

**McKean, Jennifer - FSIS**

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**From:** Glass, David (CIV) [David.Glass@usdoj.gov]  
**Sent:** Tuesday, June 25, 2013 5:04 PM  
**To:** Bolick, Thomas - OGC; McKean, Jennifer - FSIS  
**Subject:** Valley Meat: Email From NMED re Clean Water Act

**From:** Kendall, Jeff, NMENV [mailto:Jeff.Kendall@state.nm.us]  
**Sent:** Wednesday, June 05, 2013 4:55 PM  
**To:** Glass, David (CIV)  
**Cc:** Kendall, Jeff, NMENV  
**Subject:** NMED 9 cfr § 304.2

Mr. Glass,

Thank you for your inquiry in regard to the New Mexico Environment Department's (NMED) interpretation of the United States Department of Agriculture (USDA), Food Safety and Inspection Service's (FSIS) regulation, 9 CFR § 304.2. And more specifically, NMED's authority to provide state certification under 33 USC 1341 (a)(1) (Clean Water Act (CWA) § 401(a)(1)), as required by 9 CFR s 304.2 (c)(1).

The threshold determination of whether an applicant's operations may result in any discharge into navigable waters of the United States, thereby triggering the state certification requirement, must be made by the USDA/FSIS, not the NMED. USDA/FSIS must determine whether the applicant's operations may constitute a discharge and whether the potential discharge would be into navigable waters of the United States. The onus is not on NMED under the USDA regulation or any New Mexico regulation.

If the USDA decides that the applicant's operations may result in a discharge into navigable waters of the United States, a formal request for Section 401 certification may then be submitted to NMED. Under authority granted by the New Mexico Legislature in the Water Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17, the New Mexico Water Quality Control Commission has adopted regulations for state certification of draft federal permits or licenses under Section 401 of the federal CWA at 20.6.2.2001 to 2003 NMAC. The timing and process for obtaining state certification can be found there.  
<http://www.nmcpr.state.nm.us/nmac/parts/title20/20.006.0002.htm>.

NMED understands this issue is politically charged. Despite that, NMED is committed to enforcing the laws and regulations as written. Regardless of political implications or heightened media attention, NMED cannot change course. The laws and regulations must be applied consistently and uniformly in all instances. As regulators, I expect that you can appreciate our approach.

I hope this email explaining NMED's position is helpful and addresses your concerns. Please call should you have any further questions.

Very respectfully,

Jeffrey M. Kendall  
GENERAL COUNSEL  
NEW MEXICO ENVIRONMENT DEPARTMENT

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