

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 7 WASTEWATER AND WATER SUPPLY FACILITIES
PART 7 REVIEW PROCEDURES FOR WASTEWATER CONSTRUCTION LOANS

20.7.7.1 ISSUING AGENCY: New Mexico Environment Department.
[20.7.7.1 NMAC - Rp, 20.7.1.1 NMAC, 3/10/2020]

20.7.7.2 SCOPE: These procedures apply to all construction or planning/design projects funded in-part from the Wastewater Facilities Construction Loan Fund which is derived from the federal capitalization grant except as provided in Section 11 of 20.7.7 NMAC.
[20.7.7.2 NMAC - Rp, 20.7.1.2 NMAC, 3/10/2020]

20.7.7.3 STATUTORY AUTHORITY: Department of Environment Act, Subsection D of Section 9-7A-6 NMSA 1978; Wastewater Facility Construction Loan Act, Sections 74-6A-1 to 15 NMSA 1978; and Water Quality Act, NMSA 1978, Sections 74-6-1 to 17.
[20.7.7.3 NMAC - Rp, 20.7.1.3 NMAC, 3/10/2020]

20.7.7.4 DURATION: Permanent.
[20.7.7.4 NMAC - Rp, 20.7.1.4 NMAC, 3/10/2020]

20.7.7.5 EFFECTIVE DATE: March 10, 2020. This Part amends and replaces the Environmental Review Procedures for Projects Funded Through the Wastewater Facility Construction Loan Program, HED 88-3 (EID), filed September 22, 1988, as amended.

A. All references to HED 88-3 (EID) or to the Review Procedures for Projects Funded through the Wastewater Facility Construction Loan Program in any other rule shall be construed as a reference to this Part.

B. The amendment and replacement of HED 88-3 (EID) shall not affect any administrative or judicial enforcement action pending on the effective date of such amendment nor the validity of any financial assistance provided pursuant to HED 88-3 (EID).

[20.7.7.5 NMAC - Rp, 20.7.1.5 NMAC, 3/10/2020]

20.7.7.6 OBJECTIVE: This Part establishes the New Mexico Environment Department's policy and procedures for the identification and analysis of the environmental impacts of construction of wastewater facilities funded in-part through loans from the Wastewater Facility Construction Loan Fund (which is New Mexico's SRF) and the preparation and processing of Environmental Impact Statements (EISs). This procedure shall be coordinated with and shall be consistent with NMED's environmental review responsibilities pursuant to the Governor's Executive Order 83-73, "State Clearinghouse Review Process."
[20.7.7.6 NMAC - Rp, 20.7.1.6 NMAC, 3/10/2020]

20.7.7.7 DEFINITIONS: All terminology used in this Part will be consistent with the terms as defined in 40 CFR Part 1508 (the CEQ Regulations) except as provided in this Part.

A. **"Applicant"** means any state agency or other qualified borrower, which has filed an application for loan assistance from the SRF.

B. **"Environmental Information Document"** (EID) means any written analysis prepared by an applicant or contractor describing the environmental impacts of a proposed project. This document will be of sufficient scope to enable the responsible official to assess the environmental impacts of the proposed project;

C. **"Department" or "NMED"** means the New Mexico environment department.

D. "environmental review" means the process whereby an evaluation is undertaken by NMED to determine whether a proposed project may have a significant impact on the environment and therefore require the preparation of an Environmental Impact Statement (EIS);

E. **"Loan"** means a loan of funds by a written loan agreement from the SRF;

F. **"Planning/design loan"** means a loan which is issued for the purpose of preparation of a plan (including environmental review process) or preparation of design drawings and specifications for a potential construction project.

G. “**Project**” means a construction project which receives a loan for the purpose of building a publicly owned treatment works (POTW) or other eligible works.

H. “**Record of Decision**” (ROD) means a document prepared and issued by the NMED responsible official on the Environmental Impact Statement (EIS) which includes an identification of mitigation measures.

I. “**Responsible Official**” means the Secretary of the department who is authorized to fulfill the requirements of these procedures. The Chief of the Construction Programs Bureau is delegated the day-to-day responsibilities for implementing these procedures.

J. “**SRF**” means the state revolving loan fund as established by the Wastewater Facility Construction Loan Act.

K. “**State agency**” means an agency or department of the New Mexico executive branch of government.

[20.7.7.7 NMAC - Rp, 20.7.1.7 NMAC, 3/10/2020]

20.7.7.8 BACKGROUND:

A. On June 10, 2014, the President signed into law the Water Resources Reform and Development Act of 2014. The U.S. Environmental Protection Agency (EPA) issued on September 18, 2014, Interpretive Guidance for Certain Amendments in the Water Resources Reform and Development Act to Titles I, II, V, and VI of the Federal Water Pollution Control Act (FWPCA). Section 5002 states the following: All CWSRF-funded projects involving the construction of treatment works, regardless of the source of the funding must undergo an environmental review. The [EPA] has consistently interpreted the statement “with assistance made available by a State water pollution control revolving fund authorized under this title” to mean that the specific requirement identified applies to all CWSRF-funded projects, not just equivalency projects. Consistent with this prior interpretation, any project that is considered a “treatment work” as defined in the FWCPA section 212, now incorporated in FWCPA Section 502(26), must comply with the FWCPA 511(c)(1) regardless of which eligibility it is funded under (see section 603(c)). A state may choose to apply its own “NEPA-like” state environmental review process for complying with the FWCPA 511(c)(1) provided that the elements in 40 CFR 35.3140(b)(1) through (5) are met.

B. The department, pursuant to Section 9-7A-6 NMSA 1978, revised and adopted the procedures as outlined at 40 CFR Part 6 - Procedures for Implementing the Requirements of the Council on Environmental Quality on the National Environmental Policy Act of 1969 (NEPA).

C. NMED is authorized by Subsection A of Section 74-6A-4 NMSA 1978 of the Wastewater Facility Construction Loan Act to establish and administer a program to make loans to state agencies and other qualified borrowers for construction or modification of wastewater facilities. In carrying out this responsibility, the Secretary of the department has adopted policies, requirements, procedures, and guidelines for administration of the SRF which includes the primary responsibility for conducting environmental reviews and evaluations of SRF projects. Legal remedies available to the public to challenge environmental review determinations and enforcement pursuant to this procedure are provided by appeal by an aggrieved party(s) of the determination or action through administrative channels to higher authorities within NMED.

D. The New Mexico Water Quality Act, Sections 74-6-1 to 17 NMSA 1978, created the Water Quality Control Commission (WQCC) which is the state water pollution control agency for all purposes of the federal Clean Water Act, as amended. The WQCC may take all action necessary and appropriate to secure to New Mexico and its political subdivisions the benefits of the federal act. The Water Quality Act identifies legal remedies available to it and its constituent agencies (including NMED) in enforcement of its regulations, and legal remedies available to the public regarding implementation of programs covered by the Water Quality Act which includes the SRF.

[20.7.7.8 NMAC - Rp, 20.7.1.8 NMAC, 3/10/2020]

20.7.7.9 CONSTRUCTION: This Part shall be liberally construed to carry out the purposes of the Act. If any provision or application of this Part is held invalid, the remainder or its application to other situations or persons shall not be affected.

[20.7.7.9 NMAC - Rp, 20.7.1.9 NMAC, 3/10/2020]

20.7.7.10 COMPLIANCE WITH OTHER REGULATIONS: Compliance with this Part does not relieve a person from the obligation to comply with other applicable state and federal regulations.

[20.7.7.10 NMAC – Rp, 20.7.1.10 NMAC, 3/10/2020]

20.7.7.11 OVERVIEW: The process for conducting an environmental review of wastewater facility construction projects includes the following steps.

A. Consultation. The applicant is encouraged to consult with NMED early in project formulation or the facilities planning stage to determine whether a project is eligible for a categorical exclusion from the remaining substantive environmental review requirements of these procedures, to determine alternatives to the proposed project for evaluation, to identify potential environmental issues, and to determine the potential need for partitioning the environmental review process or the need for an Environmental Impact Statement (EIS).

B. Determining categorical exclusion eligibility. At the request of an applicant, NMED will determine if a project is eligible for a categorical exclusion in accordance with the submission of a loan application and other documents submitted to NMED to substantiate the request.

C. Documenting environmental information. If the project is determined to be ineligible for a categorical exclusion, or if no request for a categorical exclusion is made, the potential applicant subsequently prepares an Environmental Information Document (EID) for the project.

D. In the event that the proposed action is of a limited nature, but does not qualify for a categorical exclusion, and that an EID had been approved previously by the EPA or NMED for wastewater facilities, the responsible official may determine to what extent updated information may suffice to provide the requisite environmental review of the project.

E. Assessing environmental impacts. NMED reviews the EID, prepares an environmental assessment (EA), and based upon an assessment of the environmental impacts of the proposed project NMED:

(1) Prepares and issues a Finding of No Significant Impact (FONSI); or

(2) Prepares or issues a Notice of Intent to prepare an original or supplemental EIS and

Record of Decision (ROD).

F. Monitoring. The construction and post-construction operation and maintenance of the facilities are monitored to ensure implementation of mitigation measures identified in the FONSI or ROD.

[20.7.7.11 NMAC - Rp, 20.7.1.11 NMAC, 3/10/2020]

20.7.7.12 CONSULTING DURING THE PRELIMINARY ENGINEERING PROCESS: The responsible official shall initiate the environmental review process early to identify environmental effects, avoid delays, and resolve conflicts. The environmental review process should be integrated throughout the preliminary engineering process. Potential applicants should consult with NMED early in the preliminary engineering process. The consultation should be conducted during the evaluation of project alternatives prior to the selection of a preferred alternative, to assist in resolving any identified environmental problems.

[20.7.7.12 NMAC - Rp, 20.7.1.12 NMAC, 3/10/2020]

20.7.7.13 COORDINATION WITH OTHER ENVIRONMENTAL REVIEW AND CONSULTATION REQUIREMENTS: Pertinent laws, regulations, or executive orders should be included in a coordinated environmental review effort as outlined in the NMED Construction Programs Bureau State Environmental Review Process (SERP), EPA' general terms and conditions of the grant, and the EPA CWSRF guidance.

[20.7.7.13 NMAC - Rp, 20.7.1.13 NMAC, 3/10/2020]

20.7.7.14 REVIEW OF COMPLETED PRELIMINARY ENGINEERING REPORTS: NMED shall review the completed preliminary engineering reports (PER) and EID in the development of alternatives and the selection of a preferred alternative. An adequate EID shall be an integral part of planning submitted to NMED. The EID shall be of sufficient scope to enable the responsible official to make determinations on requests for partitioning the environmental review process and for preparing an environmental assessment (EA).

[20.7.7.14 NMAC - Rp, 20.7.1.14 NMAC, 3/10/2020]

20.7.7.15 ENVIRONMENTAL ASSESSMENT: The environmental assessment process shall cover all potentially significant environmental impacts. NMED personnel shall assess environmental impacts before PER approval. The EID shall address all elements in 40 CFR Part 6 and follow the SERP. In minimizing the adverse effects of the proposed action:

A. Structural and nonstructural measures, directly or indirectly related to the facilities plan, to mitigate or eliminate adverse effects on the human and natural environments shall be identified during the environmental review. Among other measures, structural provisions include changes in facility design, size, and

location; nonstructural provisions include staging facilities, monitoring and enforcement of environmental regulations, and local commitments to develop and enforce land use regulations.

B. NMED shall not accept a PER, nor approve loan assistance for its implementation, if the applicant has not made, or agreed to make, changes in the project, in accordance with determinations made in a FONSI or the ROD for an EIS. NMED shall condition a loan or seek other ways to ensure that the applicant will comply with such environmental review determinations.

[20.7.7.15 NMAC - Rp, 20.7.1.15 NMAC, 3/10/2020]

20.7.7.16 FONSI/EID DETERMINATION: The responsible official shall apply the criteria under Section 19 of 20.7.7 NMAC to the following:

- A.** A complete PER;
- B.** The EID; and
- C.** Other documentation deemed necessary by the responsible official adequate to make an EIS

determination by NMED. Following an independent environmental review of the projects, the responsible official shall document in writing the reasons for his determination to issue a FONSI or to prepare an EIS. The responsible official's determination to issue a FONSI or to prepare an EIS shall constitute final department action.

[20.7.7.16 NMAC - Rp, 20.7.1.16 NMAC , 3/10/2020]

20.7.7.17 PARTITIONING THE ENVIRONMENTAL REVIEW PROCESS:

A. Purpose. Under certain circumstances, the building of a component/portion of a wastewater treatment system may be justified in advance of completing all environmental review requirements for the remainder of the system(s). When there are overriding considerations of cost or impaired program effectiveness the responsible official may approve a loan for a discrete component of a complete wastewater treatment system(s). The process of partitioning the environmental review for the discrete component shall comply with the criteria and procedures described in subsection (B) of this section. In addition, all reasonable alternatives for the overall wastewater treatment works system(s), of which the component is a part, shall have been previously identified and each part of the environmental review for the remainder of the overall facilities plan shall comply with all requirements under Sections 14 and 15 of 20.7.7 NMAC.

B. Criteria for partitioning. The project component must:

- (1) Immediately remedy a severe public health, water quality, or other environmental problem;
- (2) Not foreclose any reasonable alternatives identified for the overall wastewater treatment works system(s);
- (3) Not cause significant adverse direct or indirect environmental impacts including those which cannot be acceptably mitigated without completing the entire wastewater treatment system of which the component is a part; and
- (4) Not be highly controversial.

C. Request for partitioning. The applicant's request for partitioning must contain the following:

- (1) A description of the discrete component proposed for construction before completing the environmental review of the entire facilities plan;
- (2) How the component meets the above criteria;
- (3) The environmental information required by Sections 14 and 15 of 20.7.7 NMAC for the component; and
- (4) Any preliminary information that may be important to NMED in an EA determination for the entire facilities plan.

D. Approval of requests for partitioning. The responsible official shall:

- (1) Review the request for partitioning against all requirements of this procedure;
- (2) If approvable, prepare and issue a FONSI;
- (3) Include a loan condition prohibiting the building of additional or different components of the entire facilities plan for which the environmental review is not complete.

[20.7.7.17 NMAC - Rp, 20.7.1.17 NMAC, 3/10/2020]

20.7.7.18 FINDING OF NO SIGNIFICANT IMPACT (FONSI) DETERMINATION:

A. Criteria for producing and distributing a FONSI. If, after completion of the EA, NMED determines that an EIS will not be required, the responsible official shall issue a FONSI. The FONSI will be based on NMED independent review of the EID and any other environmental information deemed necessary by the

responsible official, consistent with the requirements of Sections 14 and 15 of 20.7.7 NMAC. The FONSI shall list mitigation measures necessary to make the recommended alternative environmentally acceptable.

B. Proceeding with loan agreement.

(1) Once the issued FONSI becomes effective for the project, after a 30 day public comment period construction may proceed unless the responsible official determines that the project or environmental conditions have changed significantly from that which underwent environmental review.

(2) For an EID five or more years old, the responsible official shall re-evaluate the project, environmental conditions, and public views, and, prior to approval of loan agreement, either:

(a) Reaffirm - issue a public notice reaffirming the original environmental determination to proceed with the project without revising the EID;

(b) Supplement - require an update of the EID, issue and distribute a revised FONSI with the necessary public notice or

(c) Reassess - withdraw the FONSI and publish a notice of intent to produce an EIS, followed by the preparation, issuance, and distribution of the EIS and ROD.

C. Revisions to the Project.

(1) Statement of Findings. If the project scope of work is revised after FONSI has been issued, but the revision is determined by NMED to be a minor revision, NMED shall issue a Statement of Findings (SOF) documenting the reason for the revision and its impact, if any, on the environment. The SOF shall be distributed to parties who previously indicated interest in the project environmental review process.

(2) Amendment. If the project scope of work is revised after a FONSI has been issued, but the revision is determined by NMED to be significant, NMED shall issue an amendment to the FONSI with proper public notification as identified in Section 23 of 20.7.7 NMAC and shall provide for a public meeting to discuss the amendment.

[20.7.7.18 NMAC - Rp, 20.7.1.18 NMAC, 3/10/2020]

20.7.7.19 CRITERIA FOR INITIATING ENVIRONMENTAL IMPACT STATEMENTS: Conditions requiring an EIS. The responsible official shall assure that an EIS will be prepared and issued when it is determined that the proposed project will cause any of the following conditions to exist, or when:

A. The proposed action would result in a discharge of treated effluent from a new or modified existing facility into a body of water and the discharge is likely to have a significant effect on the quality of the receiving waters.

B. The proposed action is likely to directly, or through induced development, have significant adverse effect upon local ambient air quality or local ambient noise levels.

C. The proposed action is likely to have significant adverse effects on surface water reservoirs or navigation projects.

D. The proposed action would be inconsistent with state or local government, or federally-recognized Indian tribe approved land use plans or regulations, or federal land management plans.

E. The proposed action would be inconsistent with state or local government, or federally-recognized Indian tribe environmental, resource-protection, or land-use laws and regulations for protection of the environment.

F. The proposed action is likely to significantly affect the environment through the release of radioactive hazardous or toxic substances, or biota.

G. The proposed action involves uncertain environmental effects or highly unique environmental risks that are likely to be significant.

H. The proposed action is likely to significantly affect national natural landmarks or any property on or eligible for the National Register of Historic Places.

I. The proposed action is likely to significantly affect environmentally important natural resources such as wetlands, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat.

J. The proposed action in conjunction with related federal, state or local government, or federally-recognized Indian tribe projects is likely to produce significant cumulative impacts.

K. The proposed action is likely to significantly affect the pattern and type of land use (industrial, commercial, recreational, residential) or growth and distribution of population including altering the character of existing residential areas.

[20.7.7.19 NMAC - Rp, 20.7.1.19 NMAC, 3/10/2020]

20.7.7.20 ENVIRONMENTAL IMPACT STATEMENT (EIS) PREPARATION:

A. Steps in preparing the EIS. In addition to the other requirements specified in this procedure, the responsible official will conduct the following activities:

(1) Notice of intent. If a determination is made that an EIS will be required, the responsible official shall prepare and distribute a notice of intent.

(2) Scoping. As soon as possible, after the publication of the notice of intent, the responsible official will convene a meeting of affected federal, state, and local agencies, or affected Indian tribes, the applicant and other interested parties to determine the scope of the EIS. As part of the scoping meeting, NMED will, as a minimum:

(a) Determine the significance of issues for and the scope of those significant issues to be analyzed in depth in the EIS;

(b) Identify the preliminary range of alternatives to be considered;

(c) Identify potential cooperating agencies and determine the information or analyses that may be needed from cooperating agencies or other parties;

(d) Discuss the method for EIS preparation and the public participation strategy;

(e) Identify consultation requirements of other environmental laws; and

(f) Determine the relationship between the EIS and the completion of the facilities plan and any necessary coordination arrangements between the preparers of both documents.

(3) Identifying and evaluating alternatives. Immediately following the scoping process, the responsible official shall commence the identification and evaluation of all potentially viable alternatives to adequately address the range of issues identified in the scoping process. Additional issues may be addressed, or others eliminated, during this process and the reasons documented as part of the EIS.

B. Methods for preparing EIS. After NMED determines the need for an EIS, it shall select one of the following methods for its preparation:

(1) By NMED contracting directly with a qualified consulting firm;

(2) By utilizing a third party method whereby the responsible official enters into "third party agreements" for the applicant to engage and pay for the services of a third party to prepare the EIS. Such agreement shall not be initiated unless both the applicant and the responsible official agree to its creation. A third party agreement will be established prior to the applicant's EID and eliminate the need for the document. In proceeding under the third party agreement, the responsible official shall carry out the following practices:

(a) In consultation with the applicant, choose the third party contractor and manage that contract;

(b) Select the consultant based on ability and absence of conflict of interest. Third party contractors shall execute a disclosure statement prepared by the responsible official signifying they have no financial or other conflicting interest in the outcome of the project; and

(c) Specify the information to be developed and supervise the gathering, analysis, and presentation of the information. The responsible official shall have sole authority for approval and modification of the statements, analyses, and conclusions included in the third party EIS.

[20.7.7.20 NMAC - Rp, 20.7.1.20 NMAC, 3/10/2020]

20.7.7.21 THE ENVIRONMENTAL IMPACT STATEMENT (EIS) FORMAT: Preparers of EIS must conform with the requirements of 40 CFR, Part 1502, in writing the EIS. The format used for the EIS shall encourage good analysis and clear presentation of alternatives, including the proposed action, and their environmental, economic, and social impacts. The following standard format for EISs should be used unless the responsible official determines that there is a compelling reason to do otherwise:

- A.** Cover Sheet;
- B.** Executive Summary;
- C.** Table of Contents;
- D.** Purpose of and need for action;
- E.** Alternatives including proposed action;
- F.** Affected environment;
- G.** Environmental consequences of the alternative;
- H.** Coordination (includes list of agencies, organizations, and persons to whom copies of the EIS are sent);
- I.** List of preparers;
- J.** Index (commensurate with complexity of EIS);
- K.** Appendices.

[20.7.7.21 NMAC - Rp, 20.7.1.21 NMAC, 3/10/2020]

20.7.7.22 MONITORING FOR COMPLIANCE:

A. General. The responsible official shall ensure adequate monitoring of mitigation measures and other loan conditions identified in the FONSI or ROD.

B. Enforcement. If the applicant fails to comply with loan conditions, the responsible official may consider applying the sanctions.

[20.7.7.22 NMAC - Rp, 20.7.1.22 NMAC, 3/10/2020]

20.7.7.23 PUBLIC, FEDERAL AGENCY, AND OTHER STATE AGENCY INVOLVEMENT:

A. NMED shall make diligent efforts to involve the public in the environmental review process consistent with program regulations and State Clearinghouse for Intergovernmental Review policies on public participation. The responsible official shall ensure that public notice is provided and shall ensure that public involvement is carried out following state policies and guidelines on public participation.

B. General. It is NMED's policy that certain public participation steps be achieved before NMED completes the environmental review process. At a minimum, potential applicants shall conduct one public hearing prior to formal adoption of a facilities plan to discuss the proposed facilities plan and any needed mitigation measures.

C. Publication of notices of intent. As soon as practicable after a decision is rendered to issue a categorical exclusion or FONSI, or to prepare an EIS (but before the signing process), the responsible official shall send the notice of intent to interested and affected members of the public, and shall publish the notice of intent in a newspaper of general circulation in the community of the project.

D. The responsible official shall not take administrative action on the project for at least 30 calendar days after release of the notice of determination on the categorical exclusion or release of the FONSI to allow time for public response.

E. EIS. The responsible official shall follow, as applicable, procedures identified at 40 CFR, Part 6, Subpart B, for official filing requirements, availability of documents, commenting process, and supplements to the EIS.

F. Record of Decision. The responsible official shall disseminate the record of decision to those parties which commented on the draft or final EIS. One copy shall be submitted to EPA.

G. Scope. The responsible official may institute additional NEPA-related public participation procedures as are deemed necessary during the environmental review process.

[20.7.7.23 NMAC - Rp, 20.7.1.23 NMAC, 3/10/2020]

HISTORY OF 20.7.7 NMAC:

Pre-NMAC History: Material in the part was derived from that previously filed with the commission of public records - state records center and archives:

HED 88-3 (EID), New Mexico Health and Environment Department, Environmental Improvement Division, Review Procedures for Projects Funded Through The Wastewater Facility Construction Loan Program, 9/22/1988

OTHER HISTORY:

20 NMAC 7.7, Wastewater and Water Supply Facilities - Review Procedures For Wastewater Construction Loans, 10/25/1995

History of Repealed Material:

20.7.7 NMAC, Review Procedures for Wastewater Construction Loans, adopted 7/16/2000, replaced with 20.7.7 NMAC Review Procedures Wastewater Construction Loans, effective 3/10/2020.