

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



IN THE MATTER OF:
PETITION FOR RULEMAKING)
FOR PROCEDURES GOVERNING STATE)
CERTIFICATION OF FEDERAL PERMITS)
UNDER THE CLEAN WATER ACT,)
)
NEW MEXICO ENVIRONMENT)
DEPARTMENT,)
)
Petitioner.)
_____)

No. WQCC 10-10 (R)

RULEMAKING PETITION

Pursuant to section 301 of the Guidelines for Water Quality Control Commission Regulation Hearings (1993) (“Guidelines”), the New Mexico Environment Department (“Department”) hereby petitions the Water Quality Control Commission (“Commission”) for a rulemaking to establish procedures governing State certification of federal permits under section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. The Department seeks a hearing on this Rulemaking Petition during the Commission’s December 14, 2010 meeting.

I. REASONS FOR THE REGULATORY CHANGE

Adoption of procedural rules for certification of federal permits issued under the Clean Water Act is required under both State and federal law. In addition, such procedural rules would serve to clarify and lend certainty to the certification process.

Under section 301(a) of the federal Clean Water Act, the discharge of any pollutant by any person into a water of the United States is unlawful, except in accordance with a permit issued under the Act. 33 U.S.C. § 1311(a). The Clean Water Act establishes two primary programs to implement the permit requirement. First, section 402 of the Act establishes the

National Pollutant Discharge Elimination System (“NPDES”). 33 U.S.C. § 1342. It authorizes the United States Environmental Protection Agency (“EPA”), or a state under an approved permit program, to issue NPDES permits for the discharge of pollutants into waters of the United States. *Id.* The State of New Mexico does not have an approved NPDES permit program. NPDES permits for the discharge of pollutants into waters of the United States originating in New Mexico are issued by EPA. Second, section 404 of the Act establishes a permitting program for the discharge of dredged or fill material. 33 U.S.C. § 1344. It authorizes the Army Corps of Engineers, or a state under an approved permit program, to issue permits for the discharge of dredged or fill material into waters of the United States. *Id.* Again, the State of New Mexico does not have an approved permit program for the discharge of dredged and fill material. Permits for discharges of dredged and fill material into waters of the United States in New Mexico are issued by the Army Corps of Engineers.

In addition, several other federal statutes require licenses or permits for activities affecting waters of the United States. For example, the Federal Power Act authorizes the Federal Energy Regulatory Commission (“FERC”) to issue preliminary permits and licenses for the construction and operation of dams, water conduits, and reservoirs. 16 U.S.C. § 797(e), (f). And the Rivers and Harbors Act of 1899 authorizes the Army Corps of Engineers to issue permits and licenses for the construction of any bridge, causeway, dam, dike, pier, wharf, jetty, or other obstruction to navigation in waters of the United States. 33 U.S.C. §§ 401, 403. Although the primary purpose of these permit programs is not to prevent or regulate the discharge of pollutants, the permitted activities nevertheless could incidentally result in a discharge into waters of the United States.

The Clean Water Act requires state involvement in the issuance of such federal permits. Section 401(a) of the Act provides that an applicant for a federal license or permit to conduct any activity “which may result in any discharge into” waters of the United States must obtain from the state in which the discharge originates a certification that the discharge will comply with all applicable requirements of sections 208(e), 301, 302, 303, 306, and 307 of the Clean Water Act,¹ and with all applicable requirements of state law. 33 U.S.C. § 1341(a), (d). The Environment Department, through its Surface Water Quality Bureau, administers the certification of these federal permits in New Mexico.

Both the Clean Water Act and the New Mexico Water Quality Act require the adoption of procedures for certification of federal permits. Section 401(a)(1) of the Clean Water Act provides that the appropriate state agency “shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.” 33 U.S.C. § 1341(a)(1). The Water Quality Act similarly provides that “[t]he [C]ommission shall adopt regulations establishing procedures for certifying federal water quality permits.” NMSA 1978, § 74-6-5(B).

Moreover, promulgation of such procedures would add clarity and certainty to the certification process. Interested parties would have a better understanding of how the process works, and what their options are to participate in the process. In the past, some parties have criticized the lack of such procedures.²

It should be noted that, to a limited extent, the Commission has already established certain procedures that apply to the certification of permits. The Commission’s Adjudicatory

¹ 33 U.S.C. §§ 1288(e), 1311, 1312, 1313, 1316, and 1317.

² See *U.S. Dep’t of Energy et al. v. N.M. Env’t Dep’t*, No. WQCC 08-07 (A), Los Alamos National Security’s and United States Department of Energy’s Response to Motion to Dismiss Petition for Review 9-10 (Sept. 5, 2008) (arguing that the lack of certification procedures creates uncertainty regarding the time for appeal).

Procedures apply to “the appeal from permitting actions pursuant to the Water Quality Act.” 20.1.3.2.A(1) NMAC. The definition of the term “permitting action” expressly includes “the certification of a federal water quality permit.” 20.1.3.7(11)(a) NMAC. However, these procedures apply only once a certification is appealed to the Commission. There are no comprehensive procedures governing the initial certification by the Department. In particular, there are no rules governing notice and the opportunity for public comment on a pending certification, the form the certification must take, or review of the certification by the Department Secretary.

II. PROPOSED REGULATORY CHANGE

The Department has drafted and is proposing for the Commission’s adoption regulations that would establish procedures for certification of federal permits. The proposed regulations would govern State certification of NPDES permits issued by EPA, permits for discharge of dredged or fill material issued by the Army Corps of Engineers, and other federal permits that may effect waters of the United States. The Department solicited and received comments on a draft of these proposed regulations from interested stakeholders. The Department has considered those comments in drafting the proposed regulations. A copy of the proposed regulations is attached hereto as Exhibit 1.

The first section of the proposed regulations, section 20.6.2.2001 NMAC, would apply to certification of NPDES permits issued by EPA under section 402 of the Clean Water Act. It would require the Department to issue a public notice that it is reviewing a draft NPDES permit for purpose of certification or denial of certification. 20.6.2.2001.C and D NMAC (proposed). The provision would prescribe how the notice is to be published and to whom it is to be sent. *Id.* It would also prescribe the information to be included in the notice. 20.6.2.2001.E NMAC

(proposed). The Department would have the option, if practical, to issue the notice jointly with EPA. 20.6.2.2001.C (proposed). The public would then have a minimum of thirty days to submit comments to the Department on the draft permit. 20.6.2.2001.F NMAC (proposed). The Department would be required to consider all pertinent public comments. *Id.* Following the public comment period, the Department would then certify the permit, certify the permit subject to conditions, or deny certification. 20.6.2.2001.F NMAC (proposed). If the Department does not act within the time prescribed by the federal permitting agency for such action, the authority to do so would be waived. *Id.*; *see also* 33 U.S.C. § 1341(a)(1). Any person adversely affected by the certification decision would then have thirty days to appeal that decision to the Department Secretary. 20.6.2.2001.G NMAC (proposed). The Secretary could hold a hearing on the appeal. *Id.* The Secretary's decision could then be appealed to the Commission. 20.6.2.2001.I NMAC (proposed).

The second section of the proposed regulations, section 20.6.2.2002 NMAC, would apply to certification of permits for discharge of dredged or fill material issued by the Army Corps of Engineers under section 404 of the Clean Water Act. It would establish certification procedures very similar to those for NPDES permits. However, it would allow the Department to certify emergency permits issued under federal regulations at 33 C.F.R. § 325.2(e)(4) without following the requirements for public notice and comment. 20.6.2.2002.G NMAC (proposed). Nevertheless, the Department would be required to make reasonable efforts to obtain comments from interested state and local agencies and the affected public. *Id.*

The third section of the proposed regulations, section 20.6.2.2003 NMAC, would apply to certification of other federal permits for activities that might result in a discharge into waters

of the United States, such as permits issued by FERC under the Federal Power Act, or permits issued by the Army Corps of Engineers under the Rivers and Harbors Act of 1899.

The Department solicited comments on a draft of the proposed regulations from interested members of the public. On June 25, 2010, the Department sent a copy of the draft proposed regulations by electronic mail to those persons on the Surface Water Quality Bureau mailing list, soliciting comments for thirty days. The Department also posted a copy of the draft proposed regulations on its website. The Department received comments from the Albuquerque Bernalillo County Water Utility Authority; Amigos Bravos; the International Boundary and Water Commission; Los Alamos National Security, LLC and the United States National Nuclear Security Administration; Montgomery and Andrews; the San Juan Water Commission; the United States Department of the Army, Corps of Engineers; and the United States Environmental Protection Agency. All of the comments are attached hereto as Exhibit 2. The Department carefully considered these comments in preparing the proposed regulations submitted herewith (Exhibit 1). The Department has prepared a written response to the comments received, which is attached hereto as Exhibit 3.

III. CONCLUSION

For the foregoing reasons, the Department respectfully petitions the Commission to promulgate the certification procedures attached hereto as Exhibit 1. The Department further requests that the Commission schedule a hearing on the proposed rulemaking during its December 14, 2010 meeting.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

September 28, 2010 By: 

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20.6.2.2001 PROCEDURES FOR CERTIFICATION OF FEDERAL NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMITS:

A. This section applies to the State certification of draft National Pollutant Discharge Elimination System (NPDES) permits under section 401 of the federal Clean Water Act. The purpose of such certification is to reasonably ensure that the permitted activities will be conducted in a manner that will comply with applicable water quality standards, including the antidegradation policy, and the statewide water quality management plan.

B. After review of a draft permit, the department will either:

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

(2) certify 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 specified conditions in the permit; or

(3) deny certification and include reasons for the denial.

(4) If the department does not act on the certification within the time prescribed by the federal permitting agency for such action, the authority to do so shall be waived.

C. Pursuant to federal regulations at 40 Code of Federal Regulations section 124.10(c), the U.S. Environmental Protection Agency provides notice of draft NPDES permits to the applicant (except for general permits); various local, state, federal, tribal and pueblo government agencies; and other interested parties, and it allows at least 30 days of public comment. To the extent practicable, the department will provide public notice that the department is reviewing a draft NPDES permit for the purpose of preparing a state certification or denial pursuant to Section 401 of the federal Clean Water Act jointly with the notice provided by the U.S. Environmental Protection Agency. The department will also post notice on its website.

D. When joint notice is impractical, the department shall provide notice that the department is reviewing a draft NPDES permit for purpose of preparing a state certification or denial pursuant to Section 401 of the federal Clean Water Act as follows:

(1) for general permits by:

(a) posting notice on the department's website;

(b) publishing notice in at least one newspaper of general circulation;

(c) mailing or e-mailing notice to those persons on the general mailing list maintained by the department who have requested such notice; and

(d) mailing or e-mailing notice to any affected local, state, federal, tribal, or pueblo government agency, as identified by the department; or

(2) for individual permits by:

(a) posting notice on the department's website;

(b) publishing notice in a newspaper of general circulation in the location of the discharge;

(c) mailing notice to the applicant;

(d) mailing or e-mailing notice to those persons on the general and facility-specific mailing list maintained by the department who have requested such notice; and

(e) mailing notice to any affected local, state, federal, tribal, or pueblo government agency, as identified by the department.

E. Public notices may describe more than one permit or permit action. The notice provided under Subsections C and D of 20.6.2.2001 NMAC shall include:

(1) for general permits:

(a) a statement that the department will accept written comments on the draft permit during the comment period including the address where comments may be submitted;

(b) a brief description of the activities that produce the discharge; and

(c) a description of the geographic area to be covered by the permit; or

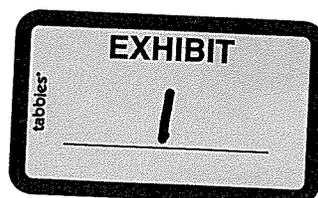
(2) for individual permits:

(a) a statement that the department will accept written comments on the draft permit during the comment period including the address where comments may be submitted;

(b) the name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit;

(c) a brief description of the activities that produce the discharge; and

(d) a general description of the location of the discharge and the name of the receiving water.



F. Following the public notice provided under Subsections C or D of 20.6.2.2001 NMAC, there shall be a period of at least 30 days during which interested persons may submit written comments to the department. The 30-day comment period shall begin on the date of the public notice provided under Subsections C or D of 20.6.2.2001 NMAC. The department shall consider all pertinent comments.

G. Following the public comment period provided under Subsection F of 20.6.2.2001 NMAC, the department shall issue a final permit certification including any conditions that the department places on the certification, or issue a statement of denial including the reasons for the denial. The final certification will generally be issued within 33 days from the date a request to grant, deny or waive certification is received by the department, unless the department in consultation with the U.S. Environmental Protection Agency Regional Administrator finds that unusual circumstances require a longer time. The department shall send a copy of the final permit certification or denial to the U.S. Environmental Protection Agency, the applicant (except for general permits), and those members of the public who submitted comments to the department.

- (1) The permit certification shall be in writing and shall include:
 - (a) the name of the applicant (except for general permits) and the NPDES permit number;
 - (b) a statement that the department has examined the application or other relevant information and bases its certification upon an evaluation of the information contained in such application or other information which is relevant to water quality considerations;
 - (c) a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;
 - (d) a statement of any conditions which the department deems necessary or desirable with respect to the discharge of the activity;
 - (e) identification of any condition more stringent than that in the draft permit required to assure compliance 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 citing the Clean Water Act or state law upon which the condition is based;
 - (f) a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of state law, including water quality standards; and
 - (g) such other information as the department may determine to be appropriate.
- (2) With justification, including any of the reasons listed in the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(E), the department may deny permit certification. Denial of permit certification shall be in writing and shall include:
 - (a) the name of the applicant (except for general permits) and the NPDES permit number;
 - (b) a statement that the department has examined the application or other relevant information and bases its denial upon an evaluation of the information contained in such application or other information which is relevant to water quality considerations;
 - (c) a statement of denial including the reasons for the denial; and
 - (d) such other information as the department may determine to be appropriate.

H. Any person who is adversely affected by the certification or denial of a specific permit may appeal such certification or denial by filing a petition for review with the secretary within 30 days after the department issues the final permit certification or statement of denial. Such petition shall be in writing and shall include a concise statement of the reasons for the appeal and the relief requested. The secretary may hold a hearing on the appeal. In any such appeal hearing, the procedures of Part 20.1.4 NMAC shall not apply. The department shall give notice of the appeal hearing at least 30 days prior to the hearing. The notice shall state the date, time, and location of the appeal hearing and shall include the pertinent information listed in Subsection E(2)(b), (c), and (d) of 20.6.2.2001 NMAC. The Secretary shall appoint a hearing officer to preside over the appeal hearing. Any person may present oral or written statements, data, technical information, legal arguments, or other information on the permit certification or denial during the appeal hearing. Reasonable time limits may be placed on oral statements, and the submission of written statements may be required. Cross examination of persons presenting oral statements shall not be allowed. Within 30 days after the completion of the hearing, or such other time as the secretary may order given the complexities of the case, the hearing officer shall submit recommendations to the secretary. The secretary shall issue a final decision on the appeal within 30 days after receiving the recommendation, or such other time as the secretary may order given the complexities of the case.

I. Pursuant to the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(O), any person who is adversely affected by the secretary's final decision may file with the commission a petition for review of that decision based on the administrative record.

20.6.2.2002 PROCEDURES FOR CERTIFICATION OF FEDERAL PERMITS FOR DISCHARGE OF DREDGED OR FILL MATERIAL:

A. This section applies to the State certification of draft permits or permit applications for the discharge of dredged or fill material under section 401 of the federal Clean Water Act. The purpose of such certification is to reasonably ensure that the permitted activities will be conducted in a manner that will comply with applicable water quality standards, including the antidegradation policy, and the statewide water quality management plan.

B. After review of a draft permit or permit application, the department will either:

- (1) certify that the discharge will comply with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the federal Clean Water Act and with appropriate requirements of State law;
- (2) certify that the discharge will comply with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of State law upon inclusion of specified conditions in the permit; or
- (3) deny certification and include reasons for the denial.
- (4) If the department does not act on the certification within the time prescribed by the federal permitting agency for such action, the authority to do so shall be waived.

C. Pursuant to federal regulations at 33 Code of Federal Regulations section 325.3 and section 330.5, the U.S. Army Corps of Engineers provides notice of draft dredged or fill permits and permit applications to the applicant (except for general or nationwide permits); various local, state, federal, tribal and pueblo government agencies; and other interested parties, and it allows at least 15 days of public comment. To the extent practicable, the department will provide public notice that the department is reviewing a draft permit or permit application for the purpose of preparing a state certification or denial pursuant to Section 401 of the federal Clean Water Act jointly with the notice provided by the U.S. Army Corps of Engineers. The department will also post notice on its website.

D. When joint notice is impractical, the department shall provide notice that the department is reviewing a draft dredged or fill permit or permit application for purpose of preparing a state certification or denial pursuant to Section 401 of the federal Clean Water Act as follows:

- (1) for general permits by:
 - (a) posting notice on the department's website;
 - (b) publishing notice in at least one newspaper of general circulation;
 - (c) mailing or e-mailing notice to those persons on the general mailing list maintained by the department who have requested such notice; and
 - (d) mailing or e-mailing notice to any affected local, state, federal, tribal, or pueblo government agency, as identified by the department; or
- (2) for individual permit applications by:
 - (a) posting notice on the department's website;
 - (b) publishing notice in a newspaper of general circulation in the location of the discharge;
 - (c) mailing notice to the applicant;
 - (d) mailing or e-mailing notice to those persons on the general and facility-specific mailing list maintained by the department who have requested such notice; and
 - (e) mailing notice to any affected local, state, federal, tribal, or pueblo government agency, as identified by the department.

E. Public notices may describe more than one permit or permit action. The notice provided under Subsections C and D of 20.6.2.2002 NMAC shall include:

- (1) for general permits:
 - (a) a statement that the department will accept written comments on the draft permit during the comment period including the address where comments may be submitted;
 - (b) a brief description of the activities that produce the discharge; and
 - (c) a description of the geographic area to be covered by the permit; or
- (2) for individual permit applications:
 - (a) a statement that the department will accept written comments on the permit application during the comment period including the address where comments may be submitted;
 - (b) the name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit;
 - (c) a brief description of the activities that produce the discharge; and
 - (d) a general description of the location of the discharge and the name of the receiving water.

F. Following the public notice provided under Subsections C or D of 20.6.2.2002 NMAC, there shall be a period of at least 30 days during which interested persons may submit written comments to the department. The 30-day comment period shall begin on the date of the public notice provided under Subsections C or D of 20.6.2.2002 NMAC. The department shall consider all pertinent comments.

G. The public notice provisions in Subsection C and D of Section 20.6.2.2002 NMAC and the public comment provisions in Subsection F of Section 20.6.2.2002 NMAC shall not apply to permits issued using emergency procedures under 33 Code of Federal Regulations section 325.2(e)(4). However, even in emergency situations, reasonable efforts shall be made to receive comments from interested state and local agencies and the affected public.

H. Following the public comment period provided under Subsection F of 20.6.2.2002 NMAC, the department shall issue a final permit certification including any conditions that the department places on the certification, or issue a statement of denial including the reasons for the denial. The final certification will generally be issued within 60 days from the date a request to grant, deny or waive certification is received by the department, unless the department in consultation with the U.S. Army Corps of Engineers District Engineer finds that unusual circumstances require a longer time. The department shall send a copy of the final permit certification or denial to the Army Corps of Engineers, the applicant (except for general or nationwide permits), and those members of the public who submitted comments to the department.

(1) The permit certification or denial shall be in writing and shall include:

- (a) the name of the applicant (except for general permits) and the permit number;
- (b) a statement that the department has examined the application or other relevant information and bases its certification upon an evaluation of the information contained in such application or other information which is relevant to water quality considerations;
- (c) a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;
- (d) a statement of any conditions which the department deems necessary or desirable with respect to the discharge of the activity; and
- (e) such other information as the department may determine to be appropriate.

(2) With justification, including any of the reasons listed in the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(E), the department may deny permit certification. Denial of permit certification shall be in writing and shall include:

- (a) the name of the applicant (except for general permits) and the permit number;
- (b) a statement that the department has examined the application or other relevant information and bases its denial upon an evaluation of the information contained in such application or other information which is relevant to water quality considerations;
- (c) a statement of denial including the reasons for the denial; and
- (d) such other information as the department may determine to be appropriate.

I. Any person who is adversely affected by the certification or denial of a specific permit may appeal such certification or denial by filing a petition for review with the secretary within 30 days after the department issues the final permit certification or statement of denial. Such petition shall be in writing and shall include a concise statement of the reasons for the appeal and the relief requested. The secretary may hold a hearing on the appeal. In any such appeal hearing, the procedures of Part 20.1.4 NMAC shall not apply. The department shall give notice of the appeal hearing at least 30 days prior to the hearing. The notice shall state the date, time, and location of the appeal hearing and shall include the pertinent information listed in Subsection E(2)(b), (c), and (d) of 20.6.2.2002 NMAC. The Secretary shall appoint a hearing officer to preside over the appeal hearing. Any person may present oral or written statements, data, technical information, legal arguments, or other information on the permit certification or denial during the appeal hearing. Reasonable time limits may be placed on oral statements, and the submission of written statements may be required. Cross examination of persons presenting oral statements shall not be allowed. Within 30 days after the completion of the hearing, or such other time as the secretary may order given the complexities of the case, the hearing officer shall submit recommendations to the secretary. The secretary shall issue a final decision on the appeal within 30 days after receiving the recommendation, or such other time as the secretary may order given the complexities of the case.

J. Pursuant to the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(O), any person who is adversely affected by the secretary's final decision may file with the commission a petition for review of that decision based on the administrative record.

20.6.2.2003 PROCEDURES FOR CERTIFICATION OF OTHER FEDERAL PERMITS:

A. This section applies to the State certification of draft federal permits, permit applications or licenses under section 401 of the federal Clean Water Act, except for NPDES permits or permits for the discharge of dredged or fill material. For example, this section applies to certification of permits or licenses issued by the Federal Energy Regulatory Commission (FERC), and to permits or licenses issued under the Rivers and Harbors Act of 1899. The purpose of such certification is to reasonably ensure that the permitted activities will be conducted in a manner that will comply with applicable water quality standards, including the antidegradation policy, and the statewide water quality management plan.

B. After review of a draft permit, permit application or license, the department will either:

- (1) certify that the activity will comply with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the federal Clean Water Act and with appropriate requirements of State law;
- (2) certify that the activity will comply with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of State law upon inclusion of specified conditions in the permit; or
- (3) deny certification and include reasons for the denial.
- (4) If the department does not act on the certification within the time prescribed by the federal permitting agency for such action, the authority to do so shall be waived.

C. To the extent practicable, the department will provide public notice that the department is reviewing a draft federal permit, permit application or license for the purpose of preparing a state certification or denial jointly with the notice provided by the federal permitting or licensing agency. The department will also post notice on its website.

D. When joint notice is impractical, the department shall provide notice that the department is reviewing a draft federal permit, permit application or license for purpose of preparing a state certification or denial pursuant to Section 401 of the federal Clean Water Act as follows:

- (1) for general permits or licenses by:
 - (a) posting notice on the department's website;
 - (b) publishing notice in at least one newspaper of general circulation;
 - (c) mailing or e-mailing notice to those persons on the general mailing list maintained by the department who have requested such notice; and
 - (d) mailing or e-mailing notice to any affected local, state, federal, tribal, or pueblo government agency, as identified by the department; or
- (2) for individual permits or licenses by:
 - (a) posting notice on the department's website;
 - (b) publishing notice in a newspaper of general circulation in the location of the permitted or licensed activity;
 - (c) mailing notice to the applicant;
 - (d) mailing or e-mailing notice to those persons on the general and facility-specific mailing list maintained by the department who have requested such notice; and
 - (e) mailing notice to any affected local, state, federal, tribal, or pueblo government agency, as identified by the department.

E. Public notices may describe more than one license, permit or permit action. The notice provided under Subsections C and D of 20.6.2.2003 NMAC shall include:

- (1) for general permits or licenses:
 - (a) a statement that the department will accept written comments on the permit or license during the comment period including the address where comments may be submitted; and
 - (b) a brief description of the permitted or licensed activities; and
 - (c) a description of the geographic area to be covered by the permit; or
- (2) for individual permits or licenses:
 - (a) a statement that the department will accept written comments on the permit or license during the comment period including the address where comments may be submitted;
 - (b) the name and address of the licensee, permittee or permit or license applicant and, if different, of the facility or activity regulated by the permit or license;
 - (c) a brief description of the permitted or licensed activities; and
 - (d) a general description of the location of the permitted or licensed activities and the name of the receiving water.

F. Following the public notice provided under Subsections C or D of 20.6.2.2003 NMAC, there shall be a period of at least 30 days during which interested persons may submit written comments to the department. The 30-day comment period shall begin on the date of the public notice provided under Subsections C or D of 20.6.2.2003 NMAC. The department shall consider all pertinent comments.

G. Following the public comment period provided under Subsection F of 20.6.2.2003 NMAC, the department shall issue a final certification including any conditions that the department places on the certification, or issue a statement of denial including the reasons for the denial. The final certification will generally be issued within 60 days from the date a request to grant or deny certification is received by the department, unless the department in consultation with the federal permitting or licensing agency finds that unusual circumstances require a longer time. The department shall send a copy of the final certification or denial to the federal permitting or licensing agency, the applicant (except for general permits), and those members of the public who submitted comments to the department.

- (1) The certification or denial shall be in writing and shall include:
 - (a) the name of the applicant (except for general permits) and the permit or license number;
 - (b) a statement that the department has examined the application or other relevant information and bases its certification upon an evaluation of the information contained in such application or other information which is relevant to water quality considerations;
 - (c) a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;
 - (d) a statement of any conditions which the department deems necessary or desirable with respect to the discharge of the activity;
 - (e) identification of any condition more stringent than that in the draft permit or license required to assure compliance with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of state law citing the Clean Water Act or state law upon which the condition is based;
 - (f) a statement of the extent to which each condition of the draft permit or license can be made less stringent without violating the requirements of state law, including water quality standards; and
 - (g) Such other information as the department may determine to be appropriate.
- (2) With justification, including any of the reasons listed in the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(E), the department may deny certification. Denial of certification shall be in writing and shall include:
 - (a) the name of the applicant (except for general permits) and the permit or license number;
 - (b) a statement that the department has examined the application or other relevant information and bases its denial upon an evaluation of the information contained in such application or other information which is relevant to water quality considerations;
 - (c) a statement of denial including the reasons for the denial; and
 - (d) such other information as the department may determine to be appropriate.

H. Any person who is adversely affected by the certification or denial of a specific permit or license may appeal such certification or denial by filing a petition for review with the secretary within 30 days after the department issues the final certification or statement of denial. Such petition shall be in writing and shall include a concise statement of the reasons for the appeal and the relief requested. The secretary may hold a hearing on the appeal. In any such appeal hearing, the procedures of Part 20.1.4 NMAC shall not apply. The department shall give notice of the appeal hearing at least 30 days prior to the hearing. The notice shall state the date, time, and location of the appeal hearing and shall include the pertinent information listed in Subsection E(2)(b), (c), and (d) of 20.6.2.2003 NMAC. The Secretary shall appoint a hearing officer to preside over the appeal hearing. Any person may present oral or written statements, data, technical information, legal arguments, or other information on the certification or denial during the appeal hearing. Reasonable time limits may be placed on oral statements, and the submission of written statements may be required. Cross examination of persons presenting oral statements shall not be allowed. Within 30 days after the completion of the hearing, or such other time as the secretary may order given the complexities of the case, the hearing officer shall submit recommendations to the secretary. The secretary shall issue a final decision on the appeal within 30 days after receiving the recommendation, or such other time as the secretary may order given the complexities of the case.

I. Pursuant to the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(O), any person who is adversely affected by the secretary's final decision may file with the commission a petition for review of that decision based on the administrative record.

**COMMENTS ON DRAFT PROCEDURES
FOR CERTIFICATION OF FEDERAL PERMITS**

Letter from John Stomp III, P.E., Chief Operating Officer, Albuquerque Bernalillo County Water Utility Authority, dated July 26, 2010 (2 pages).

Letter from Rachel Conn, Policy Analyst, Amigos Bravos, dated July 2, 2010 (5 pages).

Letter from Lisa M. Santana, Ph.D., Acting Division Chief, Environmental Management Division, International Boundary and Water Commission, dated July 14, 2010 (1 page).

Letter from Louis W. Rose, Montgomery & Andrews, dated July 27, 2010 (5 pages).

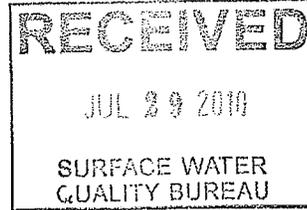
Letter from L. Randy Kirkpatrick, Executive Director, San Juan Water Commission, dated July 25, 2010 (3 pages).

Letter from Allan E. Steinle, Chief, Regulatory Division, United States Department of the Army, Albuquerque District, Corps of Engineers, dated June 4, 2010 (2 pages).

Comments of United States Department of Energy, National Nuclear Security Administration and Los Alamos National Security LLC, undated (2 pages).

Electronic message from Brent Larson, Acting Chief, Permits and Technical Assistance Section, NPDES Permits and TMDLs Branch, United States Environmental Protection Agency Region 6, dated June 9, 2010 (1 page).





Chair

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Executive Director
Mark S. Sanchez

Website
www.abcwua.org

July 26, 2010

Glenn Saums, Acting Bureau Chief
NMED-SWQB
P.O. Box 5469
Santa Fe, New Mexico 87502-5469

Re: Public Discussion Draft for Certification of Federal Permits Pursuant to Section 401 of Clean Water Act.

Dear Mr. Saums:

Thank you for the opportunity to provide comments on the public discussion draft regulations for certification of federal permits pursuant to Section 401 of the federal Clean Water Act (20.6.2.2000 NMAC). The Albuquerque Bernalillo County Water Utility Authority provides the following comments on the draft regulation for your consideration:

20.6.2.2001(E)(1)(a) and (2)(a). The public notice will include a statement "that the department will accept written comments on the permit certification or denial during the comment period..." Will NMED provide the actual certification for review? What documentation will be available for interested persons to review?

20.6.2.2001(G). It would be helpful if NMED delineated in the statement of reasons for the proposed rule the steps used in the 401 certification review process. Are there other criteria/factors besides those listed in Section 74-6-5(E) NMSA 1978, that NMED uses to deny certification?

What reasons would NMED use to waive certification? Does NMED expect to document "waivers" in writing?

The draft regulations require NMED to take action from the "date a request to grant, deny or waive is received by the department." This is the first time the phrase is used in the regulation. Is that the same as when the state receives notice of the draft permit?

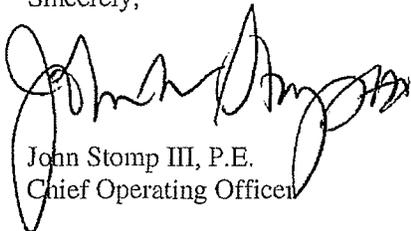
20.6.2.2001(H). "Any person who is adversely affected by the certification or denial of a specific permit may appeal such certification or denial..." This language appears to restrict appeals to certification or denial of certification. What happens if NMED waives certification?

If the certification decision is appealed, what is the impact on the effectiveness of the NPDES permit? Will the appeal impede EPA's issuance of the permit?

Glenn Saums
July 26, 2010
Page 2

Should you have questions about these comments, please contact myself at (505) 768-3631, jistomp@abcwua.org or you may contact Patrick Akin at (505) 873-3696, pakin@abcwua.org.

Sincerely,



John Stomp III, P.E.
Chief Operating Officer

cc: Barbara Gastian, Manager, Environmental Compliance Division
Joe Chwirka, P.E., Manager, Plant Operations Division
Patrick Akin, NPDES Program Manager



Friends of the Wild Rivers

P.O. Box 238, Taos, NM 87571

Telephone: 505.758.3474

Fax: 505.758.7345

July 2, 2010

Glenn Saums
Acting Bureau Chief
New Mexico Environment Dept.
Surface Water Quality Bureau
1190 St. Francis Dr., Room N2050 (87505)
P.O. Box 5469
Santa Fe, NM 87502-5469
glenn.saums@state.nm.us

RE: 20.6.2.2001 – 401 Regulations

Dear Mr. Saums:

Amigos Bravos is a statewide river conservation organization guided by social justice principles. Our mission is to protect and restore the rivers of New Mexico, and ensure that those rivers provide a reliable source of clean water to the communities and farmers that depend on them, as well as a safe place to swim, fish, and go boating. Amigos Bravos works locally, statewide and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. In this capacity Amigos Bravos works to make sure that New Mexico's water quality standards are protective enough to support the diverse human and non-human uses of our state's water resources and to make sure that these standards are implemented in processes like state 401 certification of federal permits or licenses. We would like to communicate the following comments and concerns regarding the draft 401 regulations being proposed by the New Mexico Environment Department (NMED).

Section 20.6.2.2001.A , Section 20.6.2.2002.A. :

The title and first sentence of these sections should include language that denial of certification is one of the potential outcomes of these regulations. In addition, because the state's antidegradation policy is a component of the state's water quality standards, the second sentence in these paragraphs should read, "comply with applicable water quality standards including the State's antidegradation policy, the statewide water quality management plan, and associated implementation guidance and procedures."

Sections 20.6.2.2001.D(1), 20.6.2.2002.D(1), and 20.5.2.2003.D(1):

Amigos Bravos believes that the same amount of public notice that is given for an individual permit should be given for a general permit. General Permits apply to many sites and thus have a large impact on water quality; therefore the public should be given comprehensive public notice. Amigos Bravos requests that public notice requirements for general permits be as comprehensive as those for individual permits.

Section 20.6.2.2001.G:

Amigos Bravos does not believe that 33 days is an adequate enough time for the department to process a request to grant, deny, or waive certification; issue public notice on this request; grant a 30-day comment period; review public comments; and draft a final certification that takes into account public comment. Amigos Bravos believes that 45 days is a more appropriate time period. Though it is important to note 45 days may not be enough time if the public notice is not issued immediately after the department receives the request to grant, waive or deny certification. To address this concern Amigos Bravos requests that this section include language that states that the final certification will be issued 15 days after the close of the comment period. This amount of time will allow the department to thoroughly review public comment and, if needed, follow up on issues raised in public comment.

Sections 20.6.2.2001.G, 20.6.2.2002. H and 20.6.2.2003.G:

Amigos Bravos is concerned that the requirements listed in subsection 1-8 are more relevant towards issuing a certification or a certification with conditions rather than denying a certification. For example, subsection (3) which states that the certification “*shall* [emphasis added] include a statement that there is a reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards” makes the assumption that in fact the activity can occur or be conducted in a manner that will not violate water quality standards. What if the state denies the certification? If the certification was denied because the activity was going to violate water quality standard then surely the department could not make such a statement. In addition there should be a subsection added that details what must be included in a permit denial.

The Clean Water Act requires that certifications require monitoring to ensure compliance with any provisions listed in 401 certifications (CWA, Section 401(d)). Amigos Bravos suggests adding a subsection number 8 to these sections (20.6.2.2001.G, 20.6.2.2002. H and 20.6.2.2003.G) that requires the certification to include identification of any required monitoring to ensure compliance with 401 certification conditions.

Section 20.6.2.2003:

Amigos Bravos applauds the Department for thinking larger than application of 401 certification to 402 and 404 permits by including this section in the proposed regulations. As the department is aware, the Clean Water Act and associated regulations give broad authority to the state to either certify, deny certification, certify with conditions, or waive certification for any “Federal license or permit to conduct an activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters,” (CWA, Section 401(a)(1)). Amigos Bravos would request that this

section of the proposed regulations be expanded to include procedures for certification for federal permits *and licenses* to mirror the language in the Act itself.

Waivers:

If the state fails to respond to a request for certification within a year the Clean Water Act allows for the requirement for state certification to be waived (CWA, Section 401(a)(1)). Amigos Bravos urges the department to include provisions in the regulations that would prohibit defacto waivers. Specifically, Amigos Bravos requests that the state include language that the state shall respond to all requests to grant deny or waive certification within one year of receiving such requests. In this case, even if the state decides to actively waive its right to certify, the public will receive public notice of this waiver. Amigos Bravos is concerned that if such a provision is not included than some activities may receive a defacto waiver and the public would not have a chance to review or comment on this decision. Alternatively, and preferable in Amigos Bravos' opinion, the department could propose to prohibit all waivers and require the department to either certify, certify with conditions, or deny certification of all requests within one year.

Compliance with the Terms of 401 Certifications:

Amigos Bravos suggests incorporating language into the rule change that will outline how the department will monitor 401 conditions and how the department will assert enforcement authority if a permittee does not comply with 401 certification conditions. For example, Colorado, in their regulations, outlines a 401-enforcement process:

Colorado's 5 CCR 1002-82.7 IMPLEMENTATION AND ENFORCEMENT OF CERTIFICATIONS

The Division is authorized to utilize the following approaches to ensure that the certification is implemented and maintained:

(A) Upon receipt of information that water quality standards are being exceeded as a consequence of the project's construction or operation, the Division, after consultation with the permittee and notification of the appropriate federal permitting agency, may modify the certification and provide a copy of such modification to the federal permitting agency.

(B) Upon receipt of information indicating that one or more certification conditions have not been complied with during the construction or operation of a project, the Division shall notify the appropriate federal permitting agency in writing and request that necessary action be taken to implement such conditions as contemplated in Section 401(D) of the Federal Act. A copy of any such notification and request shall be sent to the permittee. The Division shall remain in communication with the federal permitting agency and the permittee regarding the progress towards implementation of the conditions until satisfactory compliance has been obtained, or until the federal agency has completed enforcement action.

(C) If the procedures in subsection 82.7(A) and (B) above are unsuccessful at implementing the certification, in addition to enforcement authorities provided under the Water Quality Control Act, the Division may initiate procedures pursuant to section 24-4-104, C.R.S., to suspend certification for a defined period of time to enable the applicant to comply with the certification conditions or submit a new certification application, or to revoke the water quality certification.

(D) Temporary exceedances of water quality standards shall be deemed in compliance

with applicable provisions so long as such exceedance will not be of a degree to cause conditions acutely toxic to aquatic life or to exceed standards assigned to protect a domestic drinking water supply where that is a classified use.

Application Requirements:

The department may want to consider including information about what applicants are required to submit in a request for 401 certification. For example Montana has outlined specific 401 certification application requirements in their regulations:

ENVIRONMENTAL QUALITY

CHAPTER 30

WATER QUALITY

Sub-Chapter 1

401 Certification

17.30.103 APPLICATION FOR CERTIFICATION

(1) A person may not conduct or commence construction for any activity requiring state water quality certification under 33 USC section 1341, as amended, unless the department has issued certification, issued with conditions, or waived certification under this subchapter.

(2) The applicant, the licensing or permitting agency, or the regional administrator (under 40 CFR 121.13) shall submit to the department a complete description of the activity for which certification is sought, including:

- (a) the name and address of the applicant;
- (b) a description of the facility or activity and of any discharge which may result from the facility or activity, including but not limited to:
 - (i) the volume of the discharge;
 - (ii) the biological, chemical, physical, and radiological characteristics of the discharge;
 - (iii) a description of the existing environment at the site of the discharge;
 - (iv) the size of the area affected;
 - (v) the location or locations at which the discharge may enter state waters; and
 - (vi) any environmental impact assessment, information, maps, and photographs which have been provided to the licensing or permitting agency;
- (c) a description of the function and operation of equipment, facilities, activities, or practices to minimize or to treat wastes or other effluents which may be discharged, including the degree of treatment expected to be attained;
- (d) the date or dates on which the activity is proposed to begin and end, if known, and the date or dates on which the discharge will take place; and
- (e) a description of the methods being used or proposed to monitor the quality and characteristics of the discharge and the operation of equipment, facilities, or activities employed in the treatment or control of pollutants.

(3) The department may exempt an applicant from the information requirements of (2)(b), (c), and (e) of this rule, if the applicant's federal permit application is to the United States army corps of engineers under section 404 of the federal Clean Water Act, 33 USC 1344, as amended, and the federal permit application provides the information required under these sections.

Thank you for the opportunity to comment on the draft regulations related to 401 certifications. Please do not hesitate to contact me at 575-758-3874 or rconn@amigosbravos.org if further clarification or discussion on the above issues is merited or needed.

Sincerely,

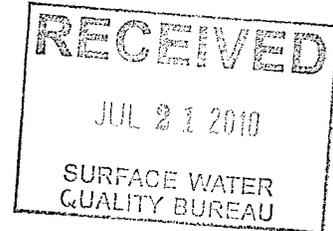
Rachel Conn
Policy Analyst
Amigos Bravos



OFFICE OF THE COMMISSIONER
UNITED STATES SECTION

INTERNATIONAL BOUNDARY AND WATER COMMISSION
UNITED STATES AND MEXICO

July 14, 2010



Glenn Saums
Acting Bureau Chief
New Mexico Environment Department
Surface Water Quality Bureau
P.O. Box 5469
Santa Fe, New Mexico 87502-5469

RE: DRAFT Procedures for Certification of Federal Permits Pursuant to Clean Water Act
Section 401

Dear Mr. Saums,

The United States Section, International Boundary and Water Commission(USIBWC) has received notice of the new regulation proposal for rules addressing the certification of federal permits pursuant to Section 401 and would like to offer the following comments.

The proposed rules do not mention procedures for certification of federal permits for discharge of dredge or fill material authorized under U.S. Army Corps of Engineers (USACE) nationwide permits. The current proposed rules make exception to general and nationwide permits, however there is no information for these type of federally permitted activities. The USIBWC routinely conducts channel maintenance activities in the Rio Grande in New Mexico under USACE nationwide permits. Once an activity is authorized by the USACE under a nationwide permit, the USIBWC then must obtain a separate Section 401 authorization from the New Mexico Environment Department (NMED). The USIBWC recommends that these two processes be completed concurrently. A separate and streamlined New Mexico Section 401 certification should be automatically authorized for small projects or activities that are already authorized under USACE nationwide permits. Variations of the 401 certification may occur depending on degree or levels of impact authorized by each individual nationwide permit. A formal agreement between the USACE and the NMED to automatically certify (401 certification) nationwide permit authorizations would be beneficial and streamline the process.

If you have any questions regarding these comments, please feel free to contact Natural Resources Specialist, Daniel Borunda of my staff at 915-832-4767.

Sincerely,

Lisa M. Santana, Ph.D.
Acting Division Chief
Environmental Management Division



**MONTGOMERY
& ANDREWS**

LOUIS W. ROSE
Direct: (505) 986-2506
Cell: (505) 660-8680
Email: lrose@montand.com
Reply To: Santa Fe Office
www.montand.com

July 27, 2010

SENT VIA EMAIL ONLY

Glenn Saums
Acting Bureau Chief
New Mexico Environment Department
Surface Water Quality Bureau
P.O. Box 5469
Santa Fe, NM 87502-5469
glenn.saums@state.nm.us

**Re: Comments on draft rules for CWA Section 401 certifications,
20.6.2.2001-.2003 NMAC**

Dear Mr. Saums:

Thank you for the opportunity to review the draft rules for certification of Federal National Pollutant Discharge Elimination System (NPDES) Permits (20.6.2.2001 NMAC), federal permits for discharge of dredged and fill material (20.6.2.2002 NMAC), and other federal permits (20.6.2.2003 NMAC), which are all being promulgated pursuant to §401 of the Clean Water Act, codified at 33 USC §1341, and 1978 NMSA, §74-6-5(B) (2009). My comments are as follows.

A threshold comment relates to the certification process. The rules are drafted to reflect the manner in which the Department has historically conducted certifications—by certifying the federal draft permit. This is one way in which the certification may be undertaken. *See, e.g.*, 40 CFR §124.54(b) (2009) (addressing certification for section 301(h) variances). However, the federal scheme allows for other ways in which certification may take place.

Under federal law, a request or application for certification may be submitted to the certifying State agency by the applicant at any time prior to a new discharge

REPLY TO:

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Santa Fe, New Mexico 87501
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6301 Indian School Road NE, Suite 400
Albuquerque, New Mexico 87110
Telephone (505) 884-4200 • Fax (505) 888-8929

Post Office Box 36210
Albuquerque, New Mexico 87176-6210

or prior to the renewal of an existing permit, if an applicant can provide the information necessary to determine whether the discharge will be in compliance. *See* 40 CFR §121.2 (requiring the contents of a certification to include a statement that the certifying agency has “examined the application made . . . to the licensing or permitting agency” or “examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement . . . that there is a reasonable assurance” the activity will not violate water quality standards); *accord* 20.6.2.2001.G(2) NMAC (stating that the “permit certification or denial . . . shall include . . . a statement that the department has examined the application or other relevant information”); *cf.* 40 CFR Part 121, Subpart C (providing the process for application for certification by EPA when a state has not designated a certifying agency). *See generally* CWA §401(a)(1); 40 CFR Part 121 (“State Certification of Activities Requiring a Federal License or Permit”). It may be helpful to draft the rules to include these alternative methods of processing a request for §401 certification.

Comments specific to certain provisions are detailed below. The comments with respect to 20.6.2.2001 also apply to the corresponding provisions of 20.6.2.2002 and 20.6.2.2003 NMAC.

2001.B(1)-(2) address certification and certification with conditions. CWA Section 401(d) requires a certification to “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any application . . . will comply with any applicable” limitations, standards, prohibitions, and any other requirements. The limitations set forth in the certification are thereafter conditions of the certification. *Id.* We suggest including this Section 401(d) language in 2001.B(2) to clarify the types of conditions that must be included in the certification. In addition, 40 CFR §124.53(e)(2) requires the certifying state agency to cite the CWA or state law reference in support of any condition that is more stringent than a condition in the draft permit. We suggest also including the §124.53(e)(2) language in 2001.B(2). In the alternative, reference to the foregoing could be included in 2001.G(4).

2001.D(1) provides notice for general permits by posting on the Department’s website. Providing notice solely on the Department’s website would require interested parties to visit the website on a daily basis in order to be adequately informed. We suggest also providing notice by publication in the state register and by email to those persons on a general mailing list maintained by the department.

2001.D(2)(e) provides notice for individual permits to certain affected government entities. We suggest making the identified entities consistent with those entities identified in 20.6.2.3108.E NMAC (“any affected local, state, federal, tribal or pueblo governmental agency, political subdivisions, ditch associations and land grants, as identified by the department”).

2001.E(1)-(2) provide that notice shall include “a statement that the department will accept written comments on the permit certification or denial during the comment period.” The Department, however, will not have taken action on the certification prior to the comment period. We therefore suggest replacing “permit certification or denial” with “possible actions under 2001.B” or something to that effect. Also, it is not clear whether “written comments” includes electronic submissions. We believe it should include electronic submission and suggest including an express reference to submissions by email.

2001.G provides that the Department shall issue a final permit certification, issue a statement of denial with reasons for the denial, or waive its rights to certify. We suggest that this language track the language/format of 2001.B, which references four types of action that may be taken. We also suggest that the rule require the Department to provide reasons for any decision made by the department. This will assist in subsequent review of the decision.

2001.G further provides that the Department shall send a copy of the “final permit certification or denial to the” EPA when it is issued, which will generally be within 33 days from the date a request to certify is received by the department. Submitting the decision to the EPA at this time creates a timing issue, however, if the Department’s decision is appealed pursuant to 2001.H, because the EPA will issue the final permit, including the conditions in the certification, after it has received the certification from a state. In the event that administrative review results in a revised certification, the applicant must thereafter try to obtain a modification of the final permit. To prevent this complication, we suggest that certification be deemed final when the time for appeal has passed or when administrative review is complete. At that time, the certification would be sent to the EPA.

2001.G also provides that “[t]he permit certification or denial shall be in writing” and sets forth the content of the writing. First, we suggest that 2001.G provide for a writing in support of any action that may be taken by the Department under 2001.B, including waiver. Second, many of the statements that are required in the writing pertain only to a certification decision and not to a statement of

denial. We suggest identifying the statements that must be included with respect to each of the possible actions that may be taken by the department under 2001.B.

2001.G(4) provides that the certification shall include "a statement of any conditions which the department deems necessary or desirable with respect to the discharge of the activity." The word "desirable" should be deleted. Our understanding is that conditions for certification must be necessary to achieve compliance with applicable standards and regulations. If a "desirable" condition is not necessary to achieve compliance, it cannot be imposed. Any condition that is imposed should be supported by identifying the applicable law that establishes the need for such condition, *see, e.g.*, CWA §401(d), and by providing the technical analysis upon which the condition is based.

2001.H provides that any person who is adversely affected by the certification or denial of a specific permit may appeal the certification or denial. The opportunity to appeal should extend to those adversely affected by a general permit as well as a specific permit.

2001.H further provides that the secretary may hold a hearing on the appeal. We have found no federal provision that requires a hearing. It may be sufficient to provide an opportunity for written statements and to thus forego the time and expense of an oral hearing.

2001.H also provides that cross-examination of persons presenting oral statements shall not be allowed. Cross-examination of a person presenting an oral statement should be allowed, however, if the oral statement constitutes factual testimony (as opposed to opinion or argument) that a hearing officer could take into consideration in reaching a decision. If the Department wishes to properly limit cross-examination of oral statements, we suggest replacing "oral statements" with "oral argument," or something to that effect.

2002.E(1) addresses the content of notice for general permits. Unlike 2001.E(1), 2002.E(1) does not provide for a description of the geographic area. *See* 2001.E(1)(c). We are not aware of any restriction on issuing a general permit for a geographic area smaller than an entire state. If a general permit is intended to apply to an area less than an entire state, then the geographic area should be identified. We therefore suggest including a subsection (c) in 2002.E(1), providing that if a permit is intended to apply to an area less than the entire state, the notice shall include a description of the geographic area to be covered by the permit. This comment also applies to 20.6.2.2003 NMAC.

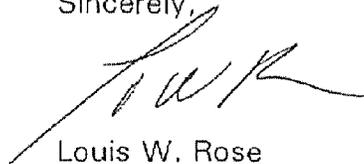
Glenn Saums
July 27, 2010
Page 5

2002.H provides that the final certification will be issued within 60 days unless a hearing is held. Neither 2001.H nor 2003.G contains a reference to a hearing. Unless there is a reason for the difference, suggest deleting the reference to a hearing.

2003.E(2)(d) addresses identification of "the name of the affected water." This language is slightly different from that found in 2001.E(2)(d) and 2002.E(2)(d), each of which refer to "the name of the receiving water." It is unclear why the language is different. If there is no basis for the difference, suggest using the same language in all three rules, for consistency.

We appreciate the opportunity to review the draft regulations before they are submitted to the Commission. Please feel free to give me a call if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "LWR", written over a horizontal line.

Louis W. Rose

LWR:

San Juan Water Commission

7450 East Main Street, Suite B • Farmington • New Mexico • 87402
Ph: 505-564-8969 • Fax: 505-564-3322 • Email: sjwcoffice@sjwc.org

MEMBERS:
City of Aztec
City of Bloomfield
City of Farmington
San Juan County
S.J. County Rural Water Users Association

July 25, 2010

Glenn Saums
Acting Bureau Chief
NMED-SWQB
P.O. Box 5469
Santa Fe, NM 87502-5469

Via E-mail (glenn.saums@state.nm.us)

Re: Comments of San Juan Water Commission on Draft Procedures for Certification of Federal Permits Pursuant to Clean Water Act Section 401

Dear Mr. Saums:

Thank you for publishing, and accepting public comment on, the New Mexico Environment Department's ("NMED") Draft Procedures for Certification of Federal Permits Pursuant to Clean Water Act Section 401 (June 15, 2010) (the "401 Certification Procedures" or "Procedures"). Through this letter, I hereby submit San Juan Water Commission's ("SJWC") comments on the draft 401 Certification Procedures. SJWC appreciates the opportunity provided by NMED to comment on the draft Procedures and specifically requests that NMED make any future changes to the Procedures subject to public comment, as it has for its current proposal.

GENERAL COMMENTS

SJWC has two general comments concerning the 401 Certification Procedures. First, SJWC believes that participation in the 401 Certification process should be limited to those who truly are "adversely affected" by the issuance of a 401 Certification or the denial of a Certification. Thus, SJWC proposes a definition of "adversely affected party" and suggests adding language to clarify that only adversely affected parties may present oral or written statements at hearing. Second, in order to ensure a fair hearing and the presentation of accurate information to the Water Quality Control Commission, SJWC proposes that the Procedures expressly allow for cross-examination and rebuttal testimony.

SPECIFIC COMMENTS

Definition of "Adversely Affected Person"

1. Proposed sections 20.6.2.2001(H), 20.6.2.2002(I), and 20.6.2.2003(H) state that "[a]ny person who is adversely affected by the certification or denial of a specific permit may appeal such certification or denial" Similarly, proposed sections 20.6.2.2001(I), 20.6.2.2002(J) and 20.6.2.2003(I) state that "any person who is adversely affected by the

July 25, 2010

secretary's final decision may file with the commission a petition for review of that decision based on the administrative record."

2. A definition of an "adversely affected person" needs to be added to the definitions in Section 20.6.4.7 NMAC. SJWC proposes the following definition:

An 'adversely affected person,' as referenced in sections 20.6.2.2001, 20.6.2.2002, or 20.6.2.2003 NMAC, means a person or entity directly affected physically, affected due to changed water quality, or economically impacted by certification of a permit or denial of a permit. Such persons may include federal, state, or local government agencies having resource management responsibilities.

3. The purpose of this change is to ensure that petitions for review and appeal filed with the secretary and/or commission are from parties actually "adversely affected by the certification or denial." Without such clarification, the Secretary or the Commission may be faced with dozens of petitions for appeal, review, and/or hearing, and be required to appropriately respond to each, filed by persons who are not truly adversely affected by the grant or denial of permit certification.

Limiting Participation in Appeal Hearing

1. Sections 20.6.2.2001(H), 20.6.2.2002(I) and 20.6.2.2003(H) state that "[a]ny person may present oral or written statements, data, technical information, legal arguments, or other information on the permit certification or denial during the appeal hearing."

2. SJWC recommends the following revision to this language:

Any person who is adversely affected by the certification or denial of a permit may present oral or written statements, data, technical information, legal arguments, or other information on the permit certification or denial during the appeal hearing.

3. The purpose of this change is to ensure that parties directly affected by the outcome of the hearing are provided an opportunity to submit information that is relevant to the certification or denial of a permit, while preventing a waste of resources associated with participation by those who are not impacted by the grant or denial of permit certification.

Hearing Procedures

1. Sections 20.6.2.2001(H), 20.6.2.2002(I) and 20.6.2.2003(H) state:

Any person may present oral or written statements, data, technical information, legal arguments, or other information on

July 25, 2010

the permit certification or denial during the appeal hearing. Reasonable time limits may be placed on oral statements, and the submission of written statements may be required. Cross examination of persons presenting oral statements shall not be allowed.

2. SJWC recommends the following change to the last sentence:

Cross examination of persons presenting oral or written statements shall ~~not~~ be allowed.

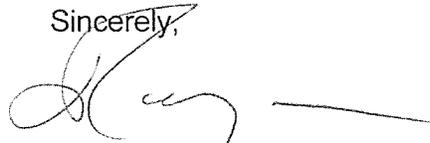
In addition, the following sentence should be added after the sentence above:

Any person who is adversely affected by the certification or denial of the permit may submit written rebuttal statements to any oral or written statements, data, technical information, legal arguments, or other information on the permit certification or denial received during the appeal hearing. Such rebuttal statements shall be submitted within 15 days of the close of the hearing. Rebuttal information will be considered by the decision-maker in reaching a decision on the appeal.

3. SJWC is concerned that the proposed procedure is silent regarding cross-examination or rebuttal of those submitting written statements. The purpose of SJWC's proposed changes is to ensure that information entered into the hearing record may be scrutinized and challenged by affected parties. It is possible that false, misleading, or biased information could be submitted for consideration. The opportunity for rebuttal is needed to ensure that any such testimony can be properly evaluated by the decision-maker.

Thank you for your consideration of these comments. If you have any questions about SJWC's position, or would like to discuss these issues in more detail, please do not hesitate to call me. We look forward to receiving your responses to these comments.

Sincerely,



L. Randy Kirkpatrick
Executive Director
San Juan Water Commission



DEPARTMENT OF THE ARMY
ALBUQUERQUE DISTRICT, CORPS OF ENGINEERS
4101 JEFFERSON PLAZA NE
ALBUQUERQUE NM 87109-3435

June 4, 2010

Regulatory Division

SUBJECT: May 20, 2010 Discussion Draft, Regulations for State Certification of Federal Clean Water Act Permits

Glenn Saums
Acting Bureau Chief
New Mexico Environment Department
Surface Water Quality Bureau
P.O. Box 5469
Santa Fe, NM 87502-5469

Dear Mr. Saums:

Thank you for the opportunity to review and comment on the New Mexico Environment Department Surface Water Quality Bureau (SWQB) discussion draft proposed water quality certification regulations pursuant to federal permits issued under the Clean Water Act. We have limited our comments to the draft regulations pertaining to permits issued by the U.S. Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act (Section 404).

General comments:

1. We encourage the use of electronic media to disseminate public notification where possible. Our experience in the utilization of electronic media has been very positive. We have now eliminated most hard copy mailings and retain an email address list which is used for individual permit notifications, with an email providing a link to the public notice posted on our website. We also use this list and our website for special public notices regarding our Section 404 program.
2. We would be glad to work with SWQB staff to develop draft language for inclusion in our individual permit public notices so that our public notice would suffice for your certification as well, as indicated in your draft regulations.
3. We are encouraged that your public notice provisions would not apply to permits issued under the emergency procedures described in 33 CFR 325(e)(4).

4. We are encouraged that your certification appeal process has a time limitation on issuance of a final decision.

5. Our understanding in reviewing the draft regulations is that, with regard to general permits, only proposed general permits would come under the purview of this regulation. The regulation does not prescribe any action for review and certification of individual projects that may be authorized by a Section 404 general permit. If that is an incorrect understanding, please let me know.

6. For your information, we anticipate the draft 2012 Nationwide General Permits will be published in the Federal Register in January 2011. Proposed final permits are scheduled for publication in December 2011, at which time the States, EPA and affected Tribes will have 90 days to make their decisions regarding 401 certification.

Specific comments:

1. 20.6.2.2002 (C) – You may consider including Section 10 of the Rivers and Harbors Act for cases in which a discharge may reasonably be expected to occur in association with a Section 10-only USACE authorized activity in Navajo Reservoir within New Mexico.

2. 20. 6.2.2002(D) – Recommend reference to review of draft permits in the case of proposed general permits and permit applications in the case of individual permit proposals in the first sentence of this section.

3. 20.6.2.2002 (G) –Citation should be 33 CFR 325(e)(4).

Again, thank you for the opportunity to provide USACE comment on the SWQB discussion draft water quality certification regulations. Please don't hesitate to contact me at 505-342-3282 or by email at allan.e.steinle@usace.army.mil should you have any questions.


Allan E. Steinle
Chief, Regulatory Division

Los Alamos National Laboratory
NPDES Permit No. NM0028355
Comments on Discussion Draft for NPDES Permit Certification

Thank you for the opportunity to comment on the proposal for rules that address certification of federal permits pursuant to Section 401 of the federal Clean Water Act [33 U.S.C. 1341]. The Los Alamos National Security, LCC (LANS) and National Nuclear Security Administration (NNSA) provide the following comments for your consideration:

- The draft regulations contain language that is somewhat vague and overly broad. For example, in 20.6.2.2001, Section G (4) states that a certification or denial shall include a statement of any conditions that the department deems to be “necessary or desirable.” Permit conditions must be limited to those conditions that are necessary to comply with the provisions of the CWA or the State Water Quality Act and associated regulations. State certification should not be based on meeting unanticipated, “desirable” conditions that are not regulatory requirements. The exact intent of this statement is unclear.
- Similarly, 20.6.2.2001 Section G (2) requires that the written certification or denial include a statement that “the department has examined the application or other relevant information and bases its certification upon an evaluation of the information contained in such application or other information which is relevant to water quality considerations.” It is not clear what additional information the Department will consider relevant to water quality considerations. The regulations should state that the specific information considered by the Department would be provided in the certification or denial document. This allows the public and the applicant to verify and understand the analysis that was conducted.
- In 20.6.2.2001 Section F, a comment period of “at least 30 days” is specified. LANS/NNSA recommend that the comment period be limited to 30 days and that no extensions be granted. Without this limitation, the process will be unnecessarily delayed by repeated requests for extension.
- In 20.6.2.2001 Section G, it itemizes what must be included in the written certification, but does not adequately address denials. An item should be added requiring a statement that in the case of a denial, the Department will specify the basis for that denial.
- In 20.6.2.2001 Section H, it states that cross-examination of persons presenting oral statements will not be allowed, which is inconsistent with other regulations and denies interested parties the opportunity to challenge the validity of the testimony that will be under consideration by the Secretary. This challenge is essential to ensure that the decision makers have adequate information on which to base their determination.
- Overall, the sequence of events laid out in the regulations is not optimum. As defined, the public and the applicant have no opportunity to comment on

conditions that are added by the Department. Their only option is to appeal the final certification, which could result in the need for a permit modification if the appeal is successful. This adds an unnecessary complexity to the process that could significantly delay the final permit.

- The procedures for certifying federal water quality permits allow submittal of written comments from the public regarding permit certification or denial during the comment period. The procedures also document that the Department shall consider all comments. However, the procedures do not document if the public comments will be incorporated into the certification. LANS/NNSA recommend that NMED respond in writing to all written comments received on the certification, similar to EPA's response to comments received during the Public Comment period for the draft NPDES permit (i.e. Fact Sheet).

From: Larsen.Brent@epamail.epa.gov
Sent: Wednesday, June 09, 2010 2:36 PM
To: Saums, Glenn, NMENV
Cc: Hosch.Claudia@epamail.epa.gov; Powell, Richard, NMENV;
Ryland.Renea@epamail.epa.gov
Subject: RE: Discussion Draft Regulations for State Certification of federal Clean Water Act Permits

Howdy Glenn:

I looked at the draft certification rule language and also shared it with Renea Ryland. Renea's comments, if any, will follow, but I had a few minor suggestions. Overall looks pretty good and we look forward to working with y'all on the changes to our Public Notice language so it can also serve as NMED's 401 notice.

Comments:

NPDES Permits Section

E.1.B - probably should also describe the area of coverage for the general permit. Not all general permits will necessarily cover the entire state.

G. - should the requirements for a certification vs. denial of certification be separated? Most items in this section only apply to certifications or conditional certifications.

404 Permits

same comments.

Other Federal Permits

same comments.

Sincerely,

Brent Larsen
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NEW MEXICO
ENVIRONMENT DEPARTMENT



Surface Water Quality Bureau

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RON CURRY
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SARAH COTTRELL
Deputy Secretary

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Draft Procedures for Certification of Federal Permits

Response to Comments

September 28, 2010

The New Mexico Environment Department sought public comment on a proposal for new rules addressing state certification of federal Clean Water Act (CWA) permits. The Department's Surface Water Quality Bureau (SWQB) is developing a new regulation proposal to address the certification of federal permits pursuant to Section 401 of the federal Clean Water Act [33 U.S.C. 1341]. The proposal is being developed for submission to the New Mexico Water Quality Control Commission (WQCC) to consider through its formal public review process as new state regulations codified in 20.6.2 NMAC – Ground and Surface Water Protection Regulations.

During preparation of these procedures, the Department coordinated with, and received comments from, both the U.S. Army Corps of Engineers – Albuquerque District (USACOE) and the U.S. Environmental Protection Agency – Region 6 (USEPA) to assure compatibility with these agencies' regulations, policies, and procedures. Following coordination with USACOE and USEPA, the Department developed a public discussion draft and made the draft available to the public for review and comment by mailing the discussion draft to the SWQB mailing list, issuing a news release, and publishing a notice on the NMED/SWQB website. The Department solicited comments from the public on the draft procedures during a 30-day period. The public comment period ended close-of-business, Monday, July 26, 2010.

Written comments were received during the 30-day public comment period from:

- International Boundary and Water Commission
- San Juan Water Commission
- Albuquerque Bernalillo County Water Utility Authority
- Los Alamos National Laboratory
- Montgomery & Andrews
- Amigos Bravos

The Department has carefully considered the comments it has received. After review and consideration of all comments received, the Department made several changes to the proposed regulations to be submitted to the WQCC for consideration. Several comments included suggestions that the Department believes are already covered in the proposed regulations. Generally, these are not further addressed in the Department's responses. Several commenters submitted comments that were substantially the same or quite similar. Following is a summary of the most significant comments and the Department's responses.



1. One commenter recommended streamlining the process for completion of state water quality certification for discharge of dredged or fill material authorized under USACOE nationwide permits. The Department understands that the current procedure for obtaining state certification for projects authorized under some nationwide permits can at times be difficult and time consuming. State certification of federal permits and licenses must reasonably ensure that the permitted activities will be conducted in a manner that will comply with applicable water quality standards, including the antidegradation policy, and the statewide water quality management plan. However, the Department believes it has at least partially addressed the commenter's concern by inclusion of language in the proposed section 20.6.2.2002 NMAC that specifies that state water quality certification or denial will be provided in most cases within 60 days from the date a request to grant, deny or waive certification for an individual permit application or draft nationwide permit is received by the Department. Unlike the current practice of requiring, in some cases, that an applicant apply for and receive a separate certification for an individual project covered under a particular nationwide permit, the Department intends to provide a certification or denial coincident with permit issuance by the USACOE.
2. Several commenters objected to the prohibition on cross examination of persons presenting oral statements at Department hearings on permit certifications or denials in proposed sections 20.6.2.2001.H, 20.6.2, 2002.I, and 20.6.2.2003.H. However, nothing in the Clean Water Act or the Water Quality Act would require cross-examinations in such hearings. Indeed, one of the commenters questioned whether a hearing was necessary at all. Nor is cross examination required by due process. Due process requires notice and a right to be heard, which the procedures would provide. Any participant in a hearing will have the opportunity to present evidence, including rebuttal evidence, and make oral statements. Participants in agency administrative proceedings possess no due process right to cross-examination. The Department believes that streamlining the hearing process outweighs any marginal benefit served by cross-examination of persons making oral statements.
3. One commenter suggested that the term "adversely affected person" be defined in the regulations. The term is derived from section 74-6-7(A) of the Water Quality Act, which allows any person who is adversely affected by a permitting action of the Secretary to appeal that action to the WQCC. The scope of that section is much broader than certification appeals. But the term is not defined in the statute. It would be beyond the scope of this rulemaking proceeding to attempt to set outer bounds on the term "adversely affected person" as it is used in the Water Quality Act.
4. Several comments were received regarding waivers of state certification. The Department responds to these comments by clarifying waiver requirements and eliminating a provision for affirmative waivers from the proposed regulations.
5. Two commenters took exception to the proposed regulatory language in sections 20.6.2.2001.G.4, 20.6.2.2002.H.4, and 20.6.2.2003.G.4 that includes the term "necessary and desirable." This language is a direct quote from mandatory contents of certification specified at 40 Code of Federal Regulations Part 121.2(a) (4).
6. Several comments were received that appear to indicate that there is some confusion regarding the scope of these proposed regulations. These regulations are intended to

codify the general procedures for issuance of a final permit certification or denial, including the procedures for solicitation of comments from the public on the draft permits, to be considered by the Department during preparation of the certification or denial. They are not intended to specify, or limit, the data, documents and other information used by the Department in preparing a final permit certification or denial. The Department believes it is not appropriate to define, or limit the information used by the Department in preparing a final permit certification or denial. However, the Department typically considers, at a minimum, appropriate technical and regulatory information, which includes information provided by the applicant, including the permit application (except for general permits), the draft permit, the WQCC regulations (20.6.2 NMAC), the Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC), various planning documents such as the Water Quality Management Plan/Continuing Planning Process, Total Maximum Daily Load documents, the Clean Water Act §303(d)/§305(b) Integrated Report, and other applicable state and federal laws and regulations as well as comments related to the protection of surface water quality received by the public and the permittee on the draft permit.

These regulations are also not intended to provide for public comment on the final certification or denial, but they do specify procedures for appeal of the certification or denial. Provisions for the appeal of permit certifications and denial are included both in these certification regulations at proposed sections 20.6.2.2001.H, 20.6.2.2002.I, and 20.6.2.2003.H, and in the Water Quality Act NMSA 1978, § 74-6-5.O. The Department is constrained by federal regulations and policies that require that the Department take action to either grant, deny or waive certification within a relatively short period of time (generally 33 or 60 days with limited exceptions) from the date a request is received by the Department. Inclusion of a provision for public comment on the final certification or denial would result in significant delays in the permitting process and most likely de facto waivers of certification in some cases (note: the Department has included language in these proposed regulations generally prohibiting waivers). For the same reasons, delaying the issuance of a final permit certification or statement of denial until after the time for appeal has passed or when administrative review is complete as suggested by one commenter, is not a feasible option. Although the permit, including any conditions required by the Department, may in some cases become effective prior to completion of the appeal or review process, any revisions to the certification necessary to comply with the findings of the appeal or administrative review are included in a revised certification submitted by the Department to the federal permitting authority for incorporation into the permit. The Department has attempted to clarify the scope of these proposed regulations by modifying the language in sections 20.6.2.2001.E, 20.6.2.2002.E, 20.6.2.2003.E, and other appropriate sections.

7. Several commenters correctly pointed out that several of the items to be included in the Department's statements of certification or denial, as specified in proposed sections 20.6.2.2001.G, 20.6.2.2002.H and 20.6.2.2003.G, do not apply to statements of denial. The proposed regulations have been amended to address this issue. Also related to denial of certification, one commenter asked whether there are other criteria the Department may use to deny certification besides those listed in NMSA 1978, § 74-6-5.E. The Water Quality Act does not limit the reasons for denial to only those listed, but the Department anticipates that generally the reasons used to deny certification will be those specified in NMSA 1978, § 74-6-5.E. Regardless, as specified in federal regulations and these

proposed certification regulations, any statement of denial must include the reasons for the denial.

8. Two comments were received that stated the public notice provisions in the discussion draft for general permits were inadequate. The Department has addressed this concern by significantly expanding the proposed general permit public notice regulations in sections 20.6.2.2001.D(1), 20.6.2.2002.D(1), and 20.6.2.2003.D(1). Also related to general permit public notice, one commenter suggested adding a description of the geographic area to be covered by a general permit to proposed sections 20.6.2.2002.E (1) and 20.6.2.2003.E (1) similar to that contained in sections 20.6.2.2001.E (1). The Department agrees and has made the necessary changes to these sections.
9. One commenter suggested that the certification regulations provide for state monitoring and enforcement of any conditions of certification included in a permit or license by the federal permitting or licensing authority as required by the Department. The Department responds that such provisions would be inappropriate. In New Mexico, USEPA administers and enforces permits issued under § 402 of the CWA and USACOE administers and enforces permits issued under section 404 of the CWA, not the Department. Generally, therefore, federal permit conditions, including conditions required by the Department, are enforced by the applicable federal agency.

The WQCC adopted the *State of New Mexico Continuing Planning Process*, or CPP, in fulfillment of the requirements of the federal CWA § 303(e). The CPP states “[t]he Water Quality Control Commission has determined that the National Pollutant Discharge Elimination System permit program established under Section 402 of the federal Clean Water Act should be the primary mechanism for controlling point source discharges to surface waters in New Mexico.” Although not explicit, the Department presumes that the WQCC intended that this determination regarding the NPDES permit program also applies to other federal permitting or licensing programs such as the discharge of dredged or fill material permit program established under Section 404 of the federal CWA.

10. Two commenters suggested that the Department include CWA § 401 certification application requirements in these proposed regulations. However, since the Department generally receives a request from the federal permitting authority to certify, deny or waive its right to certify a draft permit, rather than receiving a permit application and request to certify the application from an applicant, there is rarely, if ever, a need for such application requirements. Also, as correctly pointed out by one of these commenters, federal regulations provide for an alternative process for obtaining the required CWA § 401 certification other than the method historically used by the Department. As noted above, the current and past practice of the Department is to provide certification of draft federal permits or licenses, generally upon receiving notice from the USEPA or the USACOE that a draft permit has been prepared, stating that a permit cannot be issued or denied until the Department has granted or denied certification, or has waived its right to certify, within a relatively short period of time. Although the Department coordinates with and assists the federal permitting authorities during the draft permit issuance process, thereby improving the efficiency of the process and also aiding State certification, the Department neither has the resources nor believes it necessary or desirable to undertake the alternative certification process discussed in these comments.