Original via Electronic Mail

January 15, 2023

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

Re: Clean Water Act Section 401 Water Quality Certification
United States Army Corps of Engineers 2022 Regional General Permit No. NM & West TX-17-01, Emergency Repair and Protection Activities (SPA-2012-00347-ABQ)

Dear Kelly 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 (SWQB) Chief. NMED examined the Draft Regional General Permit NM/West TX-17-01 for Emergency Repair and Protection Activities (RGP 17-01) under Section 404 of the CWA and Section 10 of the Harbors and Rivers Act issued by the U.S. Army Corps of Engineers (Corps), the Corps' November 8, 2022 public notice of the proposed reissuance of RGP 17-01, and the Corps' November 21, 2022 certification request for RGP 17-01.

Pursuant to state regulations for permit certification at 20.6.2.2002 New Mexico Administrative Code (NMAC), NMED issued a public notice of this activity and announced a public comment period that was published in the Albuquerque Journal on November 23, 2022 and posted on NMED's web site at https://www.env.nm.gov/public-notices/. The public comment period ended on December 23, 2022. NMED received no comments.

Applicable Water Quality Regulations:

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 provided in the New Mexico Water Quality Act, NMSA 1978, Section 74- 6-4, and promulgated in accordance with the New Mexico State Rules Act, NMSA 1978, Sections 14-4-1 to -11. For projects that discharge dredged or fill material into surface waters of the state, NMED relies on conditions included in the Certification to ensure compliance with State water quality regulations and standards at 20.6.2 NMAC and 20.6.4 NMAC and the State of New Mexico Water Quality Management Plan and Continuing Planning Process (WQMP/CPP), including Total Maximum Daily Loads (TMDLs) and the State's Antidegradation Policy.

The State of New Mexico hereby certifies that the permitted activities will comply with applicable provisions of the CWA Sections 301, 302, 303, 306, and 307 and with appropriate requirements of State law, including the New Mexico Water Quality Act (NMSA 1978, Sections 74-6-1 to -17), 20.6.2 NMAC, and 20.6.4 NMAC, upon inclusion of NMED's conditions in RGP 17-01, as listed below. Projects that are unable to comply with the conditions of this Certification are denied Certification without prejudice and the Project Proponent must apply to NMED for an Individual Certification pursuant to 20.6.2.2002 NMAC. The conditional Certification for RGP 17-01 is attached.

Sincerely,

Shelly Lemon Digitally signed by Shelly Lemon
Date: 2023.01.15 16:00:08 -07'00'

Shelly Lemon, Chief
Surface Water Quality Bureau

xc: Christina Schroeder, New Mexico/Texas Branch Chief, USACE Albuquerque District, Christina.L.Schroeder@usace.army.mil
Curry Jones, Enforcement and Compliance Assurance Division, USEPA Region 6, Jones.Curry@epa.gov
Brianna Wadley, Water Division, USEPA Region 6, Wadley.Brianna@epa.gov
Mathew Wunder, Chief, Ecological & Environmental Planning, New Mexico Department of Game and Fish, Mathew.Wunder@dgf.nm.gov
Jared Watson, Aquatic/Riparian Specialist, New Mexico Department of Game and Fish, Jared.Watson@dgf.nm.gov
Debra Hill, Large River Restoration Branch Supervisor, NM Ecological Services Field Office, U.S. Fish and Wildlife Service – Debra_Hill@fws.gov
John Rhoderick, Water Protection Division Director, NMED, John.Rhoderick@env.nm.gov
Abe Franklin, Watershed Protection Program Manager, NMED, Abraham.Franklin@env.nm.gov
Alan Klatt, Implementation & Restoration Team Supervisor, NMED, Alan.Klatt@env.nm.gov
401 Certification File, NMED-SWQB

General Conditions of Certification:

The following conditions apply to all uses of Regional General Permit 17-01 within the State of New Mexico Clean Water Act (CWA) Section 401 area or region of certification authority.

General Condition 1. Inspection

Prior to the initial operation of a certified project, the New Mexico Environment Department (NMED) shall be afforded the opportunity to inspect the facility or activity for the purpose of determining whether the discharge from the certified project will violate the certification (40 C.F.R. §121.11). To facilitate an inspection, the Project Proponent shall

1) submit a copy of the "Contents of Notification," as described in RGP 17-01, to NMED when the Corps requires notification,
2) for projects that propose to maintain or repair an existing structure, include a description of how the structure failed and what will be done to prevent a future failure, and
3) submit a copy of the Post-Activity Report, as described in RGP 17-01, to NMED.

The Contents of Notification, measures to prevent future failures, and the Post-Activity Report should be emailed to:

wpsprogram.manager@env.nm.gov
Watershed Protection Program Manager, Surface Water Quality Bureau, NMED
Or mailed to (email is preferred):
Program Manager, Watershed Protection Section
Surface Water Quality Bureau
PO BOX 5469
Santa Fe, NM 87502

General Condition 2. Impaired Water Bodies

If a proposed activity will result in fill material in water bodies listed as impaired under Section 303(d) of the CWA, the Project Proponent shall select and implement specific measures or Best Management Practices (BMPs) to prevent further degradation of the water quality. 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 most current summary spreadsheet "All Impairments (Category 4 or 5)" or contact NMED's Surface Water Quality Bureau if you have any questions or need assistance.

General Condition 3. Best Management Practices (BMPs)

Project Proponents shall select and implement all practicable and reasonable BMPs to prevent and mitigate pollutant transport to a watercourse and are appropriate for their project. Practicable and reasonable BMPs for New Mexico surface waters include but are not limited to:

Scheduling – 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 sandbags, water bladders, concrete barriers, or channel lined with geotextile or plastic sheeting. Dirt cofferdams or unlined ditches 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.

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 and topography.
- Excavated trenches shall not result in draining any surface water including wetlands.
- Excavated trenches shall include escape ramps for wildlife.
- Use planning and construction practices to minimize the length and duration of open trenches.

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.

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 working in wetlands when soils are too saturated to support heavy machinery.
- Avoid permanent impacts to wetlands such as draining, filling, or other hydro-modifications.
- Install permeable fills to allow natural seepage flows.
- 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.

Post-construction stabilization –

- The Project Proponent 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. SWQB strongly recommends that all bank stabilization projects involve either the sole use of native vegetation or other bioengineered design techniques (e.g., willow plantings, root wads, large woody debris, etc.) or alternatively, a combination of hard-armoring (e.g., rock) and native vegetation or bioengineered design techniques.
- All areas adjacent to the watercourse that are disturbed because of the project, including temporary access roads, stockpiles and staging areas, must be restored to pre-project elevations.
- Disturbed areas outside stream channels that are not otherwise physically protected from erosion must be reseeded or planted with native vegetation so that species regrowth is functionally equivalent to the pre-disturbed site or a reference site. 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. The Corps will determine the requirements for post-construction monitoring on a case-by-case basis.

Structures

- Structures and culverts at stream crossings must allow for the passage of sediment, bedload, woody debris, aquatic life, and prevent erosion problems such as headcuts, incision, bank erosion, and the diversion of the stream from its natural channel during flood events. The Project Proponent shall consider options that minimize disturbance and allow for uninterrupted flow such as low water crossings instead of culverts (for low standard rural roads), bottomless arch culverts, and spans that preserve bank full geometry, depending on site characteristics and level of service needs.

General Condition 4. Fills Within Floodplains

The authorized dredge and fill activity shall comply with Executive Order 11988 (Floodplain Management).

General Condition 5. 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 Project Proponent shall select and implement low impact development practices (e.g., native landscaping, bioretention and infiltration techniques, and constructed green spaces) to the extent practicable. More information including low impact concepts and definitions is available at: https://www.epa.gov/nps/urban-runoff-low-impact-development.

General Condition 6. Spills
Appropriate spill clean-up materials such as absorbent pads must be available on-site at all times during construction. The Project Proponent 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).

General Condition 7. Posting
The Project Proponent shall provide all contractors and subcontractors a copy of this Certification and make all contractors and subcontractors aware of the certification conditions prior to initial operation. A copy of this Certification must be kept at the project site during all phases of construction.

Table 1: 40 C.F.R. §121.7(d)(2) Action on a Certification request.

General & Specific Conditions	Why the condition is necessary to assure that the proposed project will comply with water quality requirements	A citation that authorizes the condition
General Condition 1	This condition is necessary to protect water quality, because it supports the purpose of determining whether the discharge from the certified project will violate the water quality requirements included in this Certification.	40 C.F.R. §121.11 Enforcement of and compliance with Certification conditions.
General Condition 2	Impaired water bodies are protected as Tier 1 waters under New Mexico's Antidegradation Policy and Implementation Procedure ("no further degradation is permitted"). This condition is necessary to protect water quality, because the installation and implementation of Best Management Practices (BMPs) is the primary tool for preventing and limiting the discharge of pollutants from dredge and fill activities to a watercourse. It is necessary to ensure that water quality is not further degraded, and that the chemical, physical, and biological integrity of New Mexico's waters are not negatively impacted by potential discharges.	20.6.4.13 NMAC General Criteria; 20.6.4.8 NMAC Antidegradation Policy and Implementation Plan; Statewide Water Quality Management Plan and Continuing Planning Process (WQMP/CPP) – Appendix A, Antidegradation Policy Implementation Procedure for Regulated Activities; 40 C.F.R. §131.12 Antidegradation policy and implementation methods; 40 C.F.R. §230.10 Restrictions on discharge; 40 C.F.R. §230.72 Actions controlling the material after discharge; 40 C.F.R. §230.74 Actions related to technology; 40 C.F.R. §230.75 Actions affecting plant and animal populations.
General Condition 3	This condition is necessary to protect water quality, because the installation and implementation of Best Management Practices (BMPs) is the primary tool for preventing and limiting the discharge of pollutants from dredge and fill activities to a watercourse. It is necessary to ensure that water quality is not degraded, and that the chemical, physical, and biological integrity of the National waters are not negatively impacted by potential discharges.	20.6.4.13 NMAC General Criteria; 20.6.4.8 NMAC Antidegradation Policy and Implementation Plan; 40 C.F.R. §131.12 Antidegradation policy and implementation methods; 40 C.F.R. §230.10 Restrictions on discharge; 40 C.F.R. §230.72 Actions controlling the material after discharge; 40 C.F.R. §230.74 Actions related to technology; 40 C.F.R. §230.75 Actions affecting plant and animal populations.
General Condition 4	This condition is necessary to protect water quality because proper functioning floodplains provide natural riparian buffers along streams that filter	Executive Order 11988 – Floodplain management; 20.6.4.13 NMAC General Criteria; 20.6.4.8 NMAC Antidegradation

	sediment and pollutants from runoff and promote uptake of nutrients and chemical reactions in the soil and water column that improve water quality[1]. Land-use changes have the potential to disrupt floodplain function, limiting the natural ability of floodplain ecosystems to assimilate pollutants. Executive Order 11988 requires the avoidance of long- and short-term adverse impacts associated with the occupancy and modification of floodplains and the avoidance of direct or indirect support of floodplain development wherever there is a practicable alternative. It is necessary to ensure that water quality is not degraded, and that the chemical, physical, and biological integrity of the National waters are not negatively impacted by potential discharges.	Policy and Implementation Plan; 40 C.F.R. §131.12 Antidegradation policy and implementation methods; 40 C.F.R. §230.10 Restrictions on discharge; 40 C.F.R. §230.72 Actions controlling the material after discharge; 40 C.F.R. §230.74 Actions related to technology; 40 C.F.R. §230.75 Actions affecting plant and animal populations.
General Condition 5	This condition is necessary to protect water quality, because impervious surfaces, buildings, and land developments are documented as probable sources of water quality impairments (CWA Section 303(d)(1), State of New Mexico Total Maximum Daily Loads[2]). The installation and implementation of Best Management Practices (BMPs) is the primary tool for preventing and limiting the discharge of pollutants from dredge and fill activities to a watercourse. It is necessary to ensure that water quality is not degraded, and that the chemical, physical, and biological integrity of the National waters are not negatively impacted by potential discharges.	20.6.4.13 NMAC General Criteria; 20.6.4.8 NMAC Antidegradation Policy and Implementation Plan; 40 C.F.R. §131.12 Antidegradation policy and implementation methods; 40 C.F.R. §230.10 Restrictions on discharge; 40 C.F.R. §230.72 Actions controlling the material after discharge; 40 C.F.R. §230.74 Actions related to technology; 40 C.F.R. §230.75 Actions affecting plant and animal populations.
General Condition 6	This condition is necessary to protect water quality, because 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 General Criteria; 20.6.2.1203 NMAC Notification of Discharge-Removal; 40 C.F.R. §230.74 Actions related to technology.
General Condition 7	This condition is necessary to protect water quality, because providing all contractors and subcontractors with the terms and conditions of this Certification will help prevent noncompliance with the State water quality regulations by supporting adequate training and working procedures.	NMSA 1978, Sections 74-6-1 to -17; 20.6.2 NMAC Ground and Surface Water Protection; 20.6.4 NMAC Standards for Interstate and Intrastate Surface Waters. 40 C.F.R. §230.74 Actions related to technology.

Comments that are not Conditions of Certification:

Other permits that may be required in addition to CWA Section 404 permits –

- 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

[1] https://www.epa.gov/sites/production/files/201508/documents/a_function_based_framework_for_stream_assessment_3.pdf
[2] https://www.env.nm.gov/surface-water-quality/tmdl/

Water Quality Bureau (https://www.env.nm.gov/surface-water-quality/) for discharges that may affect surface water. Based on the information provided in the notice of intent, the appropriate Bureau will notify the Project Proponent if a discharge permit is required.

- 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