



July 12, 2021

David Grey  
Acting Regional Administrator  
US EPA Region 6  
1201 Elm St., Suite 500  
Dallas, Texas 75270  
Sent via email to [gray.david@epa.gov](mailto:gray.david@epa.gov)

Re: Request to delay Section 401 Certification of the draft Construction General Permit

Dear Acting Regional Administrator Gray,

Last week the New Mexico Environment Department (NMED) submitted our [comments](#) on the draft 2022 Construction General Permit (CGP) to the Environmental Protection Agency (EPA) Office of Water. As we note in our comments, based on our review, our position is that EPA should not ask New Mexico to certify the current draft of the 2022 CGP. NMED urges Region 6 to postpone the start of state water quality certification on the CGP until the Office of Water reviews and responds to public comments and makes a revised permit available to states, tribes and the general public.

There are two key reasons why NMED believes Region 6 should honor our request to delay certification until a revised draft CGP is available. First, it runs counter to the cooperative federalism principles of Clean Water Action section 401 to limit a state's certification opportunity to a permit that is incomplete. The Office of Water included eight specific areas for public comment, all of which render key terms and conditions subject to substantive change or to be drafted anew between the May 2021 draft and the final permit. For example, based on many questions raised by EPA's requests for comment, it is not clear what the final permit will require regarding water quality-based conditions for dewatering activities.

Second, EPA recently acknowledged "substantial concerns with a number of provisions in the [2020] 401 Certification Rule that relate to cooperative federalism principles and CWA Section 401's goal of ensuring that states are empowered to protect their water quality." 86 Fed. Reg. at 29,542 (June 2, 2021). In accordance with President Biden's Executive Order 13990, EPA is currently gathering input through a public docket to inform revisions that should restore the cooperative federalism principles of CWA section 401. NMED simply cannot reconcile EPA's recent statements on the 401 rule and CWA intent with any expectation from Region 6 that New Mexico certify the May 2021 draft CGP.

Alternatively, if Region 6 proceeds with requesting New Mexico's certification of the May 2021 draft, NMED requests that Region 6 establish the "reasonable period of time" for state certification to be the maximum allowed under 40 CFR 121.6 and coordinate closely with the Office of Water to ensure NMED has ample opportunity during the reasonable period of time to consider the provisions of a revised draft CGP (not the May 2021 draft).

Any approach other than those described above would represent a discretionary action by EPA that jeopardizes New Mexico's surface waters, diminishes regulatory certainty for CGP implementation in New Mexico and unnecessarily constrains the state through some of the most problematic provisions of the 2020 final rule.

To discuss this letter and next steps for how we can collaborate on the best water quality outcomes under existing laws and regulations, please contact Rebecca Roose, Deputy Cabinet Secretary of Administration, at [Rebecca.roose@state.nm.us](mailto:Rebecca.roose@state.nm.us) or (505) 670-6852.

Sincerely,

James C. Kenney  
Cabinet Secretary

Cc: Rebecca Roose, Deputy Cabinet Secretary of Administration  
Courtney Kerster, Director of Federal Affairs, Office of Governor Michelle Lujan Grisham  
Radhika Fox, Assistant Administrator, USEPA Office of Water  
Andrew Sawyers, Director, USEPA Office of Wastewater Management  
John Goodin, Director, USEPA Office of Wetlands, Oceans and Watersheds  
Charles Maguire, USEPA, Region 6, Director, Water Division