NEW MEXICO
ENVIRONMENT DEPARTMENT

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

Michelle Lujan Grisham
Governor

Howie C. Morales
Lt. Governor

James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

February 22, 2021

VIA ELECTRONIC MAIL

Ms. Jane Nishida, Acting Administrator
Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue
Washington, Dc 20460
Nishida.Jane@epa.gov

Subject: Nationwide Permit Reissuance, New Mexico Water Quality Certification Denial Determination

Dear Acting Administrator Nishida:

The New Mexico Environment Department (NMED) requests the Environmental Protection Agency's (EPA) prompt attention and support in resolving a serious matter between NMED and the U.S. Army Corps of Engineers (USACE).

As I am sure you are aware, modification and reissuance of the Nationwide Permits (NWPs) is on President Biden's *List of Agency Actions for Review*, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/. However, in a February 12, 2021, letter to NMED, the USACE Albuquerque District conveyed its decision to "decline" New Mexico's Section 401 Water Quality Certification (Certification) for the 16 NWPs published in the Federal Register on January 13, 2021. The USACE communicated that, based on this decision, it will require project proponents in New Mexico whose activities would otherwise be governed by the NWPs of the need to obtain individual Section 401 Certification from the State. NMED is aware of similar adverse actions by the USACE in response to other states' conditional Certifications of the NWPs.

As explained in the enclosed letter to the USACE District Commander, New Mexico stands by the Certification with conditions we issued in December 2020 and maintains that USACE has misinterpreted and misapplied program requirements in this instance, including EPA's revised Section 401 regulations finalized last year. Where a State has granted with conditions, and included in the certification a statement explaining why the condition is necessary to assure that water quality requirements are met and has cited federal or state law that authorizes the condition, the Federal agency, in this case the USACE, is obligated by law to include and clearly identify those conditions in the permit it issues. See 40 C.F.R. § 121.10.

This decision, if allowed to stand, adversely impacts both NMED and the citizens of New Mexico and it directly undermines the intent of the Clean Water Act to ensure federal actions reflect and respect state water quality standards. Requiring individual Section 401 Certifications for each project or activity

authorized under a NWP will place undue burden on the State of New Mexico and will cause irreparable harm to water quality in the state if certifications cannot be issued within the established reasonable period of time due to resource constraints within NMED. If Certifications are not timely issued, they are considered waived and water quality and public health will suffer as a result.
Pursuant to 40 C.F.R. § 121.16, which states that the EPA Administrator shall, upon request, provide certifying authorities with relevant information and assistance regarding the Section 401 rule, New Mexico respectfully requests that EPA intervene in support of New Mexico's request to the USACE for immediate reversal of the adverse decision to "decline" the State's Certification in its entirety.

Please contact Rebecca Roose, Director, Water Protection Division, at rebecca.roose@state.nm.us or 505-670-6852 for further discussion and prompt resolution of this critical matter.

Sincerely,

Digitally signed by James Kenney
Date: 2021.02.22 08:14:14 -07'00'

James C. Kenney
Cabinet Secretary

Enclosure: NMED letter to USACE Albuquerque District

Cc: Martin Heinrich, United States Senator
Ben Ray Lujan, United States Senator
David Gray, Acting Regional Administrator, USEPA Region 6
Radhika Fox, Acting Assistant Administrator, USEPA Office of Water
John Goodin, Deputy Assistant Administrator, USEPA Office of Water
Courtney Kerster, Director of Federal Affairs, Office of Governor Michelle Lujan Grisham
Rebecca Roose, Director, NMED Water Protection Division
Don Welsh, Executive Director, Environmental Council of States