

New Mexico Home Builders Association (Miles Conway)

June 17, 2026

Members of New Mexico Home Builders Association (NMHBA) appreciate the significant work that went into creating the WQCC-25-74-NMED-Petition-to-Adopt-Amend-20.6.2-NMAC-and-New-Rule-20.6.5-NMAC. This petition is of utmost importance to members of NMHBA because overly burdensome regulatory requirements are already estimated to be adding approximately 30 percent to construction costs compared to neighboring states.

Protections are already in place in county and municipal development approval processes to prevent the migration of sediment away from commercial and residential construction projects (both single-family and multi-family). The development process included input from the Environment Department and at least four public hearings prior to approval by the appropriate county. Additional regulations from the state are redundant and costly. Residential home building should not be subject to this additional rule-making process.

Permitting delays up to 45 days to obtain a Storm Water Pollution Prevention Permit (SWPPP) are projected in the NMPDES regulations in 20.6.5. This 45-day delay can (conservatively) add more than \$6,000 to the cost of a new home, raise rents, or cause housing projects to not be built at all. For every \$1,000 increase in the sales price of a single-family residence, 1,000 New Mexico families can no longer qualify for the mortgage to purchase it.

There is a statewide shortage of more than 32,000 homes which compounds the ongoing affordability challenges, median home prices have risen 40% since 2019, and only 28% of New Mexicans can afford the median-priced home. It's not only in the single-family housing market – 50% of renters are cost-burdened, meaning they spend more than 30% of their total income on housing.

Thank you for reading our analysis of the storm water issues, its confluence with the residential construction sector, and our argument for WQCC commissioners to exempt the sufficiently-regulated home building industry from additional rules and permitting requirements.

Municipalities regulated by their separate storm sewer systems (MS4) will not issue a building permit for new home construction until the contractor shows they have first acquired a stormwater permit. NMED has stated in public testimony that it will take them two weeks to review each Notice of Intent (NOI) for completeness; and additional 30 days are estimated to determine if the SWPPP is adequate. This equates to more than \$4,500 in the sales price of each home as this unnecessary delay is imposed upon each home permit. Delays of months may be expected for developments of more than five acres. Testimony on Exhibit 79 gives the impression that some unknown additional time will likely be added for review by the NM Department of Wildlife before the SWPPP will be issued. This is unacceptable to the industry.

- For years residential, multi-family and commercial construction projects have been subjected to increasing requirements by EPA Region 6 and their proxies, MS4 permits required by the EPA. As

the regulations increased, so did the cost of housing and the costs of doing business in New Mexico.

- When the US Supreme Court (SCOTUS) reached their Sackett decision in May of 2023, the construction industry in New Mexico saw some small easing of regulations from the EPA in rural parts of the state, but not from the MS4s. Rural builders were not required to obtain SWPPPs as their remote locations were recognized as not impacting any WOTUS. Costs continued to increase for those attempting to provide housing within the MS4s, and the affordability crisis worsened.
- Study of the Sackett decision revealed that as far back as 1898 the NM Territorial Supreme Court determined the Rio Grande was not navigable in New Mexico and was definitely NOT a Water of the United States (WOTUS.) Appeals to SCOTUS failed to overturn this determination. Construction of Elephant Butte reservoir began in 1905, settling the issue of navigability of the Rio Grande once and for all. Subsequent dams across most of the rivers within the state for flood control under various Acts of the U.S. Congress from 1910-1935 also recognized their lack of "navigability" and therefore the lack of jurisdiction for enforcement of the CWA.
- The Commerce Clause of the Constitution, which serves as the authority for the Rivers and Harbors Act of 1899, requires the U.S. Army Corps of Engineers to keep a list of what waters that are determined to be navigable. Prior to Sackett, only a section of the Rio Grande that is below the New Mexico state line and down into Texas had received this Determination. After Sackett, only Navajo Reservoir on the New Mexico-Colorado border is Determined to be jurisdictional as a WOTUS in New Mexico.

The sponsors of SB21 & SB22 that were passed and signed into law in 2025 stated that their goals were to return to the original intent of the Clean Water Act (CWA), which was to eliminate "the discharge of pollutants into the navigable waters of the United States" to the greatest extent possible. The rules being considered in the Public Hearing by the NM Water Quality Control Commission to adopt amendments to 20.6.2 NMAC and new rule 20.6.5 NMAC cite their authority as Sections 74-6-4, 74-6-6 and 74-6C-1 to -11 which had been amended by SB21 and SB22. All authority and definitions relate back to the federal CWA and WOTUS. The CWA includes protections for mud flats, sand flats and prairie potholes – none of which are found within New Mexico. Mud and sand flats are subjected to ocean tidal rise and fall, and prairie potholes are found in the Upper Midwest, especially North Dakota, South Dakota, Wisconsin, and Minnesota. Yet these features are routinely discussed by legislators and regulators as requiring protection in New Mexico.

The references to "waters of the State" needing protection all use delegation of the CWA jurisdiction as the authority for the rules promulgated by the state. Since New Mexico has been determined by actions of Congress and SCOTUS to be non-jurisdictional since at least 1905, there is no authority to delegate to the state. If the state wishes to conduct scientific studies and introduce legislation sometime in the future for the purposes of protecting perennial surface waters within the state from documented pollutants, then that would be the proper path for inclusion of surface "waters of the State."

It is the position of New Mexico Home Builders Association that any law or regulations promulgated on authority under the federal CWA to protect WOTUS are non-jurisdictional in New Mexico due to the lack of navigability as evidenced by the Determination of the U.S. Army Corps of Engineers.

Specific portions of amendments to 20.6.2 NMAC and new rule 20.6.5 NMAC that support the belief that the grading and roadbuilding for residential developments and vertical construction of single-family and multifamily homes are exempt from requirements to comply with the proposed regulations include:

PAGE 12 LINES 19 AND 33 TO 36 – DEFINITION OF "DREDGED MATERIAL" AND "FILL MATERIAL"

Construction activities are not dredging from any wetlands under any of the definitions in the proposed regulations. Excavation of desert dryland topsoil is not equivalent to dredging from wetlands. Most fill materials utilized are either from the scraping topsoil off the tops of mounds within the development area, or are purchased from construction-materials suppliers and trucked into the development to be compacted to specifications by professional engineers for the purpose of correcting drainage as required by the appropriate county or city having jurisdiction over approval of the development under the New Mexico Subdivision Act [47-6-1 to 29 NMSA 1978].

Counties and municipalities already include in their plat approvals under the Subdivision Act the requirements for drainage retention/detention ponds and other permanent stormwater control infrastructure to prevent inundation of their existing stormwater infrastructure. Requiring a separate permit from NMED to perform the grading and filling required by professional engineers that has already been subjected to numerous public hearings and approvals under the Subdivision Act is redundant and can add months of delays to construction projects and adds more costs to construction in the state without resulting in any additional protection to the perennial surface waters of the State.

Page 33 (20.6.2.2305 GENERAL PERMITS)

"B. The discharges within a category include:

(1) stormwater runoff from municipal separate storm sewer systems (MS4s), construction activities, industrial activities, and oil and gas activities;"

The inclusion of creating a Construction General Permit (CGP) is non-jurisdiction under Sackett. The EPA's CGP is not a pollution elimination scheme – it is a clean fill dirt movement regulation. Despite the lack of updated requirements of EPA Region 6 after Sackett and their continued imposition upon MS4s for enforcement of construction permit acquisition and the NMPDES proposed regulations, there is no authority for the development of a CGP by the state, nor for the continued requirement of obtaining NPDES permits for any construction project from the MS4s. Public testimony has revealed that it may take NMED up to nine years to complete a state CGP. Perhaps it is not worth the effort.

Page 49 TABLE 2 – GENERAL PERMIT FEES (20.6.2.2354 SURFACE WATER DISCHARGE PERMIT FEES)

The proposed fees for "Construction General Permit – Stormwater" have been amended in Exhibit 79 to separate the "Large Construction" from the "Small Construction" in order to eliminate fees for the minimal dirt movement required on each individual home site within a development. However, there should not be a requirement for a SWPPP at all on small lots within a development that has already constructed the permanent stormwater control features required during the subdivision approval process. While fees for Large Construction are reasonable, the requirement for obtaining a

SWPPP and installing BMPs are extensive. Add to that the carrying costs for construction loans while the lengthy approval process takes months, and the sales price of each lot for home construction sometimes makes it so the project no longer makes financial sense.

PAGE 107 (20.6.5.7 DEFINITIONS) LINES 33-37 – DEFINITION OF "DISCHARGE"
[REQUIREMENT OF "ADDITION OF A POLLUTANT" TO WOTUS FROM A POINT
SOURCE.] – ALSO STATES IT DOES NOT INCLUDE AN ADDITION OF POLLUTANTS BY
AN INDIRECT DISCHARGER [NON-POINT SOURCE]

Construction activities are not adding the "pollutants" of rock, sand, or cellar dirt neither directly nor indirectly to a WOTUS or its wetlands, as there are no WOTUS or its wetlands in the state. Additionally, the definition specifically exempts any "indirect discharger" which would be non-point sources such as construction projects. This has always been a difficult concept to explain to the construction industry, as the inadvertent movement of rock, sand and topsoil during monsoon storms into an adjacent arroyo that is already made up of rock, sand and dirt does not appear to be adding any "pollutants" to the arroyo. There have not been any scientific studies to determine which grain of sand in the Rio Grande might be from a construction site five miles up an arroyo, or which might have been from the arroyo itself.

NMHBA members encourage WQCC commissioners to participate in the work toward housing affordability in New Mexico. For all the reasons and analysis presented above, we look forward to receiving clarification from the WQCC confirming that robust environmental protections are currently in place and that construction activities in New Mexico are exempt from compliance requirements promulgated under
WQCC-25-74-NMED-Petition-to-Adopt-Amend-20.6.2-NMAC-and-New-Rule-20.6.5-NMAC.



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Robust protections are already in place in county and municipal development approval processes to prevent the migration of sediment away from residential construction projects (both single-family and multi-family). The development process included input from the Environment Department and at least four public hearings prior to approval by the appropriate county. Additional regulations from the state would become redundant and costly. Residential home building should not be subject to this additional rule-making process.

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Thank you for reading our analysis (below) of the storm water issues, its confluence with the residential construction sector, and our argument for WQCC commissioners to **recognize the home building industry is already sufficiently regulated and no additional rules and permitting requirements are necessary.**

Municipalities regulated by their separate storm sewer systems (MS4) will not issue a building permit for new home construction until the contractor shows they have first acquired a stormwater permit. NMED has stated in public testimony that these new rules being contemplated will allow **two weeks** to review each Notice of Intent (NOI) for completeness; and additional 30 days are estimated to determine if the SWPPP is adequate. **Delays of months may be expected** for developments of more than five acres. Testimony on Exhibit 79 gives the impression that unknown additional times are likely as added for review by the NM Department of Wildlife before the SWPPP will be issued. This would be cost-prohibitive and untenable for the home building industry.

- For years residential, multi-family and commercial construction projects have been subjected to increasing requirements by EPA Region 6 and their proxies, MS4 permits required by the EPA. As the regulations increased, so did cost of housing and the costs of doing business in New Mexico.
- When the US Supreme Court (SCOTUS) reached their *Sackett* decision in May of 2023, the construction industry in New Mexico saw some small easing of regulations from the EPA in rural parts of the state, but not from the MS4s. Rural builders were not required to obtain SWPPPs as their remote locations were recognized as not impacting any WOTUS. Costs continued to increase for those attempting to provide housing within the MS4s, and the affordability crisis worsened.
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