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James C. Kenney
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Original via Electronic Mail

February 11, 2021

Ms. Kelly Allen
Chief, Regulatory Division
U.S. Army Corps of Engineers, Albuquerque District
4101 Jefferson Plaza NE
Albuquerque, New Mexico 87109-3434

Re: Clean Water Act Section 401 Water Quality Certification
United States Army Corps of Engineers 2021 Regional General Permit 16-01

Dear Ms. Allen:

The Cabinet Secretary of the New Mexico Environment Department (NMED) delegated signatory authority for state certifications of federal Clean Water Act (CWA) permits to the Surface Water Quality Bureau Chief. NMED examined the November 17, 2020 Draft Regional General Permit (RGP) 16-01 under Section 404 of the CWA and Section 10 of the Harbors and Rivers Act issued by the Albuquerque District of the U.S. Army Corps of Engineers ("Corps"), the Corps public notice of the proposed Revisions to Regional General Permit 16-01 and the Corps request that NMED consider certification of this permit under the CWA §401 (Certification). Certification is required by CWA §401 to ensure that RGPs are consistent with state law, comply with the state Water Quality Standards (20.6.4 NMAC and 20.6.2 NMAC), Water Quality Management Plan/Continuing Planning Process, including Total Maximum Daily Loads (TMDLs), and Antidegradation Policy.

Pursuant to State regulations for permit certification at 20.6.2.2002 NMAC, NMED issued a public notice of this activity and announced a public comment period, posted on the Surface Water Quality Bureau's web site: <https://www.env.nm.gov/surface-water-quality/public-notices/> on December 11, 2020. The public comment period ended on January 11, 2021. NMED received no comments.

The Conditional Certification for Regional General Permit 16-01 is attached.

Sincerely,

Shelly Lemon, Chief
Surface Water Quality Bureau

xc: Curry Jones, Enforcement and Compliance Assurance Division, USEPA Region 6
Briana Wadley, Water Division, USEPA Region 6
Mathew Wunder, Chief, New Mexico Department of Game and Fish
U.S. Fish and Wildlife Service
401 Certification File, NMED-SWQB

State of New Mexico CWA Section 401 Certification of Regional General Permit 16-01:

For projects that discharge dredged or fill material into surface waters of the state, the New Mexico Environment Department (NMED) relies on conditions to ensure compliance with State water quality standards at [20.6.2](#) and [20.6.4](#) New Mexico Administrative Code (NMAC) and the State of New Mexico Water Quality Management Plan and Continuing Planning Process (WQMP/CPP)¹, including Total Maximum Daily Loads (TMDLs)² and the State's Antidegradation Policy³.

The New Mexico Environment Department (NMED) has examined the proposed Regional General Permit (RGP) for discharge of dredged or fill material into waters of the United States (U.S.) for crossings of those waters associated with the construction, maintenance, repair and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project. Projects authorized, must not result in more than minimal individual and cumulative adverse environmental effects. NMED considers the RGP to be an individual permit with "abbreviated procedures" per 33 CFR §322.2(d).

The water quality standards and regulations cited herein as codified in the New Mexico Administrative Code (i.e., 20.6.2 NMAC, 20.6.4 NMAC) were adopted by the New Mexico Water Quality Control Commission pursuant to the authority granted by the New Mexico Water Quality Act, NMSA 1978, § 74-6-4, and promulgated in accordance with the New Mexico State Rules Act, NMSA 1978, §§ 14-4-1 to -11.

The State of New Mexico certifies that the permitted activities will comply with applicable provisions of the CWA §§301, 302, 303, 306, and 307 and with appropriate requirements of State law, including the New Mexico Water Quality Act (NMSA 1978, §§ 74-6-1 to -17), 20.6.2 NMAC and 20.6.4 NMAC, upon inclusion of the following conditions in the permit, as listed below. Compliance with the terms and conditions of the permit and this certification provides reasonable assurance that the permitted activities will be conducted in a manner which will not violate applicable State water quality standards nor the water quality management plan and will be in compliance with the antidegradation policy.

Projects that are unable to comply with the conditions of this certification are denied certification without prejudice and the applicant must apply to NMED for an individual certification pursuant to 20.6.2.2002 NMAC⁴.

NMED has the knowledge and experience to determine the appropriate conditions necessary to protect state water quality. The following conditions and Best Management Practices (BMPs) have proven successful in maintaining and protecting state water quality and are hereby justified pursuant to the CWA §401 Certification Rule (40 CFR 121.7(d)(2)) and are authorized by the state and federal Antidegradation Policy and Implementation Plan and Methods (40 CFR 131.12; 20.6.4.8 NMAC).

Violations of State water quality standards could lead to penalties under the New Mexico Water Quality Act ("Act"), which states: "[a]ny person who violates any provision of the Water Quality Act [Chapter 74, Article 6 NMSA 1978] other than Section 74-6-5 NMSA 1978 or any person who violates any regulation, water quality standard or compliance order adopted pursuant to that act shall be assessed civil penalties up to the amount of ten thousand dollars (\$10,000) per day for each violation." NMSA 1978, § 74-6-10.1(B).

¹ <https://www.env.nm.gov/surface-water-quality/wqmp-cpp/>

² <https://www.env.nm.gov/surface-water-quality/tmdl/>

³ <https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/25/2019/11/WQMP-CPP-Appendix-A-Antideg-20201023-APPROVED.pdf>

⁴ <http://164.64.110.134/parts/title20/20.006.0002.html>

General Conditions of Certification:

The following conditions apply to all uses of Regional General Permit (RGP) 16-01 within the State of New Mexico Clean Water Act (CWA) §401 area or region of certification authority.

1. Notification

Applicants seeking authorization under RGP 16-01 must notify NMED, including a description of all selected best management practices (BMPs; see General Condition #2), in order to be eligible for RGP 16-01.

- 1) When a Pre-Construction Notification (PCN) is required by the Corps, the applicant shall submit a copy of the PCN to NMED for notification. If not already included, the notification must include the PCN application materials as submitted to the Corps.
- 2) If a proposed activity will result in dredge or fill in water bodies listed as impaired under Section 303(d) of the CWA, the notification must include specific measures that will be used to avoid intensifying the impairment(s). The current EPA-approved New Mexico list of impaired waters is available at <https://www.env.nm.gov/surface-water-quality/303d-305b/> - see the link for "All Impairments (Category 4 or 5)" or contact NMED's Surface Water Quality Bureau should you have any questions or need assistance.

Timing. Applicants shall submit notification to NMED as early as possible, and in advance of any authorization letter from the Corps allowing the applicant to proceed under RGP 16-01. Email Confirmation from NMED for the use of this Certification is required by USACE Regional Condition 2.b and is typically completed within 60 days of receipt of a complete notification.

Content. Notification must be in writing (email submittal is preferred) and must include the same information that was submitted to the Corps in the PCN application package.

Written Notification should be emailed to: wpsprogram.manager@state.nm.us
Watershed Protection Section Program Manager, NMED- Surface Water Quality Bureau

Or mailed to (email is preferred):
Surface Water Quality Bureau
WPS Program Manager
PO Box 5469
Santa Fe, NM 87502

Notification to NMED is required in order to ensure that the activities will comply with the terms and conditions of the permit and this certification, including compliance with State water quality standards, water quality requirements associated with effective best management practices, and other water pollution controls pursuant to the State's Antidegradation Policy and Implementation Plan (20.6.4.8 NMAC; Appendix A of the WQMP/CPP).

2. Best Management Practices

No pollutants (suspended or settleable solids including fine sediment particles, precipitates, organic or inorganic solids, floating solids, total dissolved solids, oil, grease, other petroleum products, toxic pollutants, turbidity, or surface water temperature) or any other contaminant shall be allowed to discharge to a water of the state in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with public welfare or the use of property (20.6.4.13 NMAC).

The primary tool for limiting the discharge of pollutants from dredge and fill activities, individually and cumulatively, is through permit requirements mandating the installation and implementation of best management practices (BMPs) that prevent pollutant transport to a watercourse and thereby degradation (40 CFR 131.12 Antidegradation policy and implementation methods; 20.6.4.8 NMAC -

Antidegradation Policy and Implementation Plan; Appendix A of New Mexico's WQMP/CPP).

Therefore, Project Proponents (i.e., permittees) are required to select and implement all practicable and reasonable BMPs that are appropriate for their projects. Notification requires Project Proponents to describe all selected BMPs (see General Condition #1). Practicable and reasonable BMPs for New Mexico surface waters include:

Scheduling - Limit work in channel to periods of no flow or when wetland soils are frozen. Project activities must avoid times of predictable flooding to avoid working in high water (seasonal monsoons, snowmelt, or releases from dams).

Crossings - Limit stream and wetland crossings to a single, narrow location that is perpendicular to the stream (or along a contour of a wetland).

Diversions - Flowing water that is diverted around the work area must remain within the existing channel and provide for aquatic life movement. Diversions must be non-erodible, such as sand bags, water bladders, concrete barriers, or channel lined with geotextile or plastic sheeting. Dirt cofferdams are not acceptable diversion structures.

Heavy equipment -

- Pressure wash and/or steam clean before the start of the project and inspect daily for leaks (to remove contaminants and to avoid introducing invasive species).
- Complete a written log of inspections and maintenance throughout the project period.
- Do not use leaking equipment in or near surface water(s).
- Do not park or leave equipment stored within the stream channel or wetland.
- Operate from the bank or work platforms whenever possible. Avoid heavy equipment operation in flowing water.

Fuel

- Store fuel, oil, hydraulic fluid, lubricants, and other petrochemicals outside of the 100-year floodplain within a secondary containment system capable of containing twice the volume of the product.
- Refuel equipment at least 100 feet from surface water

Design

- Structures and culverts at stream crossings must be properly designed, installed and maintained to allow passage of sediment, bedload, woody debris, aquatic life, and to prevent erosion problems such as headcuts, incision, bank erosion, and the diversion of the stream from its natural channel during flood events.

Construction Materials

- Use appropriate fill material – broken concrete, tires, tire bales, treated lumber, and other refuse material shall not be used as fill material.
- All asphalt, concrete, drilling fluids and other construction materials must be properly handled and contained to prevent releases to surface water. Poured concrete must be fully contained in mortar-tight forms and/or placed behind non-erodible cofferdams to prevent contact with surface or ground waters. Appropriate measures must be used to prevent wastewater from concrete batching, vehicle and equipment wash-down, or aggregate processing from impacting surface waters and aquatic resources.

Demolition, repair, and cleaning activities

Materials associated with demolition, repair, and cleaning activities of bridges or associated structures must be kept out of the channel. Generally, impermeable containment material (e.g., plastic sheet, canvas, tarpaulins or other catchment devices) must be secured under the structure to capture falling debris. Sandblasting must include vacuum systems or the structures must be completely bagged to collect all paint and concrete debris. Any debris that falls onto the

containment area or channel must be properly disposed of in accordance with the New Mexico Solid Waste Regulations (20.9.1 NMAC). Applicable Safety Data Sheets of water repellants and surface finish treatments must be maintained at the project area and such products must follow safety procedures for use near open water.

Trenching

- Excavated trenches shall be backfilled and compacted to match the adjacent undisturbed soil.
- Excavated trenches shall not result in draining any surface water including wetlands.
- Excavated trenches shall include escape ramps for wildlife.

Confine grading to the area of the trench and minimize to the extent practicable. The total length of excavated trench open at any one time should not be greater than the total length of pipeline/utility line that can be placed in the trench and back-filled in one working day.

Dewatering discharges

Dewatering discharges shall not contain contaminants, including excessive turbidity and other contaminants associated with the discharge, in concentrations that exceed surface water or groundwater standards at 20.6.4 NMAC and 20.6.2 NMAC. Appropriate dewatering BMPs include discharging to a sediment basin within an uplands area behind a vegetative buffer, using fabric, biobag, or hay-bale corrals, or using geotextile filter bags.

Dewatering discharges may be subject to NMED Discharge Permits. Regulations for ground and surface water protection at 20.6.2.1201 NMAC require any person intending to make a new water contaminant discharge to file a notice of intent to discharge with the Ground Water Quality Bureau (<https://www.env.nm.gov/gwqb/>) for discharges that may affect groundwater and/or with the Surface Water Quality Bureau (<https://www.env.nm.gov/swqb/>) for discharges that may affect surface water. Based on the information provided in the notice of intent, the appropriate Bureau will notify the applicant if a discharge permit is required.

Dust Control - Water used in dust suppression shall not contain contaminants in concentrations that exceed surface water or groundwater standards at 20.6.4 NMAC and 20.6.2 NMAC.

Erosion Control

- Avoid disturbance to vegetation and minimize bare ground.
- Establish and maintain upland buffers between upland construction and all surface waters, including streams, arroyos and wetlands.
- Silt fences, seed free straw mulch, hydro-mulch, biodegradable straw wattles, erosion control fabrics and other techniques must be employed as appropriate to protect waters from sedimentation and other pollutants.
- Avoid using jute netting or placing woven wire in contact with the stream. These materials have been known to trap and kill fish and wildlife near streams or rivers.

Wetlands

- Avoid working in wetlands whenever possible.
- Flag or otherwise mark wetland boundaries so construction crews can avoid them.
- When wetlands must be crossed by heavy equipment, schedule work when wetland soils are frozen whenever possible.
- Avoid permanent impacts to wetlands such as draining, filling, or other hydro-modifications.
- Backfill all trenches and return topography to pre-construction elevations.
- Install permeable fills to allow natural seepage flows.
- Use machinery appropriately.
- Use the smallest machinery that can handle the job – preferably non-mechanized equipment.

- Use wide tires, tracks, wooden mats, or board roads to disperse weight and minimize soil compaction when heavy machinery is required.
- Avoid turning wheels when the vehicle is stationary to prevent digging and damage to vegetation.
- Minimize wetland impacts by stockpiling vegetation and hydric soils to be reused during post-construction stabilization.

Stormwater Management

Activities that disturb one (1) acre or more may require a National Pollutant Discharge Elimination System (NPDES) permit from the U.S. Environmental Protection Agency (EPA) under Section 402 of the Clean Water Act. The permittee should submit the appropriate application to EPA 14 days prior to initiating construction. In the case of emergency operations, operators must apply no later than 30 days after the start of construction and are considered provisionally covered under the terms and conditions of the EPA-issued general permit immediately, and fully covered 14 calendar days after EPA has acknowledged receipt of the application (Notice of Intent, or NOI), unless EPA notifies the permittee that the authorization has been delayed or denied. For additional information, contact:

EPA Region 6
1201 Elm St.
Dallas, Texas 75202
Ph: 800-887-6063 or 214-665-2760 if calling from outside Region 6

Post-construction stabilization

- Permittees and their contractors shall take necessary steps to minimize channel and bank erosion during and after construction. Where applicable, banks must be reseeded or replanted with native vegetation.
- Disturbed areas outside stream channels that are not otherwise physically protected from erosion must be reseeded or planted with native vegetation. Stabilization measures including vegetation are required at the earliest practicable date, but by the end of the first full growing season following construction. Native woody riparian and/or wetland species must be used in areas that support such vegetation. Plantings must be monitored and replaced for an overall survival rate of at least 80 percent by the end of the second growing season. Once established, native plants adapted to the site must be able to thrive with no supplemental water or treatment.

BMP Citations: Including but not limited to 20.6.4.13 NMAC - (A) bottom deposits and suspended or settleable solids; (B) floating solids, oil and grease; (F) toxic pollutants; (J) turbidity; (K) total dissolved solids and (M) biological integrity; 20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan; Appendix A of New Mexico's WQMP/CPP; 40 CFR 131.12 - Antidegradation policy and implementation methods.

3. Fills Within Floodplains

Projects requiring authorization for discharges of fill material within 100-year floodplains shall include in their Notification a statement of compliance with Executive Order 11988 (Floodplain Management).

However, projects within the Federal Emergency Management Agency (FEMA)-mapped 100-year floodplain associated with residential and commercial development are denied certification.

4. Low Impact Development

When the discharge of fill material results in the replacement of wetlands or waters of the U.S. with impervious surfaces, the authorized activity should not result in more than minimal degradation of water quality. To ensure RGP 16-01 does not cumulatively degrade water quality from increasing the impervious area, the permittee shall incorporate low impact development practices (e.g. native

landscaping, bioretention and infiltration techniques, and constructed green spaces) to the extent practical. A description of the low impact development concepts in the proposed project shall be included in the PCN or Notification to NMED. More information including low impact concepts and definitions is available at: <https://www.epa.gov/nps/urban-runoff-low-impact-development>.

Incorporating low impact development practices ensures compliance with all water quality requirements associated with effective BMPs and other water pollution controls (20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan).

5. Compliance Evaluation

NMED must be notified at least five days before starting construction to allow time to schedule a compliance evaluation, as necessary. The permittee shall allow NMED staff to monitor the authorized activity and any mitigation areas at any time deemed necessary to determine compliance with applicable State water quality standards.

NMED compliance evaluations are necessary to ensure that the project activities will comply with the terms and conditions of the permit and this certification, including compliance with State water quality standards, all water quality requirements associated with effective BMPs, and other water pollution controls (20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan).

6. Spills

Appropriate spill clean-up materials such as absorbent pads must be available on-site at all times during construction. Permittees shall report all spills immediately to NMED as required by the New Mexico Water Quality Control Commission Regulations (20.6.2.1203 NMAC). For non-emergencies during normal business hours, call 505-428-2500. For non-emergencies after hours, call 866-428-6535. For emergencies only, call 505-827-9329 twenty-four hours a day (New Mexico Department of Public Safety). Requiring clean-up materials on-site and timely spill reporting ensures compliance with all water quality requirements in the event of a spill of toxic pollutants or other contaminants (20.6.4.13 NMAC, 20.6.2.1203 NMAC).

7. Posting

To prevent noncompliance with the terms and conditions of this certification, including appropriate requirements of State water quality law and regulations (NMSA 1978, §§ 74-6-1 to -17; 20.6.2 NMAC; 20.6.4 NMAC), a copy of this Certification must be kept at the project site during all phases of construction. All contractors involved in the project must be provided a copy of this certification and be made aware of the conditions prior to the start of construction.

8. Maintenance

Maintenance of existing structures should preserve (via design, flow modeling or other information in the PCN) the natural functions of the affected surface water when the structure is fully operational. "Currently serviceable structures" which may be maintained under this permit do not include undersized culverts or structures that cause or exacerbate channel incision, bank destabilization, and/or prevent fish and wildlife passage due to inadequate design or construction standards.

Citation: Including but not limited to 20.6.4.13 NMAC - (A) bottom deposits and suspended or settleable solids; (J) turbidity; (K) total dissolved solids and (M) biological integrity; 20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan; Appendix A of New Mexico's WQMP/CPP; 40 CFR 131.12 Antidegradation policy and implementation methods.

9. Outstanding National Resource Waters

For proposed activities in Outstanding National Resource Waters (ONRWs), NMED denies Certification of RGP 16-01. The applicant must apply to NMED for an individual certification pursuant to 20.6.2.2002 NMAC.

Citation: Including but not limited to 20.6.4.9 NMAC - outstanding national resource waters; 20.6.4.13 NMAC - (A) bottom deposits and suspended or settleable solids; (B) floating solids, oil and grease; (F) toxic pollutants; (H) pathogens; (I) temperature; (J) turbidity; (K) total dissolved solids and (M) biological integrity; 20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan; Appendix A of New Mexico's WQMP/PPP; 40 CFR 131.12 Antidegradation policy and implementation methods.