts should be defined similarly to how they are laid out for Waters of the U.S. in the USACE Nationwide Permits where fill removed by a certain time period is not considered a permanent impact and does not count towards the threshold acreage. It would also be helpful to define single and complete crossings where a project may traverse multiple waters at separate and distinct locations.

Without such differentiation:

- Minor and temporary disturbances may be regulated the same as continuous pollutant discharges.
- Projects with negligible discharge potential may still require extensive permitting, monitoring, and reporting.

A one-size-fits-all approach is inefficient and inconsistent with modern regulatory best practices. We anticipate that a General Permit program that does not distinguish between temporary fill and permanent fill, particularly in intermittent and ephemeral surface waters, will have the practical effect of increasing the amount of regulated permanent fill.

3. Potential for Duplicative and Overlapping Regulation

There is much overlap between the definition of waters of the state and Waters of the U.S. As the rule is written now, it is not abundantly clear when jurisdiction is implemented under Section 404 of the CWA or under CWA Section 401/402 by the state. There is much construed as to how varying federal processes will be interpreted or intertwined into this process, especially where clear definitions of stream classifications are lacking. The Proposed Rule needs clear demarcations of jurisdiction between federal and state agencies and established permitting processes so that there are not duplicative permitting layers, inconsistencies amongst agency interpretations, or even increased administrative burden which can lead to project delays.

In addition, the Proposed Rule appears to extend comprehensive permitting requirements to ephemeral and low-flow features, which constitute the vast majority of drainages in New Mexico. Pattern Energy supports protecting these resources and has done so across its projects in New Mexico but strongly believes that they cannot be treated the same as intermittent or perennial surface water resources.

Given that:

- Ephemeral streams in the Southwest flow only in response to precipitation events, often infrequently,
- Are extensive across arid environments, to the degree that total avoidance may not be possible, and
- Many lack sustained aquatic habitat or connectivity.

Applying uniform regulatory standards to these features as if they were perennial waters would be difficult, burdensome, and could cause delays in otherwise standardized processes. For example, water quality monitoring obligations for an impact to an intermittent or perennial stream are not equivalent to what is appropriate for ephemeral streams.

4. Uncertainty in Scope and Definitions

Key terms may be interpreted too broadly including:

- "Waters of the state"
- "Discharge"
- "Dredge and fill activities"

The Proposed Rule should clearly delineate specific definitions for each stream classification and how they should be treated. Further, there is a material amount of interchangeability in references to surface waters and aquatic resources when accounting for impacts, both of which are similar but can have different implications depending on which definition is used. For example, aquatic resources include "wetlands, streams, rivers, lakes, playas, and other bodies of water, riparian areas, and the organisms that live in them and *the ecological functions, services and values they provide*". Aquatic resource impacts are what is tied to compensatory mitigation, but ecological functions, services, and values are hard to quantify when determining the appropriate level of mitigation. Rather, it should be tied to permanent impacts to the ordinary high-water mark or delineated boundary of the mapped waterways or waterbodies, respectively. Riparian would also need a more narrowed definition to include "distinctively different vegetative species that the adjacent areas" so that it is a definable and mappable resource.

V. RECOMMENDED IMPROVEMENTS

To ensure the Proposed Rule achieves its intended purpose without imposing unnecessary burdens, we respectfully recommend:

1. Establish a Tiered Framework for Surface Waters

- Clearly distinguish between:
    - Perennial,
    - Intermittent,
    - Ephemeral waters,
- Apply graduated requirements based on hydrologic function.

2. Create General Permits for Renewable Projects

- Develop streamlined general permits for:
    - Projects that support state climate and energy goals,
    - Implement standard avoidance measures similar to how the regional and general conditions of the Nationwide Permit Program are implemented,

- Demonstrate minimal water quality impacts,
- Temporary construction disturbances, and
- Projects with no continuous discharge.

3. Provide Clear Guidance and Definitions

- Establish consistent criteria for:
  - Identifying regulated features,
  - Determining when a “discharge” occurs, and
  - Applicability of dredge/fill requirements.

VII. CONCLUSION

We commend the Commission and NMED for addressing an important regulatory gap and for conducting a transparent rulemaking process. However, we respectfully urge the Commission to refine the proposed rules to ensure they:

- Are proportional to actual environmental risk
- Reflect the unique conditions of arid landscapes
- Provide clarity, predictability, and efficiency
- Support continued investment in renewable energy development

We appreciate the opportunity to provide these comments and would welcome continued engagement in this process.

Respectfully submitted,

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