NEW MEXICO
ENVIRONMENT DEPARTMENT

Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469
Telephone (505) 827-2855
www.env.nm.gov

MICHELLE LUJAN GRISHAM
Governor

HOWIE C. MORALES
Lt. Governor

JAMES C. KENNEY
Cabinet Secretary Designate

JENNIFER PRUETT
Deputy Secretary

Original via UPS – Copy via Electronic Mail

February 1, 2019

Mr. Charles Maguire, Director
Water Quality Protection Division (6WQ)
U.S. Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Revoke and Reissue State Certification for the Proposed NPDES General Permit for Storm Water Discharges from Construction Activities (CGP) – NMR100000

Dear Mr. Maguire:

Enclosed, please find the revoked and reissued state certification for the following proposed National Pollutant Discharge Elimination System (NPDES) permit:

Proposed NPDES General Permit for Storm Water Discharges from Construction Activities (CGP) – NMR100000

If any, comments and conditions are enclosed on separate sheets.

The U.S. Environmental Protection Agency (USEPA) proposes to regulate discharges under the above-referenced NPDES General Permit. A state Water Quality Certification is required by the federal Clean Water Act (CWA) §401 to ensure that the action is consistent with state law (New Mexico Water Quality Act, New Mexico Statutes Annotated (NMSA) 1978, §§ 74-6-1 to -17,) and complies with state Water Quality Standards [*State of New Mexico, Standards for Interstate & Intrastate Surface Waters, New Mexico Water Quality Control Commission, 20.6.4 New Mexico Administrative Code (NMAC)*], the Water Quality Management Plan/Continuing Planning Process, including Total Maximum Daily Loads (TMDLs), and the Antidegradation Policy.

Pursuant to State regulations for permit certification (20.6.2.2001 NMAC), USEPA jointly with NMED issued a public notice of the draft permit and announced a public comment period posted on the NMED web site www.nmenv.state.nm.us/swqb/WQA/Notice on December 12, 2018. The public comment period ended on January 11, 2019. NMED did not receive any comments.

Sincerely,

/s/ Shelly Lemon

Shelly Lemon, Chief
Surface Water Quality Bureau

cc: (w/enclosures)

Ms. Evelyn Rosborough, USEPA (6WQ-NP) via e-mail
Mr. Brent Larsen, USEPA (6WQ-PP) via e-mail
Ms. Emily Halter, USEPA (HQ) via e-mail
Ms. Suzanna Perea, USEPA (6WQ-PP) via e-mail

Ms. Anne Idsal, Regional Administrator
Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202-2733

February 1, 2019

STATE CERTIFICATION

RE: Proposed NPDES General Permit for Storm Water Discharges from Construction Activities – NMR100000

Dear Ms. Idsal:

The New Mexico Environment Department has examined the proposed NPDES permit linked above. The following conditions are necessary to assure compliance with the applicable provisions of the Clean Water Act Sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law.

Compliance with the terms and conditions of the permit and this certification will provide reasonable assurance that the permitted activities will be conducted in a manner which will not violate applicable water quality standards and the water quality management plan and will be in compliance with the antidegradation policy.

The State of New Mexico

( ) certifies that the discharge will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of State law

(x) certifies that the discharge will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of State law upon inclusion of the following conditions in the permit (see attachments)

( ) denies certification for the reasons stated in the attachment

( ) waives its right to certify

In order to meet the requirements of State law, including water quality standards and appropriate basin plan as may be amended by the water quality management plan, each of the conditions cited in the draft permit and the State certification shall not be made less stringent.

The Department reserves the right to amend or revoke this certification if such action is necessary to ensure compliance with the State's water quality standards and water quality management plan.

Please contact Sarah Holcomb at (505) 827-2798, if you have any questions concerning this certification.

Comments and conditions pertaining to this draft permit are attached.

Sincerely,

/s/ Shelly Lemon

Shelly Lemon, Chief
Surface Water Quality Bureau

2017 Construction General Permit Modifications
State Comments on the Proposed NPDES Permit
NMR100000
February 1, 2019

The following revisions are necessary to ensure that discharges allowed under the National Pollutant Discharge Elimination System (NPDES) permit protect State of New Mexico water quality standards (WQS) adopted in accordance with §303 of the Clean Water Act (CWA) and the New Mexico Water Quality Act [NMSA 1978, §§ 74-6-1 to -17]. State of New Mexico (State) WQS are published in the document entitled Standards for Interstate and Intrastate Surface Waters, New Mexico Water Quality Control Commission (WQCC), 20.6.4 New Mexico Administrative Code (NMAC} as amended by the WQCC and approved by the United States Environmental Protection Agency {EPA or USEPA) as of August 11, 2017.

NPDES regulations at 40 CFR 122.44(d)(l)(i) require that permit *limitations must control all pollutants or pollutant parameters... which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard…*

<u>Conditions of Certification</u>

The following revisions are necessary to ensure that discharges allowed under the National Pollutant Discharge Elimination System (NPDES) permit protect State of New Mexico water quality standards (WQS) adopted in accordance with §303 of the Clean Water Act (CWA) and the New Mexico Water Quality Act [NMSA 1978, §§ 74-6-1 to -17]. State of New Mexico (State) WQS are published in the document entitled Standards for Interstate and Intrastate Surface Waters, New Mexico Water Quality Control Commission (WQCC), 20.6.4 New Mexico Administrative Code (NMAC) as amended by the WQCC and approved by the United States Environmental Protection Agency (EPA or USEPA) as of June 5, 2013.

NPDES regulations at 40 CFR 124.53(e)(2) require:
When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirement listed in paragraph (e)(l) of this section. For each more stringent condition, the certifying State agency shall cite the CWA or State law references upon which that condition is based.

<u>Background for Condition #1:</u>
20.6.4.13 NMAC General Criteria states:

…Surface waters of the state shall be free of any water contaminant 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 use with property.

A. Bottom Deposits and Suspended or Settleable Solids:

(1) *Surface waters of the state shall be free of water contaminants including fine sediment particles (less than two millimeters in diameter), precipitates or organic or inorganic solids from other than natural causes that have settled to form layers on or fill the interstices of the natural or dominant substrate in quantities that damage or impair the normal growth, function or reproduction of aquatic life or significantly alter the physical or chemical properties of the bottom.*

(2) *Suspended or settleable solids from other than natural causes shall not be present in surface waters of the state in quantities that damage or impair the normal growth, function or reproduction of aquatic life or adversely affect other designated uses.*

B. ***Floating Solids, Oil and Grease:*** *Surface waters of the state shall be free of oils, scum, grease and other floating materials resulting from other than natural causes that would cause the formation of a visible sheen or visible deposits on the bottom or shoreline, or would damage or impair the normal growth, function or reproduction of human, animal, plant or aquatic life.*

C. ***Color:*** *Color-producing materials resulting from other than natural causes shall not create an aesthetically undesirable condition nor shall color impair the use of the water by desirable aquatic life presently common in surface waters of the state.*

E. Toxic Pollutants:

Except as provided in 20.6.4.16 NMAC, surface waters of the state shall be free of toxic pollutants from other than natural causes in amounts, concentrations or combinations that affect the propagation of fish or that are toxic to humans, livestock or other animals, fish or other aquatic organisms, wildlife using aquatic environments for habitation or aquatic organisms for food, or that will or can reasonably be expected to bioaccumulate in tissues of fish, shellfish and other aquatic organisms to levels that will impair the health of aquatic organisms or wildlife or result in unacceptable tastes, odors or health risks to human consumers of aquatic organisms.

J. ***Turbidity:*** *Turbidity attributable to other than natural causes shall not reduce light transmission to the point that the normal growth, function or reproduction of aquatic life is impaired or that will cause substantial visible contrast with the natural appearance of the water. Activities or discharges shall not cause turbidity to increase more than 10 NTU over background turbidity when the background turbidity, measured at a point immediately upstream of the activity, is 50 NTU or less, nor to increase more than 20 percent when the background turbidity is more than 50 NTU. However, limited-duration turbidity increases caused by dredging, construction or other similar activities may be allowed provided all practicable turbidity control techniques have been applied and all appropriate permits, certifications and approvals have been obtained.*

K. ***Total Dissolved Solids (TDS):*** *TDS attributable to other than natural causes shall not damage or impair the normal growth, function or reproduction of animal, plant or aquatic life. TDS shall be measured by either the "calculation method" (sum of constituents) or the filterable residue method. Approved test procedures for these determinations are set forth in 20.6.4.14 NMAC.*

L. ***Dissolved Gases:*** *Surface waters of the state shall be free of nitrogen and other dissolved gases at levels above 110 percent saturation when this supersaturation is attributable to municipal, industrial or other discharges.*

And, in 20.6.4.52 NMAC:

PECOS RIVER BASIN: In order to protect existing and designated uses, it is a goal of the state of New Mexico to prevent increases in TDS in the Pecos River above the following benchmark values, which are expressed as flow-weighted, annual average concentrations, at three USGS gauging stations: at Santa Rosa 500 mg/L; near Artesia 2,700 mg/L; and near Malaga 3,600 mg/L. The benchmark values serve to guide state action. They are adopted pursuant to the New Mexico Water Quality Act, not the Clean Water Act.

And, in 20.6.4.54 NMAC:

COLORADO RIVER BASIN: For the tributaries of the Colorado river system, the state of New Mexico will cooperate with the Colorado river basin states and the federal government to support and implement the salinity policy and program outlined in the most current "review, water quality standards for salinity, Colorado river system" or equivalent report by the Colorado river salinity control forum.

Segment-specific criteria across the state specify numeric limits for TDS, sulfate and chloride depending on the receiving waterbody, and numeric constituent specific values in 20.6.4.900 NMAC also apply depending on the designated use of the waterbody.

Condition #1:

With respect to construction site dewatering operations, especially in urban areas, there is potential to tap into an existing shallow groundwater contaminant plume and exceed the general conditions listed above. Without testing of the groundwater, it is impossible to determine whether a construction site groundwater dewatering activity would cause or contribute to surface water quality impairments.

With the following condition, EPA must amend the NOI to include a question for the permittee to indicate whether they anticipate construction site groundwater dewatering activities to occur at their site. The permittee must be able to indicate flow rate and whether they anticipate encountering impacted groundwater.

If construction dewatering activities are anticipated at a site, permittees must complete the following steps:

1. *Investigative information must be documented in the facility SWPPP.*
   a. *Refer to the GWQB Mapper at https://gis.web.env.nm.gov/GWQB/ AND the PSTB Mapper (Go Mapper) at https://gis.web.env.nm.gov/GoNM/ and check if the following sources are located within the noted distance from your anticipated construction site groundwater dewatering activity:*

Project Location Relative to a Source of Potential Groundwater Contamination	***Constituents likely to be required for testing***
Within 0.5 mile of an open Leaking Underground Storage Tank (LUST) site	*BTEX (Benzene, Toluene, Ethylbenzene, and Xylene) plus additional parameters depending on site conditions.**
Within 0.5 mile of an open Voluntary Remediation site	*All parameters listed in Appendix A (or an alternate list approved by the NMED SWQB)***
Within 0.5 mile of an open RCRA Corrective Action Site	
Within 0.5 mile of an open Abatement Site	
Within 0.5 mile of an open Brownfield Site	
Within 1.0 mile or more of a Superfund site or National Priorities List (NPL) site with associated groundwater contamination.	

**For further assistance determining whether dewatering may encounter impacted groundwater, the permittee may contact the NMED Ground Water Quality Bureau at: 505-827-2965.*
*** EPA approved-sufficiently sensitive methods must be used – approved methods are listed in 40 CFR Part 136.3.*

2. *Indicate on the NOI that dewatering activities are anticipated. Provide information on flow and potential to encounter impacted groundwater.*
3. *Permittee must test the quality of the groundwater according to the chart above. Hardness and pH must also be measured.*

4. *Permittee must send test result data to EPA Region 6 and the NMED Surface Water Quality Bureau. If the test data exceed standards, it cannot be discharged from the construction site into surface waters under this permit. Discharge to surface waters must be conducted under a separate NPDES individual permit to ensure proper treatment and disposal.*
    a. *If disposal will be to the ground surface or in an unlined pond, the permittee must submit an NOI to the NMED Ground Water Quality Bureau.*

Background for Condition #2:
State regulations at 20.6.4.8 NMAC state:

No degradation shall be allowed in waters designated by the commission as outstanding national resource waters (ONRWs), except as provided in Subparagraphs (a) through (e) of this paragraph and in Paragraph (4) of this Subsection A.

Condition #2:

Operators are not eligible to obtain authorization under this permit for all new and existing storm water discharges to outstanding national resource waters (ONRWs) (also referred to as "Tier 3" waters.)

NMED does not believe compliance with the permit necessarily assures that no degradation will occur. Although state WQS provide for temporary and short-term degradation of water quality in an ONRW under very limited circumstances if approved by the Water Quality Control Commission as specified at 20.6.4.8.A NMAC, the approval process required for these activities does not lend itself for use for projects covered under this general permit. This condition is necessary to ensure that no degradation is allowed in ONRWs by requiring proposed storm water discharges to be reviewed under the individual permit process. Tier 3 waters are defined in Appendix F of the proposed permit.

Background for Condition #3:
EPA regulations at 40 CFR Part 122.44(k) require, in part:

Best management practices (BMPs) to control or abate the discharge of pollutants when:
(3) Numeric effluent limitations are infeasible, or
(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA,

State regulations at 20.6.4.8.A(2) state in part:

…Further, the state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources…

State regulations at 20.6.4.8.B NMAC also state:

(3) assess the probable effect of the effluent on the receiving water relative to its attainable or designated uses and numeric and narrative criteria.

Condition #3:
Operators who intend to obtain authorization under this permit for new and existing storm water discharges from construction sites must satisfy the following condition:

The SWPPP must include site-specific interim and permanent stabilization, managerial, and structural solids, erosion and sediment control best management practices (BMPs) and/or other controls that are designed to prevent to the maximum extent practicable an increase in the sediment yield and flow velocity from pre-construction, pre-development conditions to assure that applicable standards in 20.6.4.NMAC, including the antidegradation policy, or TMDL waste load allocations (WLAs) are met. This requirement applies to discharges both during construction and after construction operations have been completed. The SWPPP must identify and document the rationale for selecting these BMPs and/or other controls. The SWPPP must also describe design specifications, construction specifications, maintenance schedules (including a long term maintenance plan), criteria for inspections, and expected performance and longevity of these BMPs. **For sites greater than 5 acres in size,** BMP selection must be made based on the use of appropriate soil loss prediction models (i.e. SEDCAD, RUSLE, SEDIMOT, MULTISED, etc.) OR equivalent generally accepted (by professional erosion control specialists) soil loss prediction tools.

For all sites, the operator(s) must demonstrate, and include documentation in the SWPPP, that implementation of the site-specific practices will assure that the applicable standards or TMDL WLAs are met, and will result in sediment yields and flow velocities that, to the maximum extent practicable, will not be greater than the sediment yield levels and flow velocities from pre-construction, pre-development conditions.

All SWPPPs must be prepared in accordance with good engineering practices by qualified (e.g. CPESC certified, engineers with appropriate training) erosion control specialists familiar with the use of soil loss prediction models and design of erosion and sediment control systems based on these models (or equivalent soil loss prediction tools). Qualifications of the preparer (e.g., professional certifications, description of appropriate training) must be documented in the SWPPP. The operator(s) must design, implement, and maintain BMPs in the manner specified in the SWPPP.

NMED supports the use of EPA's small residential lot template if a site qualifies to use it as explained in the document, as long as it is consistent with the above requirements. NMED's requirement does not preclude small residential sites from using the template, but it may require an additional short paragraph to justify the selection of specific BMPs for the site.

Background for Condition #4:
State regulations at 20.6.2.1203 NMAC state:

A. With respect to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, the following notifications and corrective actions are required:

1. As soon as possible after learning of such a discharge, but in no event more than twenty-four (24) hours thereafter, any person in charge of the facility shall orally notify the Chief of the Ground Water Quality Bureau of the department, or his counterpart in any constituent agency delegated responsibility for enforcement of these rules as to any facility subject to such delegation.

Condition #4:

Contact information for NMED must be added to the reporting requirements for Emergency Spill Notification Requirements in Part 2.3.6 of the proposed permit. Permittees can call 505-827-9329 for emergencies at any time and 505-476-6000 for non-emergencies during business hours from 8am-5pm, Monday through Friday.

Background for Condition #5:
EPA regulations at 40 CFR Part 122.44(k) require, in part:

> *Best management practices (BMPs) to control or abate the discharge of pollutants when:*
> *(3) Numeric effluent limitations are infeasible, or*
> *(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA,*

State regulations at 20.6.4.8.A(2) state in part:

> *…Further, the state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources…*

Condition #5:

NMED requires that EPA strike the language in the permit regarding the new Equivalent Analysis Waiver proposed in Appendix C.

Before NMED can evaluate this waiver, the following issues must be addressed:

- There is no guidance for permittees or regulatory authorities on how to conduct an equivalent analysis.
- EPA should consider defining "non-impaired" waters for the purposes of this part.
- What is a "sediment-related" parameter?
- If a water is impaired for a non-sediment related parameter, can this waiver still be used?
- What does this equivalent analysis look like – is it similar to a TMDL analysis?
- What would be EPA's process for review and approval of these analyses?