



July 8, 2021

Christopher Kloss  
Water Permits Division Director  
U.S. Environmental Protection Agency  
Office of Water, Office of Wastewater Management (4203M)  
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**Re: Proposed 2022 Construction General Permit for Stormwater Discharges Associated with Construction Activities (Docket ID: EPA-HQ-OW-2021-0169)**

Dear Mr. Kloss,

On behalf of the New Mexico Environment Department (NMED), enclosed please find our comments on the proposed 2022 Construction General Permit (CGP) for Stormwater Discharges Associated with Construction Activities, Docket ID No. EPA-HQ-OW-2021-0169. *See* 86 FR 26023 (May 12, 2021).

Please note that NMED will provide a separate 401 Certification with State Certification Conditions to the U.S. Environmental Protection Agency (EPA) Region 6 in accordance with the applicable deadline (to be determined). NMED is planning to send a separate letter to Acting Regional Administrator David Gray, urging EPA Region 6 to initiate state certification on the draft final CGP developed by the Office of Water subsequent to the current public comment period. As stated in our attached comments, it is not appropriate for NMED to certify a proposed permit with many terms and conditions subject to change in response to comments EPA receives.

If you have questions or would like to discuss these comments with NMED, please contact Susan A. Lucas Kamat, Acting Point Source Regulation Program Manager, at [Susan.LucasKamat@state.nm.us](mailto:Susan.LucasKamat@state.nm.us) or (505) 946-8924. Thank you for the opportunity to comment.

Sincerely,

Shelly Lemon  
Chief, Surface Water Quality Bureau

Attachment (1)

cc: John Rhoderick, Acting Director, Water Protection Division  
Susan Lucas Kamat, Acting Program Manager, SWQB Point Source Regulation Section  
Levi Dean, Supervisor, SWQB Industrial and Stormwater Team  
Greg Schaner, USEPA, Office of Water, Office of Wastewater Management  
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Charles Maguire, USEPA, Region 6, Director, Water Division  
Evelyn Rosborough, USEPA, Region 6 (6WDPN)  
Brent Larsen, USEPA, Region 6 (6WDPE)  
Suzanna Perea, USEPA, Region 6 (6WDPE)

## Attachment

### **New Mexico Environment Department (NMED) Comments on 2022 Proposed Construction General Permit (CGP) for Stormwater Discharges Associated with Construction Activities**

**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. Therefore, NMED requests that EPA review, respond to, and incorporate public comment, as appropriate, into a second Draft CGP and then provide the new Draft CGP for public comment and State certification under CWA Section 401.

Based on preliminary review, 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:

Request for Additional Guidance, Training and Outreach

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

Strengthen Early Assessment for Contaminants and Pollutants

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.<sup>1,2,3</sup> 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 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

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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.

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.<sup>4</sup>

#### **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 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

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<sup>4</sup>Daubenmire, Rexford. 1959. A Canopy-coverage method of vegetational analysis. Northwest Science 33:43-64.

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.