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James C. Kenney
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February 22, 2021

VIA ELECTRONIC MAIL

Lieutenant Colonel Patrick M. Stevens V
District Commander
USACE, Albuquerque District
Regulatory Branch
4101 Jefferson Plaza NE
Albuquerque, NM 87109
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Subject: Nationwide Permit Reissuance; Adverse Decision to Decline New Mexico Water Quality Certification

Dear Lieutenant Colonel Stevens:

I am writing to request your immediate reversal of the U.S. Army Corps of Engineers (USACE) Albuquerque District's decision to "decline" New Mexico's Clean Water Act Section 401 Water Quality Certification (Certification) issued on December 14, 2020, for the then-proposed and recently reissued Nationwide Permits (NWP). As I am sure you are aware, modification and reissuance of the NWP 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/>.

Although New Mexico issued the certification within the designated period of time established by the U.S. Army Corps of Engineers (USACE) and met all requirements of the applicable regulations, New Mexico received written notification on February 12, 2021, that the USACE, "...views the certification as invalid and thus declines to rely on the certification for the NWP and will instead require individual certifications or waiver for activities authorized by those NWP." New Mexico asserts that the USACE cannot "decline" a state's Certification, nor can the USACE reject conditions that New Mexico developed and submitted in accordance with the requirements of the Clean Water Act and its implementing regulations.

Section 401 of the Clean Water Act clearly and unambiguously provides that there are only four possible outcomes with regard to a State 401 Certification: waiver, denial, grant, and grant with conditions. 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 USACE is obligated by law to include and clearly identify those conditions in the permit it issues. 40 C.F.R. § 121.10. The USACE does not have the option of "declining." In fact, the term "decline" appears nowhere in Section 401 of the Clean Water Act nor does

it appear in the implementing regulations as amended by the U.S. Environmental Protection Agency (EPA) in 2020.

During a telephone call on February 9, 2021, New Mexico Environment Department (NMED) personnel were shocked when informed by the USACE Albuquerque District that, without consultation, the District decided to “decline” New Mexico’s December 14, 2020 Certification in its entirety. During subsequent communications between NMED and the USACE Albuquerque District on February 11 and 12, 2021, and in the written letter from Ms. Kelly Allen on February 12, USACE personnel explained the decision to “decline” New Mexico’s certification was based on the USACE’s determination that one sentence preceding 12 pages of conditions was inconsistent with USACE and EPA regulations and requirements. Earlier in December 2020, NMED provided the Albuquerque District a draft Certification containing this sentence for their review and feedback. While NMED’s purpose in sharing a draft with ACE staff was to avoid issues such as this adverse decision, the USACE staff did not flag the statement “amend and revoke...to ensure compliance with water quality standards” as a problem for NMED to address before finalizing the state’s Certification.

NMED firmly stands by the state’s December 14, 2020, Certification, and the conditions set forth therein, as properly issued pursuant to 40 C.F.R. § 121.7(d). Despite the abbreviated review and decision period and the proposed status of the NWP’s, New Mexico complied with the Clean Water Act Section 401 Rule, effective September 11, 2020. Specifically, as required, all of New Mexico’s Certification conditions were accompanied with statements of necessity for the condition, directly related to water quality and/or enforceable policies, and included relevant legal citations. New Mexico’s Certification was submitted on December 14, 2020, thus meeting the December 15, 2020 decision deadline for Certification. Based on information provided to NMED by the Albuquerque District to date, my understanding is that the USACE agrees that New Mexico met all procedural requirements. As stated above, the USACE is obligated by law to accept conditions that meet the regulatory standard. “Declining” New Mexico’s Certification in its entirety based on the USACE’s misinterpretation of New Mexico’s authority to preserve and protect water quality as a “reopener” condition is unlawful. The Albuquerque District informed NMED that the USACE decision to “decline” the Certification would require a project proponent to seek an individual Certification from the state to utilize an NWP, but we see no legal basis for that outcome.

The practical implications of the USACE’s adverse decision are significant. In order to ensure applicable permitted activities in New Mexico comply with state law, as intended by the Clean Water Act, NMED staff will likely expend hundreds of hours over the next five years reviewing and certifying individual actions subject to 16 NPW’s. This significant resource expenditure and the associated risk for water quality in New Mexico is entirely avoidable. New Mexico requests that the USACE reverse and revoke its decision to “decline” New Mexico’s Certification in its entirety and that incorporate New Mexico’s water quality conditions into the NWP’s before the permits take effect on March 15, 2021. In the USACE fails to respond affirmatively to this request, New Mexico will carefully explore all other available options to challenge and reverse the USACE’s February 12, 2021 decision to “decline” our Certification.

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.

Lieutenant Colonel Stevens
District Commander, USACE Albuquerque District
February 22, 2021
Page **3** of **3**

Sincerely,

James C. Kenney
Cabinet Secretary

Cc: Martin Heinrich, United States Senator
Ben Ray Lujan, United States Senator
Jane Nishida, Acting Administrator, USEPA
David Gray, Acting Regional Administrator, USEPA Region 6
Courtney Kerster, Director of Federal Affairs, Office of Governor Michelle Lujan Grisham
Rebecca Roose, Director, NMED Water Protection Division
Kelly Allen, Chief, USACE Albuquerque District Regulatory Division
Don Welsh, Executive Director, Environmental Council of States