State of New Mexico
DRAFT CWA Section 401 Certification of EPA's
Proposed NPDES Permit No. NMR100000
Construction General Permit (CGP)
October 1, 2021

Federal and State Citations

National Pollutant Discharge Elimination System (NPDES) regulations at 40 Code of Federal Regulations (C.F.R.) 122.44(d)(1)(i) require that permit "limitations must control all pollutants or pollutant parameters...which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

40 C.F.R. 124.53(e) details requirements for State certification. Pursuant to 40 C.F.R. 153(e)(1), State certification will be in writing and will include, "conditions which are necessary to assure compliance with the applicable provisions of Clean Water Act (CWA) Sections 208(e), 301, 302, 303, 306 and 307 and with appropriate requirements of State law."

40 C.F.R. 124.53(e)(2) states that for each condition more stringent than those in the draft permit, "… the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition."

40 C.F.R. 124.53(e)(3) states that for each condition less stringent than those in the draft permit, "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. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process."

New Mexico adopted surface water quality standards (WQS) in accordance with CWA Section 303 and the New Mexico Water Quality Act, New Mexico Statutes Annotated (NMSA) 1978, §§ 74-6-1 to -17. State WQS are published in Title 20, Chapter 6, Part 4 of the New Mexico Administrative Code (20.6.4 NMAC), *Standards for Interstate and Intrastate Surface Waters*, as amended by the New Mexico Water Quality Control Commission (WQCC) and approved by the U.S. Environmental Protection Agency (EPA) on July 24, 2020. The regulations at 20.6.4.8 NMAC outline the State's antidegradation policy and implementation plan. Appendix A of the Water Quality Management Plan and Continuing Planning Process (WQMP/CPP) details the antidegradation policy implementation procedures related to and in concurrence with 20.6.4.8 NMAC. The WQCC approved the revised WQMP/CPP on September 21, 2020, and EPA approved the revised WQMP/CPP on October 23, 2020. The WQMP/CPP also includes Appendix B, New Mexico's list of approved Total Maximum Daily Loads (TMDLs), which was last updated on December 28, 2020. Additional State regulations and standards are published in Title 20, Chapter 6, Part 2 of the New Mexico Administrative Code (20.6.2 NMAC), *Ground and Surface Water Protection*, as amended by the WQCC on December 21, 2018.

Procedures for Certification of Federal NPDES permits in 20.6.2.2001 NMAC states "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."

Conditions of Certification

Condition #1 – Discharges to ONRWs:
EPA shall include the following condition in Part 9 of the Final CGP to protect waters classified as Outstanding National Resource Waters (ONRWs) in New Mexico:

> In Outstanding National Resource Waters (ONRWs) in New Mexico, no degradation is permitted except in limited, specifically defined instances. Therefore, Operators are not eligible to obtain authorization under this general permit for stormwater discharges to waters classified as ONRWs listed in Paragraph D of 20.6.4.9 New Mexico Administrative Code (NMAC), also referred to as "Tier 3 waters" as defined in Appendix A of this permit
> **Exception:** When construction activities are in response to a public emergency (e.g., wildfire, extreme flooding, etc.) and the related work requires immediate authorization to avoid a threat to public health or safety.
> a. Operators who conduct construction activities in response to a public emergency to mitigate an immediate threat to public health or safety shall adhere to the requirements in 20.6.4.8(A)(3)(c) NMAC, including notifying the New Mexico Environment Department (NMED) within seven days of initiation of the emergency action and providing NMED with a summary of the action taken within 30 days of initiation of the emergency action.
> b. For all other scenarios, Operators with proposed discharges to ONRWs in New Mexico shall obtain coverage from EPA under an NPDES Individual Permit and will comply with the additional standards and regulations related to discharges to ONRWs in 20.6.4.8(A) NMAC.
>
> Additional information is available from:
> New Mexico Environment Department
> Surface Water Quality Bureau
> P.O. Box 5469
> Santa Fe, NM 87502-5469
> Telephone: 505-827-0187
>
> https://www.env.nm.gov/surface-water-quality/wqs/
> https://gis.web.env.nm.gov/oem/?map=swqb

[20.6.4.8(A) NMAC – State of New Mexico Antidegradation Policy; 20.6.4.9(D) NMAC; State of New Mexico Water Quality Management Plan and Continuing Planning Process (WQMP/CPP) – Appendix A]

Background and Citations for Condition #1 (Discharges to ONRWs):
NMED cannot reasonably ensure that stormwater discharges from construction activity authorized under this general permit will not degrade ONRWs listed in 20.6.4.9(D) NMAC. This Construction General Permit does not provide opportunity for state-specific approval requirements in 20.6.4.8 (A)(3)(a)(i) through (iv) NMAC.
Regulatory Citation and Guidance

20.6.4.8(A) NMAC - Antidegradation Policy and Implementation Plan

A. Antidegradation Policy

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

(a) After providing a minimum 30-day public review and comment period, the commission determines that allowing temporary and short-term degradation of water quality is necessary to accommodate public health or safety activities in the area in which the ONRW is located. Examples of public health or safety activities include but are not limited to

replacement or repair of a water or sewer pipeline or a roadway bridge. In making its decision, the commission shall consider whether the activity will interfere with activities implemented to restore or maintain the chemical, physical or biological integrity of the water. In approving the activity, the commission shall require that:

(i) the degradation shall be limited to the shortest possible time and shall not exceed six months;

(ii) the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate; all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;

(iii) the degradation shall not result in water quality lower than necessary to protect any existing use in the ONRW; and

(iv) the degradation shall not alter the essential character or special use that makes the water an ORNW.

(b) Prior to the commission making a determination, the department or appropriate oversight agency shall provide a written recommendation to the commission. If the commission approves the activity, the department or appropriate oversight agency shall oversee implementation of the activity.

(c) Where an emergency response action that may result in temporary and short-term degradation to an ONRW is necessary to mitigate an immediate threat to public health or safety, the emergency response action may proceed prior to providing notification required by Subparagraph (a) of this paragraph in accordance with the following:

(i) only actions that mitigate an immediate threat to public health or safety may be undertaken pursuant to this provision; non-emergency portions of the action shall comply with the requirements of Subparagraph (a) of this paragraph;

(ii) the discharger shall make best efforts to comply with requirements (i) through (iv) of Subparagraph (a) of this paragraph;

(iii) the discharger shall notify the department of the emergency response action in writing within seven days of initiation of the action;

(iv) within 30 days of initiation of the emergency response action, the discharger shall provide a summary of the action taken, including all actions taken to comply with requirements (i) through (iv) of Subparagraph (a) of this paragraph.

(4) This antidegradation policy does not prohibit activities that may result in degradation in surface waters of the state when such activities will result in restoration or maintenance of the chemical, physical or biological integrity of the water.

(a) For ONRWs, the department or appropriate oversight agency shall review on a case-by-case basis discharges that may result in degradation from restoration or maintenance activities, and may approve such activities in accordance with the following:

(i) the degradation shall be limited to the shortest possible time;

(ii) the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;

(iii) the degradation shall not result in water quality lower than necessary to protect any existing use of the surface water; and

(iv) the degradation shall not alter the essential character or special use that makes the water an ORNW.

20.6.4.9 NMAC - Outstanding Natural Resource Waters

D. *Waters classified* as ONRWs: The following waters are classified as ONRWs:

(1) *Rio Santa Barbara, including the west, middle and east forks from their headwaters downstream to the boundary of the Pecos Wilderness; and*
(2) *the waters within the United States forest service Valle Vidal special management unit… (a)-(e).*
(3) *the named perennial surface waters of the state… located within United States department of agriculture forest service wilderness…* Wilderness areas included in this designation are the Aldo Leopold wilderness, Apache Kid wilderness, Blue Range wilderness, Chama River Canyon wilderness, Cruces Basin wilderness, Dome wilderness, Gila wilderness, Latir Peak wilderness, Pecos wilderness, San Pedro Parks wilderness, Wheeler Peak wilderness, and White Mountain wilderness… (a)-(h).

Statewide Water Quality Management Plan and Continuing Planning Process (2020 WQMP/CPP)
Appendix A Antidegradation Policy Implementation Procedure for Regulated Activities

Section 1.3 Tier 3 Protection (applicable to all waters designated as an ONRW): No degradation is allowed in an ONRW, except in limited, specifically defined instances, such as to accommodate public health or safety activities or to enable activities to restore or maintain water quality, as outlined in 20.6.4.8(A)(3) and 20.6.4.8(A)(4) NMAC. For activities that may cause short-term degradation, NMED may award priority points for grant or other funding programs that target water quality protection and support actions needed to protect and restore water quality.

Section 2.1 Tier 3 – Applies only to New Mexico Outstanding National Resource Waters (ONRWs) identified in 20.6.4.9(D) NMAC. Tier 3 prohibits any degradation and lowering of water quality in an ONRW unless impacts are minimal and temporary. Approval for any degradation must be obtained according to the process outlined in 20.6.4.8(A)(3) and 20.6.4.8(A)(4) NMAC.

Section 2.2 Table 2-1. Tier Descriptions and Summary of Antidegradation Protection Requirements, Protection Requirements for ONRWs state: "No new or expanded direct discharges. No lowering of water quality allowed unless it is minimized and temporary, and degradation is approved according to 20.6.4.8 NMAC."

Section 3.1 Emergency Response Action: If an emergency response action is occurring in proximity to an ONRW and is necessary to mitigate an immediate threat to public health or safety, it may proceed prior to notification to the WQCC and NMED, in accordance with the following as outlined in 20.6.4.8(A)(3)(c) NMAC:

- *only actions that mitigate an immediate threat to public health or safety may be undertaken pursuant to this provision; non-emergency portions of the action shall comply with the requirements of 20.6.4.8 NMAC;*
- *the discharger shall make best efforts to comply with requirements noted above;*
- *the discharger shall notify the department of the emergency response action within seven days of initiation of the action; and,*
- *within 30 days of initiation of the emergency response action, the discharger shall provide a summary of the action taken, including all actions taken to comply with the requirements above.*

Condition #2 – Non-stormwater Discharges:

EPA shall include the following condition in Part 9 of the Final CGP to ensure non-stormwater discharges associated with construction activity including groundwater and subsurface water, spring water, and dewatering water comply with notification requirements in 20.6.2.1201 NMAC and reasonably ensure that the permitted activities will be conducted in a manner that will comply with applicable State of New Mexico WQS General Criteria in 20.6.4.13 NMAC, benchmark goals in 20.6.4.52 NMAC, implementation plans associated with 20.6.4.54 NMAC, segment-specific numeric criteria in 20.6.4.97 thru 20.6.4.99 NMAC and 20.6.4.101 through 20.6.4.899 NMAC, and use-specific numeric criteria set forth in 20.6.4.900 NMAC:

If non-stormwater discharges of groundwater and subsurface water, spring water, and dewatering water are anticipated, Operators/Permittees must complete the following steps:

1. Conduct a site/project-specific assessment to investigate and characterize the groundwater and subsurface water, spring water, and dewatering water to be discharged.
   a. Investigative documentation along with correspondence with NMED and EPA must be documented in the SWPPP.
   b. Review the Ground Water Quality Bureau and Petroleum Storage Tank Bureau Mappers at https://gis.web.env.nm.gov/GWQB/ and https://gis.web.env.nm.gov/oem/?map=gonm, respectively.
   c. Check if the following sources are located within the noted distance from the anticipated construction activity. At a minimum, a list of the following potential sources of contaminants and pollutants at the noted distance is to be kept with the investigative information record keeping in the SWPPP.

Source of Potential Contamination or Pollutants	**Constituents likely to be required for testing**
Within 0.5 mile of an open Leaking Underground Storage Tank (LUST) site	BTEX (Benzene, Toluene, Ethylbenzene, and Xylene) plus additional parameters depending on site conditions*
Within 0.5 mile of an open Voluntary Remediation site	All applicable parameters or pollutants listed in 20.6.4.13, 20.6.4.52, 20.6.4.54, 20.6.4.97 thru 20.6.4.99, 20.6.4.101 through 20.6.4.899 NMAC, and 20.6.4.900 NMAC (or an alternate list approved by the NMED SWQB)**
Within 0.5 mile of an open RCRA Corrective Action Site	
Within 0.5 mile of an open Abatement Site	
Within 0.5 mile of an open Brownfield Site	
Within 1.0 mile or more of a Superfund site or National Priorities List (NPL) site with associated groundwater contamination.	
Construction activity contaminants and/or natural water pollutants	Additional parameters depending on site activities and conditions (Contact for an alternate list approved by the NMED SWQB)**

*For further assistance determining whether dewatering may encounter contaminated sources, please contact the NMED Ground Water Quality Bureau at 505-827-2965 or the Surface Water Quality Bureau at 505-827-0187.

** EPA approved sufficiently sensitive methods must be used. For known PCBs sources and analysis, EPA Method 1668C must be used (see https://www.epa.gov/cwa-methods).

2. If dewatering activities are anticipated, information on the flow rate and potential to encounter contaminated groundwater, subsurface water, spring water, or dewatering water must be provided directly to NMED at the following address:

   NMED Surface Water Quality Bureau
   Program Manager, Point Source Regulation Section
   PO Box 5469, Santa Fe, NM 87502

   Please call the SWQB to obtain the appropriate email address (505-827-0187).

3. In addition, the Operator/Permittee must test the quality of the groundwater and subsurface water, spring or dewatering water being considered for discharge according to the table above and including dissolved hardness and pH.
    i. The Operator/Permittee must submit analytical test results to the EPA Region 6 Stormwater Permit Contact and the NMED Surface Water Quality Bureau. If the test data exceed applicable water quality standards, then the groundwater and subsurface water, spring water, or dewatering water cannot be discharged into surface waters under this permit. Operators/Permittees may submit an NPDES Individual Permit application to treat and discharge to waters of the U.S. or find alternative disposal measures. No discharge to surface waters are allowed until authorized.
    ii. If the discharge has the potential to affect groundwater, the Operator/Permittee must submit an NOI to the NMED Ground Water Quality Bureau (*see* 20.6.2.1201 NMAC – Notice of Intent to Discharge).

Background for Condition #2 (Non-stormwater Discharges associated with Construction Activity):

Further investigation, sample collection, and analytical testing of the ground water or subsurface water, spring water and dewatering water is needed to ensure that the proposed non-stormwater discharge would not cause or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality per 40 CFR 122.44(d)(1)(i).

Non-stormwater discharges associated with construction activity from groundwater or subsurface water, spring water, and dewatering water, especially from urban or industrial areas and possibly from natural sources, may include water contaminants or pollutants that exceed state water quality standards, which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property.

Regulatory Citation and Guidance

20.6.4.11(E)(5) NMAC - Applicability, Mixing Zone Limitations

E. Mixing Zone Limitation

(5) All applicable water quality criteria set under Subsection F of 20.6.4.13 NMAC, 20.6.4.97 through 20.6.4.899 NMAC and 20.6.4.900 NMAC shall be attained at the boundaries of mixing zones. A continuous zone of passage through or around the mixing zone shall be maintained in which the water quality meets all applicable criteria and allows the migration of aquatic life presently common in surface waters of the state with no effect on their populations.

20.6.4.13 NMAC - General Criteria

General criteria are established to sustain and protect existing or attainable uses of surface waters of the state. These general criteria apply to all surface waters of the state at all times, unless a specified criterion is provided elsewhere in this part. Surface waters of the state shall be free of any water contaminant in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with public welfare or use with property.

A. Bottom Deposits and Suspended or Settleable Solids:

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

(2) Suspended or settleable solids from other than natural causes shall not be present in surface

waters of the state in quantities that damage or impair the normal growth, function or reproduction of aquatic life or adversely affect other designated uses.

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

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

F. *Toxic Pollutants:*

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

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

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

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

20.6.4.52 NMAC Pecos River Basin

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

20.6.4.54 NMAC Colorado River Basin

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

Note: NPDES permits for industrial and municipal discharges are written in conformance with the associated Colorado River Basin Salinity Control Forum policies. EPA Stormwater Construction General

Permits are not listed as part of the Forum's Plan of Implementation in the 2020 Review Water Quality Standards for Salinity Colorado River System available at https://coloradoriversalinity.org/ at this time.

20.6.4.97 NMAC - Ephemeral Waters, 20.6.4.98 NMAC - Intermittent Waters, 20.6.4.99 NMAC - Perennial Waters and 20.6.4.101 through 20.6.4.899 NMAC

B. Criteria: The use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses" except if segment-specific criterion applies. Examples of use-specific numeric criteria that may be applicable include pH, TDS, sulfate, chloride, etc. depending upon the receiving surface water.

20.6.2.7 NMAC - Definitions

G. Definitions that begin with the letter "G"
"groundwater" means interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply;

S. Definitions that begin with the letter "S"
(5) "subsurface water" means ground water and water in the vadose zone that may become ground water or surface water in the reasonably foreseeable future or may be utilized by vegetation;

W. Definitions that begin with the letter "W"
(3) "water contaminant" means any substance that could alter if discharged or spilled the physical, chemical, biological or radiological qualities of water; "water contaminant" does not mean source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954;
(5) "water pollution" means introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property;

20.6.4.7 NMAC - Definitions

W. Definitions that begin with the letter "W"
(2) "Water contaminant" means any substance that could alter if discharged or spilled the physical, chemical, biological or radiological qualities of water. "Water contaminant" does not mean source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, but may include all other radioactive materials, including but not limited to radium and accelerator-produced isotopes.
(3) "Water pollutant" means a water contaminant in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property.

20.6.2.1201 NMAC - Notice of Intent to Discharge

A. Except for the notices specified in paragraphs (1) and (2) of this subsection, any person intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge, unless the discharge is being made or will be made into a community sewer system or subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water, and/ or the surface water quality bureau of the department for discharges that may affect surface water…

D. Notices shall state:
(1) the name of the person making the discharge;
(2) the address of the person making the discharge;
(3) the location of the discharge;
(4) an estimate of the concentration of water contaminants in the discharge; and

(5) the quantity of the discharge.

E. *Based on information provided in the notice of intent, the department will notify the person proposing the discharge as to which of the following apply:*
   (1) a discharge permit is required;
   (2) a discharge permit is not required;
   (3) the proposed injection well will be added to the department's underground injection well inventory;
   (4) the proposed injection activity or injection well is prohibited pursuant to 20.6.2.5004 NMAC.

Condition #3 Stormwater Pollution Prevention Plan (SWPPP) Requirements:

EPA shall include the following condition in Part 9 of the Final CGP to assure compliance with 40 CFR Part 122.44(k) and to reasonably ensure that the permitted activities will be conducted in a manner that will comply with 20.6.4.8(A)(2) NMAC, 20.6.4.8(B) NMAC, and the Statewide Water Quality Management Plan and Continuing Planning Process (2020 WQMP/CPP) Appendix A:

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

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

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

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

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

Background for Condition #3 (Additional SWPPP Requirements):

The proposed 2020 Draft CGP does not ensure that qualified persons will prepare the Stormwater Pollution Prevention Plan (SWPPP). For SWPPP inspectors, proposed 2020 Draft CGP Appendix A defines "Qualified Person" – a person knowledgeable in the principles and practice of erosion and sediment controls and pollution prevention, who possesses the appropriate skills and training to assess conditions at the construction site that could impact stormwater quality, and the appropriate skills and training to assess the effectiveness of any stormwater controls selected and installed to meet the requirements of this permit."

The proposed 2020 Draft CGP Part 2.1.1 requires that Operators "Account for the following factors in designing your stormwater controls: a. The expected amount, frequency, intensity, and duration of precipitation; b. The nature of stormwater runoff (i.e., flow) and run-on at the site, including factors such as expected flow from impervious surfaces, slopes, and site drainage features. You must design stormwater controls to control stormwater volume, velocity, and peak flow rates to minimize discharges of pollutants in stormwater and to minimize channel and streambank erosion and scour in the immediate vicinity of discharge points; and c. The soil type and range of soil particle sizes expected to be present on the site."

Regulatory Citation and Guidance

EPA regulations at 40 CFR Part 122.44(k) require, in part:

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

20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan

A. Antidegradation Policy

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

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

Statewide Water Quality Management Plan and Continuing Planning Process (2020 WQMP/CPP)
Appendix A Antidegradation Policy Implementation Procedure for Regulated Activities

Section 3 Antidegradation Review Requirements

Section 3.5 General NPDES Permit

A number of discharges to surface waters are authorized under general NPDES permits. These include stormwater runoff from municipalities required to comply with the Phase II MS4 stormwater permit, industrial activities covered by the stormwater program (Multi Sector General Permits), stormwater from construction sites one acre or larger (Construction General Permits), pesticide applications in or adjacent to surface waters (Pesticide General Permit), and concentrated animal feeding operations (CAFOs).

All NPDES general permits require preparation of a stormwater pollution prevention plan (SWPPP) that includes identification and control of all pollutants associated with the activities to minimize impacts to water quality. The permits also include requirements to implement site-specific interim and permanent BMPs and/or other controls to reduce (or eliminate) pollutant loading to minimize impacts to water quality. BMPs are designed to prevent to the maximum extent practicable an increase in pollutant load to the water body. BMPs also include measures to reduce flow velocity to assure that applicable water quality standards, including the antidegradation policy, are met. Compliance with the terms and conditions of the general permits is required to maintain authorization to discharge under the general permit. Discharges covered by a general permit that do not comply with general permit conditions or

antidegradation requirements will be required to seek coverage under an individual permit.

Overview of the Antidegradation Review for General Permits
Regulated discharges authorized by general permits are not required to undergo a Tier 2 antidegradation review as part of the permitting process. However, new and reissued general permits must be evaluated to consider the potential for significant degradation as a result of the permitted discharges.

Discharges covered by general permits are transient or essentially non-existent (e.g., "no discharge") with temporary or short-term impacts. Further, dischargers seeking coverage under a general permit are required in their SWPPP to identify pollutants on a pollutant-by-pollutant basis and to design and implement controlsto minimize impacts to water quality. As a result, discharges that comply with general permits are not likely to cause significant degradation of water quality. In addition, activities covered under general permits (e.g., construction, industries, municipalities, dairies, feedlots, etc.) are considered to have social and economic importance to New Mexico. Therefore, antidegradation review for general permits will be based on whether or not the permit conditions are met and if the BMPs are effective at limiting (or eliminating) pollutant loading to minimize water quality impacts.

Condition #4 Spill Notification:
EPA shall include the following condition in Part 9 of the Final CGP to notify Operators of reporting requirements in 20.6.2.1203 NMAC:

> Operators must notify NMED when discharges of toxic or hazardous substances or oil from a spill or other release occurs - *see* Emergency Spill Notification Requirements, Part 2.3.6 of the permit. For emergencies, Operators can call 505-827-9329 at any time. For non-emergencies, Operators can call 866-428-6535 (voice mail 24-hours per day) or 505-476-6000 during business hours from 8am-5pm, Monday through Friday. Operators can also call the NMED Surface Water Quality Bureau directly at 505-827-0187.

Background for Condition #4 (Spill/Unanticipated/Unauthorized Discharge Notification):
Regulatory Citation and Guidance
20.6.2.1203 NMAC - Notification of Discharge-Removal
A. *With respect to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, the following notifications and corrective actions are required…*
(1) As soon as possible after learning of such a discharge, but in no event more than twenty-four (24) hours thereafter, any person in charge of the facility shall orally notify the Chief of the Ground Water Quality Bureau of the department, or his counterpart in any constituent agency delegated responsibility for enforcement of these rules as to any facility subject to such delegation…

Condition #5 – Small Construction Activity Equivalent Analysis:
The 2022 Draft CGP Appendix C (Small Construction Waivers and Instructions) allows waivers to stormwater discharges associated with small construction activities (i.e., 1-5 acres). Operators of a small construction activities may be able to qualify for a waiver in lieu of needing to obtain coverage under this general permit based on: (C.1) a low rainfall erosivity factor, (C.2) a TMDL analysis, or (C.3) an equivalent analysis that determines allocations for small construction sites are not needed.

EPA shall include the following condition in Part 9 of the Final CGP 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.

Operators of small construction activities (i.e., 1-5 acres) are not eligible to qualify for a waiver in lieu of needing to obtain coverage under this general permit based on Item C.3 of Appendix C (Equivalent Analysis Waiver) in the State of New Mexico.

Background for Condition #5 (Operators Not Eligible for Small Construction Activity Equivalent Analysis):
The proposed 2020 Draft CGP does not adequately ensure that allocations for small construction sites are not needed. For example: EPA did not provide guidance and/or examples for Operators on how to conduct and document an equivalent analysis; EPA did not define or provide examples for "sediment-related" parameters; EPA did not clarify if EPA should clarify if an equivalent analysis for a "non-impaired" water would have similar level of documentation as a Total Maximum Daily Load (TMDL); and, EPA did not include or require a process for review and approval, including stakeholder input, of an equivalent analysis. Before the State can evaluate this waiver, the issues noted above must be addressed.

Regulatory Citation and Guidance
EPA regulations at 40 CFR Part 122.44(k) require, in part:
Best management practices (BMPs) to control or abate the discharge of pollutants when…(3) Numeric effluent limitations are infeasible, or (4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA…."

20.6.4.8.A(2) Antidegradation Policy and Implantation Plan
A. *Antidegradation* Policy
(2) *Further, the state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources…."*

Comments that are not Conditions of Certification
NMED comments on the proposed CGP were submitted to Docket ID #EPA-HQ-OW-2021-0169 via the Regulations.gov website on July 8, 2021. They are also included in this certification below.

Overarching Comment: EPA's 2022 Proposed CGP, including appendices, fact sheet and requests for comments totaling nearly 300 pages, is extensive and evolving. EPA's request for comments in eight specific areas demonstrates that many permit conditions are subject to substantive changes between the May 2021 draft and the final CGP. For example, based on many questions raised by EPA in EPA's requests for comment, it is not clear what will be required in the Final Permit regarding water quality-based conditions for dewatering activities. Expecting state and tribal governments to certify a draft permit with many substantive unresolved questions runs counter to the cooperative federalism principles enshrined in Section 401 of the Clean Water Act (CWA) and jeopardizes New Mexico's surface waters.

NMED requests EPA make the following changes and considerations before issuing the final CGP:

EPA's Request for Comment (RFC) 1: Whether to modify the definition of operator to specifically include parties that determine acceptance of work and pay for work performed.
NMED maintains that the existing definition is broad enough to capture those parties intended to be addressed by the new language. The issue raised regarding some permittees finding it difficult to get approval for additional expenditures needed to comply with the CGP appears to be an issue related to the agreement between those two parties rather than an issue related to the permit. The incentive should be that a project is halted by the Operator (e.g., owner or general contractor) because there are not adequate controls to be compliant with the permit, or risk enforcement.

If EPA chooses to include new language, NMED requests that EPA provide additional clarification in the Response to Comments and final permit as to whether state agencies that receive grant funding and/or pass-through entities or accountants are included as "Operators" under the new definition. While state agencies that receive grant funding and/or pass-through entities track and account for the grant funding by certifying invoices and accepting work products and deliverables, they do not have operational control over construction plans and specifications or activities at the project site.

RFC 2: Whether additional discharges should be prohibited from coverage under the CGP due to the possibility of those discharges containing contaminants.

Regarding prohibition of additional discharges in Part 1.3.6, NMED supports EPA in strengthening NPDES permits when necessary to protect human health and the environment and to ensure discharges will not cause or contribute to an exceedance of state Water Quality Standards (WQS). Any non-stormwater discharge to surface water, including groundwater dewatering, may contain water contaminants and pollutants (e.g., sediment, radionuclides, petroleum products, etc.) that, if not properly treated or controlled using best management practices (BMPs), could cause an exceedance of applicable state WQS if discharged. Therefore, NMED supports the prohibition of additional discharges from sites discharging dewatering water without proper treatment and/or BMPs when the groundwater (i.e., dewatering water) contains pollutant(s) at levels or concentrations that will likely not meet applicable state WQS.

Regarding groundwater definitions, NMED does not support a definition for "ground water pollutants," which may include both natural or man-made water contaminants or pollutants in Appendix A or other Parts of the Final Permit. As stated above, NMED supports the prohibition of discharges of dewatering water when the groundwater (i.e., dewatering water) contains pollutant(s) at levels or concentrations that will likely not meet applicable WQS. New Mexico has numeric and narrative criteria for pollutants and contaminants that define the levels that are necessary to protect public health and the environment. As proposed by NMED, the prohibition does not require a definition because it is based on an exceedance of applicable WQS.

Proposed Part 1.3.6 prohibits the discharge of "dewatering water discharged from a contaminated site" and footnote 7 states, "The following are considered to be discharges from contaminated sites: sites subject to existing or former remediation activities (e.g., Superfund/CERCLA or RCRA sites)." This definition of contaminated sites is too narrow and does not address potential natural and man-made contaminants or pollutants regulated under state or tribal regulatory programs beyond CERCLA and RCRA. As noted above, NMED recommends expanding the dewatering prohibition to include additional discharges that may exceed applicable WQS. Regardless, NMED could support case-by-case flexibility for Superfund or RCRA cleanup sites if EPA requires additional documentation as part of the Notice of Intent to identify and describe controls in place that prevent exposure of stormwater to buried wastes.

Beyond Part 1.3.6, EPA proposes additional changes to the permit's dewatering requirements in Parts 2.4, 3.3 (see RFC 6 comments below), 4.3.2, 4.5.5, 4.6.3, 5.1.5, and Appendix A of the 2022 Proposed CGP. EPA also proposes additional dewatering Notice of Intent (NOI) questions, controls, photograph documentation, checklists, corrective action and/or prohibitions, and to increase inspection frequency. NMED provides the following comments regarding dewatering topics:

<u>Request for Additional Guidance, Training and Outreach</u>

NMED requests EPA develop or update non-stormwater discharge and dewatering guidance and training outreach materials.

<u>Strengthen Early Assessment for Contaminants and Pollutants</u>

NMED requests EPA strengthen guidance and/or permit requirements to ensure Owners/Operators evaluate potential contaminants and pollutants in anticipated non-stormwater discharge, including groundwater, and to

develop appropriate measures to avoid or minimize impacts to human health and the environment early during project development prior to obtaining coverage under the CGP. Depending upon the results of the Owner/Operator evaluation, analytical testing and consultation with federal, state, and/or tribal governments may be needed prior to completing the final design and Stormwater Pollution Prevention Plan (SWPPP) such that appropriate dewatering treatment and/or controls can be implemented.

Request to Evaluate Standalone Non-Stormwater Dewatering General Permit

In the fact sheet, EPA discusses that state-program CGPs are more stringent or more specific than EPA's proposed changes to the CGP. State-programs have issued NPDES general permits specifically focused on regulating dewatering discharges separate from stormwater from construction sites. NMED recommends that EPA Headquarters and/or Regions evaluate whether issuing a separate (standalone) non-stormwater dewatering general permit, similar to some state programs, with a separate Dewatering Pollution Prevention Plan is more effective at regulating these types of discharges than the CGP. NMED argues that a standalone general permit would better address dewatering or other non-stormwater discharge duration, magnitude, frequency, and cumulative effects in New Mexico. It would also provide Owners/Operators the ability to obtain general permit coverage for discharges related to activities that do not require coverage under the Multi-Sector General Permit (MSGP) or CGP. Such a general permit, if properly developed and issued to effectively cover water discharged from dewatering activities at contaminated sites, would be a protective complement to the proposed Part 1.3.6 CGP prohibition on such dewatering discharges.

Additional Comments on Dewatering

Parts 1.2.2 and 1.3.6. NMED recommends listing examples described in the Proposed 2022 CGP Fact Sheet as a footnote in the Final Permit.

NMED requests that EPA clarify permit and enforcement jurisdiction of dewatering associated with activities covered under a Section 404 Dredge or Fill Permit and/or within the ordinary high-water mark of a water of the U.S. versus dewatering water discharge from activities in uplands to a water of the U.S. or conveyances to a water of the U.S. in the Final Permit.

Part 2.4.1. EPA's proposed definition of "visual turbidity" as "a sediment plume or other cloudiness in the water caused by sediment that can be identified by an observer" may cause confusion. Turbidity may be caused by other pollutants than sediment. Plume may have other common definitions than intended. Turbidity may be defined differently in State and Tribal WQS. NMED recommends using more descriptive terms of the dewatering discharge (e.g., cloudy, opaque and visible contrast in the water) may be helpful in the Final Permit.

Part 4.6.3. NMED requests that EPA clarify permit language in Part 4.6.3 (Requirements for Inspections). Part 4.6.3(a) appears to assume that the dewatering will begin and end on the day of inspection and does not address or anticipate the contractor's need for continuous discharge. It is not clear if EPA intends to authorize a continuous discharge under the CGP. Proposed Part 4.6.3(d), related to photographs, lists "stormwater control(s)" or "stormwater control" whereas "dewatering control(s)" or "dewatering control" to prevent or minimize erosion and sediment is more appropriate in this part of the permit. Proposed Part 4.6.3(d) requires photographs of the "point of discharge to any waters of the U.S." whereas photographs at drainages, stormwater sewer inlets, and other conveyances to waters of the U.S. should also be required.

NMED requests that EPA consider potential safety issues and clarify permit language that instructs operators to take immediate steps to suspend the dewatering discharge. Safety issues that prevent the immediate suspension of the dewatering discharge should be documented in required record-keeping for the permit. NMED recommends using language similar to Part 4.7.1(e) (Inspection Report) of the CGP, for example, "if you determined that it is unsafe [to continue the dewatering discharge]… you must describe the reason you found it to be unsafe and specify actions taken…."

Appendix A (Definitions). EPA proposes to add definitions for "dewatering," "non- turbidity," and "uncontaminated discharge." For the definition of dewatering, the phrase "other similar points of accumulation" does not appear to describe all the types of dewatering activity in the Proposed 2022 CGP Fact Sheet. For example, wells may not be considered similar to trenches. NMED recommends removing the word "similar" and providing a list of activities authorized or allowed by the permit. For the definitions of non-turbid and uncontaminated, NMED questions if the definitions are needed or if the intended concept is better explained in Part 1.2.2 of the permit. Part 1.2.2(j) states "uncontaminated, non-turbid discharges of ground water or spring water." It appears that EPA proposes this to be the only occurrence of "non-turbid." NMED recommends stating, "uncontaminated discharges of ground water or spring water that meet water quality standards," or something similar, to address EPA's intent.

RFC 3: Whether to extend the discharge authorization waiting period from the current 14 days to 30 days to facilitate review of eligibility related to protection of endangered or threatened species.
NMED is not opposed to extending the discharge authorization waiting period to facilitate U.S. Fish and Wildlife Service and National Marine Fisheries Service ("the Services") review of eligibility related to protection of endangered or threatened species. However, to be more transparent and informative, NMED requests that EPA and the Services provide more information or data on review activities taken during the waiting period. NMED also requests EPA develop a system where EPA and/or the Services can release individual NOIs before the end of the waiting period.

RFC 4: Whether the 5-acre disturbance threshold for stricter stabilization requirements provides incentive for and encourages operators to phase construction disturbances, so that they are kept under five acres at any one time.
NMED supports EPA strengthening CGP requirements for phased construction, especially in arid, semi-arid, and drought-stricken areas, to avoid or minimize construction activity dust and wind erosion. Phased construction controls may also help Operators comply with the requirements to minimize dust in Part 2.2.6 and preserve native topsoil in Part 2.2.8 of the permit.

RFC 5: Whether existing waste control flexibilities should be applied to additional construction materials.
NMED requests that any changes to Part 2.3.3 controls ensure that building materials and products do not become a nuisance or windblown waste that could be discharged in stormwater and that any changes will not conflict with Part 2.2.5 (Manage stockpiles or land clearing debris piles composed, in whole or in part, of sediment and/or soil) and Part 3.2 (For Sites Discharging to Sensitive Waters).

RFC 6: Whether the permit should require monitoring for sites discharging dewatering water to sediment-impaired waters or Tier 2, 2.5, or 3 waters. EPA also requests feedback on the relative merits of the two potential approaches for monitoring (benchmark versus indicator).
EPA's final CGP must better connect Part 3.3 to the proposed prohibition on discharges of dewatering water from contaminated sites. For example, Part 3.3 could affirmatively state that it applies to discharges associated with dewatering activities that are allowable under Part 1.3 and not covered by a separate NPDES permit. Please also refer back to NMED's comments on RFC 2, above.

EPA proposes that for affected sites, the permittee will be required to collect and analyze at least one turbidity sample from the discharge on each day in which dewatering discharges are occurring. Generally, NMED supports EPA adding monitoring requirements for discharges of dewatering water to sediment-impaired waters or other Tier 2 or Tier 3 waters for antidegradation purposes. The State of New Mexico does not have Tier 2.5 waters.

EPA is considering one of two approaches as a model for monitoring in the CGP: benchmark monitoring or indicator monitoring. Under a benchmark monitoring approach, permittees will be required to take turbidity

samples on each day of discharge from their dewatering activities and compare the weekly average of the results with an established benchmark turbidity value, which EPA proposes to be 50 Nephelometric Turbidity Units (NTU). If benchmark monitoring is used, the operator will be required to conduct corrective action(s) any time the weekly average exceeds the benchmark of 50 NTU. Under an indicator monitoring approach, permittees will still be required to monitor the dewatering discharge for turbidity; however, there is no benchmark level that triggers corrective action to change and upgrade dewatering controls to lower turbidity levels.

NMED prefers the benchmark monitoring approach because it provides a water quality condition to evaluate the effectiveness of the dewatering controls and requires corrective action to protect water quality if the dewatering controls are shown to be ineffective. However, both monitoring approaches give a false impression that the dewatering discharge meets applicable WQS when it may not.

New Mexico's Comprehensive Assessment and Listing Methodology (CALM) explains how existing and readily available surface water quality data and other information are used to determine whether WQS are being attained. For turbidity assessment, the CALM uses a severity of ill effects index that uses the combined effects of turbidity levels and duration of exposure to identify thresholds (i.e., benchmarks) for achieving WQS. The seven consecutive day turbidity impairment threshold in New Mexico is 15 NTU; therefore, if continuously recorded turbidity data exceed 15 NTU for seven consecutive days, the waterbody is considered impaired. Although the CALM is restricted to assessment of coldwater perennial streams and rivers with coldwater aquatic life designated uses, the literature indicates that coolwater and warmwater aquatic life may be negatively impacted at turbidity levels ranging from 37-60 NTU, and possibly higher.[1,2,3] NMED emphasizes that a singular 50 NTU benchmark may not be adequate to protect aquatic life and fishes, especially in cold and clear waterbodies, and requests EPA consider multiple benchmark values for different types of receiving waters (e.g., coldwater fisheries, warmwater fisheries, public water supplies; etc.), similar to Montana's approach.

NMED assumes EPA would require turbidity monitoring and measurements in accordance with approved sufficiently sensitive methods, and with record keeping requirements in Standard Conditions of NPDES permits. If not, then NMED requests that EPA provide its reasons in the response to comments and/or Fact Sheet for the Final Permit.

RFC 7: Specific comments on the proposed changes to the inspector training requirements.
NMED supports EPA developing an Inspector Training course. NMED is concerned that one (1) on-line course that "covers the material site inspectors will find most useful to comply with the permit's inspection requirements" may be insufficient to ensure the person is qualified. Although NMED does not recommend specific third-party training programs, often these certification programs incorporate field and/or pertinent years of experience as part of the certification approval. EPA has not developed a training program at this time, nor has EPA demonstrated that it will be equivalent to third-party training programs, as discussed above. NMED requests that EPA's or alternative trainings incorporate arid, semi-arid, and drought-stricken examples, and any state or tribe-specific requirements of the final CGP.

NMED also supports that a "qualified person" would not necessarily need a "current valid construction inspection certification or license from a program." However, NMED recommends adding the word "direct," or something similar, to better explain supervision in allowing "[a] member of the stormwater team may also

[1] Carter, M.W., Shoup, D.E., Dettmers, J.M., and D.H. Wahl. 2009. Effects of turbidity and cover on prey selectivity of adult smallmouth bass. Transactions of the American Fisheries Society 139: 353-361.

[2] Gardner, M. B. 1981. Effects of turbidity on feeding rates and selectivity of bluegills. Transactions of the American Fisheries Society 110:446-450.

[3] Reid S. M., M. G. Fox, and T. H. Whillans. 1999. Influence of turbidity on piscivory in largemouth bass (Micropterus salmoides). Canadian Journal of Fisheries and Aquatic Science 56:1362–1369.

conduct inspections if they are working under the direct supervision of a person who has the qualifications described above." In addition, NMED recommends that the person who has qualifications review, sign and certify Inspection Reports completed by employees they supervise. NMED also recommends that the person who has qualifications should inspect the site once a month or once a quarter as a quality assurance/quality control check to ensure the persons they supervise and the controls in place are compliant with the permit.

RFC 8: Feedback on the proposed requirement in Part 8.2.1(a) to take photographs of the stabilized areas of the site and submit them with notices of termination (NOT).
Proposed Part 8.2.1a states "[t]o document that you have met these stabilization requirements, you must take photographs that clearly show your compliance with the Part 2.2.14 stabilization requirements and that are representative of the stabilized areas of your site, and submit them with your NOT."

NMED agrees that photographs submitted with the NOT will help evaluate final stabilization measures consistent with criteria in Proposed Part 2.2.14(c), as well as potential compliance issues associated with Proposed Part 8.2.1 of the CGP. For smaller sites, sites with 100% permanent structures and/or non-vegetative erosion controls or for areas that need to remain disturbed, photo documentation may be sufficient. However, photographs by themselves may not adequately document compliance with all the final stabilization criteria or exceptions and removal requirements of the CGP. In addition, for preconstruction agricultural use documentation, photographs prior to construction and other documentation records may be needed. Therefore, NMED recommends that EPA provide clarification in the permit that the SWPPP include site specific procedures, measures, and other documentation that will be used to determine that final stabilization criteria are met, in combination with photographs. For example, the SWPPP should provide a schedule for completing landscaping plans and document how the landscaping plans will meet final stabilization criteria for the entire construction activity and support activity areas. In addition, a Final Stabilization Report with photographs and documentation of any changes from the plan should be submitted with the NOT as proof of compliance. To assist permittees with meeting final stabilization and NOT requirements, EPA could develop a Final Stabilization Report outline and/or checklist. NMED also recommends requiring annual Interim/Temporary Stabilization Reports for larger sites and/or for arid, semi-arid, and drought-stricken areas to ensure compliance consistent with Proposed Parts 2.2.14(c) and 8.2.1(a)-(d).

EPA should consider developing guidance, permit footnotes, and/or appendices in the CGP that detail procedures, measures, and other documentation to verify compliance. Documentation may include, but is not limited to, construction activity or support activity site specific documentation of the cover of vegetation native to local undisturbed area; reference site that has similar physical attributes (slope, aspect, elevation, soil type); visual inspection of vegetation seedling establishment (seeded, volunteer, native, and non-native or invasive species), quantitative measurements or calculations of cover (line point intercept techniques, fixed area polygon for cover estimation), quality assurance / quality control measures (sample size, minimum number of points (e.g., 3 to 5), replication, random selection) and photographs showing measurements (tape, pole, transects, etc.). In New Mexico, operators, qualified SWPPP developers, and inspectors may find guidance from academic institutions (e.g., New Mexico State University, https://jornada.nmsu.edu/monit-assess/manuals/monitoring). Also, features of the Daubenmire Method may be incorporated in a site-specific final stabilization procedure or method.[4]

Additional NMED Comments:

- EPA uses the phrase "waters of the U.S." or "water of the U.S." often but not always, with some combination of "drainages," "storm sewers," "stormwater inlets," "conveyances," etc. Not all uses of "waters of the U.S." or "water of the U.S." require listing these conveyances. Consistent language, as applicable, should be used in the Final Permit, including appendices, but for locating activities and

[4]Daubenmire, Rexford. 1959. A Canopy-coverage method of vegetational analysis. Northwest Science 33:43-64.

materials and observing visual signs of erosion or sediment. For example, footnote 4 of the Proposed CGP states, *"Note: Your site will be considered to discharge to a Tier 2, Tier 2.5, or Tier 3 water if the first water to which you discharge is identified by a state, tribe, or EPA as a Tier 2, Tier 2.5, or Tier 3 water. For discharges that enter a storm sewer system prior to discharge, the first water of the U.S. to which you discharge is the waterbody that receives the stormwater discharge from the storm sewer system. See list of Tier 2, Tier 2.5, and Tier 3 waters in Appendix F."* This note introduces uncertainty due to inconsistent use of "water of the U.S." Please revise to clarify whether the EPA's intention is to protect waters of the U.S. or all waters identified by a state, tribe, or EPA as Tier 2, Tier 2.5, or Tier 3 water.

- After reviewing the Proposed CGP and Fact Sheet, NMED is unsure why EPA replaced "…cause, have the reasonable potential to cause, or contribute to an excursion above any…" to "…not meet…" applicable water quality standards (*see* Part 1.1.8(a) of the Proposed CGP). The Fact Sheet explains on page 22 that the language change is "proposed to better reflect the objectives and requirements of the CWA and this permit to ensure that discharges from both new and existing sources meet applicable water quality standards, consistent with CWA sections 402(p)(3)(A) and 301(b)(1)(C)." The 2017 CGP language comports more directly to these CWA provisions and 40 CFR 122.4(i).

- The proposed change in Part 1.1.9 states, "…to ensure that your use of cationic treatment chemicals will not lead to discharges that do not meet water quality standards." The following, or something similar would be simpler: "…to ensure that your use of cationic treatment chemicals will lead to discharges that meet water quality standards."

- Footnote 46 on page 24 of the Proposed CGP states, "…For assistance in determining whether your site discharges to impaired waters, EPA has developed a tool that is available both within the electronic NOI form in NeT, and at https://water.epa.gov/polwaste/npdes/stormwater/ discharge.cfm." However, the link directs you to EPA's general NPDES webpage at https://www.epa.gov/npdes. It is not clear where the tool is located on EPA's website. Please correct the link so it directs people to this useful tool. NMED also recommends providing a link to each state and tribal government's 303(d) list in the Final Permit.

- Related to the "Equivalent Analysis" in Appendix C of the Proposed Permit – Small Construction Waivers and Instructions:
  - EPA should provide guidance and/or examples for Operators on how to conduct and document an equivalent analysis.
  - EPA should clarify the term "non-impaired" waters for the purposes of the equivalent analysis waiver.
  - EPA should define and/or provide examples for "sediment-related" parameter.
  - EPA should clarify if an Operator is still eligible to use the equivalent analysis waiver if the discharge is to a water impaired for a "non-sediment related" parameter.
  - EPA should clarify if an equivalent analysis for a "non-impaired" water would have similar level of documentation as a Total Maximum Daily Load (TMDL).
  - EPA should clarify the process for review and approval, including stakeholder input, of an equivalent analysis.