

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 5 PETROLEUM STORAGE TANKS
PART 16 QUALIFICATION OF PERSONS PERFORMING CORRECTIVE ACTION

20.5.16.1 ISSUING AGENCY: New Mexico Environmental Improvement Board.
[20.5.16.1 NMAC - Rp, 20.5.16.1 NMAC, 6/15/09]

20.5.16.2 SCOPE: This part applies to all persons performing corrective action on behalf of storage tank owners, operators or the state under Title 20, Chapter 5 NMAC.
[20.5.16.2 NMAC - Rp, 20 5.16.2 NMAC, 6/15/09]

20.5.16.3 STATUTORY AUTHORITY: This part is promulgated pursuant to the provisions of the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through 74-1-16 NMSA 1978.
[20.5.16.3 NMAC - Rp, 20.5.16.3 NMAC, 6/15/09]

20.5.16.4 DURATION: Permanent.
[20.5.16.4 NMAC - Rp, 20.5.16.4 NMAC, 6/15/09]

20.5.16.5 EFFECTIVE DATE: June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.
[20.5.16.5 NMAC - Rp, 20.5.16.5 NMAC, 6/15/09]

20.5.16.6 OBJECTIVE: The objective of this part is to establish rules for the qualification of firms for and disqualification of firms from conducting corrective action on sites where releases from storage tanks have caused contamination.
[20.5.16.6 NMAC - Rp, 20.5.16.6 NMAC, 6/15/09]

20.5.16.7 DEFINITIONS:

- A. The definitions in 20.5.1 NMAC and the Ground Water Protection Act apply to this part. In the case of conflict, the definitions in the Ground Water Protection Act control.
 - B. For purposes of this part, the term “firm” shall be synonymous with the term “person,” as defined in 20.5.1 NMAC.
 - C. For purposes of this part, the term “proposal” means an offer to complete work submitted in response to given specifications issued for a responsible party-lead site or for a state-lead site.
- [20.5.16.7 NMAC - Rp, 20.5.16.7 NMAC, 6/15/09]

20.5.16.8 PAYMENTS: Payments from the corrective action fund may be made only for corrective action conducted by firms qualified by the department to perform such work pursuant to this part.
[20.5.16.8 NMAC - Rp, 20.5.16.1607 NMAC, 6/15/09]

20.5.16.9 QUALIFICATION OF FIRMS:

- A. Except as provided in Subsections C and D of this section, firms shall be evaluated for qualification by the department to conduct corrective action for each workplan submitted. Except as provided in Subsection B of this section, firms shall be qualified upon approval of the following:
 - (1) the subject workplan;
 - (2) a current statement of qualifications of the firm’s authorized representative, the individual with direct, responsible, supervisory control of the approved workplan unless previously submitted under the current active phase of corrective action; and
 - (3) if the involvement of a professional engineer is required for the work to be undertaken under the workplan, a current statement of qualifications of the professional engineer that complies with 20.5.16.11 NMAC.
- B. In addition to the requirements of Subsection A of this section, if the department reasonably believes that a firm already qualified to perform corrective action under an approved workplan is not timely paying its subcontractors, suppliers, laboratories, and other entities included in any invoice connected with an approved

workplan, the firm shall not be qualified unless it provides proof to satisfy the department that within the preceding two years it has paid those entities according to the firm's contractual agreements.

C. When initial response or initial abatement is required at a site, firms may be qualified prior to commencement of work by submitting for verbal approval a statement of qualifications for the authorized representative and, if a professional engineer is required by 20.5.12 or 20.5.13 NMAC, for the professional engineer. Written statements of qualifications shall be submitted to the department with the report on initial abatement required by Subsection B of 20.5.12.12 or 20.5.13.11 NMAC.

D. When remediation is required at a site, selection of a remediation proposal in accordance with the competitive selection process described in 20.5.17.14 and 20.5.17.15 NMAC qualifies the successful firm to conduct corrective action within the scope of work defined by the proposal, except as provided in 20.5.16.12 NMAC. A firm may be tentatively qualified prior to submitting a proposal under 20.5.17.14 by submitting for verbal approval a statement of qualifications for the authorized representative and, if a professional engineer is required by 20.5.12 or 20.5.13 NMAC, for the professional engineer. Firms tentatively qualified under this subsection will be deemed qualified firms for purposes of 20.5.17 NMAC until such time as 20.5.17 NMAC is amended to permit the evaluation of proposals from firms not yet qualified under this part.

E. Statements of qualifications shall include:

- (1) the authorized representative's name and status as sole proprietor, officer, partner, employee or subcontractor of the firm;
- (2) education relevant to the nature of the work to be performed;
- (3) experience relevant to the nature of the work to be performed; and
- (4) licenses and certifications required for the work to be performed.

F. While the required education and experience for the authorized representative may vary with the work to be performed, the following shall be considered minimums: a baccalaureate degree in science or engineering and at least two years applicable experience in the investigation and remediation of unsaturated and saturated zone contamination, or five years supervised experience in investigation or remediation of unsaturated and saturated zone contamination.

G. Firms performing corrective action must maintain their qualification at all stages of work in order for the costs of that work to be eligible for payment.

H. This part is in addition to and not in lieu of any other licensing and registration requirements of the Construction Industries Licensing Act, Sections 60-13-1 through 60-13-59 NMSA 1978.

I. This part does not relieve contractors or owners or operators of their obligations and liabilities under applicable local, state, and federal laws and regulations.

[20.5.16.9 NMAC - Rp, 20 5.16.1609 NMAC, 6/15/09]

20.5.16.10 DISQUALIFICATION OF FIRMS:

A. The department may disqualify a qualified firm if the department determines that the firm has:

- (1) knowingly misrepresented a material fact in its request to become qualified or in any subsequent report or communication with the department;
- (2) failed to comply with any of the requirements of 20.5.12, 20.5.13, 20.5.16 or 20.5.17 NMAC;
- (3) failed to complete to the department's satisfaction the work described in one or more approved workplans; or
- (4) when required to do so by 20.5.16.9 NMAC, failed to prove to the department's satisfaction that it has timely paid its subcontractors, suppliers, laboratories and other entities.

B. A firm that has been disqualified under this section may become eligible to perform corrective action upon satisfactory proof that the firm has remedied, to the department's satisfaction, the problem that lead to disqualification. For purposes of Paragraph (4) of Subsection A of this section, a firm that has timely paid its subcontractors, suppliers, laboratories and other entities for at least six months, and which meets all applicable requirements of 20.5.16.9 NMAC, shall become eligible to perform corrective action.

[20.5.16.10 NMAC - N, 6/15/09]

20.5.16.11 REQUIREMENTS FOR PROFESSIONAL ENGINEERS: If the involvement of a professional engineer is required for the corrective action being conducted, the firm's qualification requirements shall include licensure by the New Mexico state board of licensure for professional engineers and surveyors in the discipline of engineering appropriate to the corrective action. This requirement may be met by demonstrating that the firm has on staff or available by contract a professional engineer licensed in the appropriate discipline.

[20.5.16.11 NMAC - Rp, 20.5.16.1610 NMAC, 6/15/09]

20.5.16.12 ADVERSE DETERMINATIONS ON REQUESTS TO QUALIFY FIRMS:

A. In reviewing a firm's qualifications to perform corrective action, the department shall consider the nature of the work to be performed under the submitted workplan. Except as provided in Subsections B and C of this section, the department's determination on a request to qualify a firm for a workplan involving remediation shall be consistent with the department's selection of the firm's proposal for remediation under 20.5.17 NMAC, if applicable.

B. Failure of a qualified firm to complete work described in one or more approved workplans to the satisfaction of the department may be taken into consideration when the firm's qualifications are reviewed by the department for purposes of future workplans.

C. The failure of a qualified firm to complete work described in an approved workplan to the satisfaction of the department may result in a determination by the department that further work by the firm is not eligible for payment or that a new remediation proposal or workplan, or both, is required.

D. Nothing in this part is intended to affect the rights or obligations of the department or its contractors in any suspension or debarment proceedings undertaken by the department under the Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978. Suspension or debarment under the Procurement Code will be considered, however, in the department's determination on a firm's qualifications under this part.

[20.5.16.12 NMAC - Rp, 20.5.16.1611 NMAC, 6/15/09]

20.5.16.13 APPEALING ADVERSE DETERMINATIONS:

A. A firm that has been denied qualification or that has been disqualified under this part may obtain review of the decision by either:

(1) submitting to the department a written request for informal review pursuant to 20.5.16.14 NMAC;

or

(2) submitting to the secretary or the secretary's designee a written request for review on written submittals pursuant to 20.5.16.15 NMAC.

B. Any request for administrative review initiated under Subsection A of this section must be postmarked within 15 days of the date of the decision to be reviewed.

C. A firm may request review on written submittals under 20.5.16.15 NMAC without first requesting informal review under 20.5.16.14 NMAC. If, however, the firm first requests informal review under 20.5.16.14 NMAC, the firm thereafter may request review on written submittals under 20.5.16.15 NMAC of the determination made by the department pursuant to Subsection D of 20.5.16.14 NMAC, provided that the request for review on written submittals under 20.5.16.15 NMAC is postmarked within 15 days of the date of the determination made by the department pursuant to Subsection D of 20.5.16.14 NMAC.

D. Review under this part does not stay the decision being reviewed nor does it apply to or affect the secretary's authority to issue compliance orders or otherwise seek enforcement of any of the provisions of Title 20, Chapter 5 NMAC.

[20.5.16.13 NMAC - Rp, 20.5.16.1612 NMAC, 6/15/09]

20.5.16.14 INFORMAL REVIEW:

A. Every request for informal review by a firm shall be in writing and shall specify the grounds upon which the firm objects to the decision to be reviewed. Every request for informal review shall be submitted to the department by the deadline set out in Subsections B and C of 20.5.16.13 NMAC.

B. The department shall afford prompt opportunity for an informal conference at which the firm may present the firm's views on the issues raised in the request for review and offer any supporting documentation or testimony. The department shall notify the firm of the time, date and place of the informal conference.

C. The member of department staff conducting the review must be someone other than the employee who made the original decision not to qualify the firm to perform corrective action under this part.

D. After considering all written and oral views presented, the department shall affirm, modify or reverse the original decision and shall furnish the firm with a written notification of its determination.

[20.5.16.14 NMAC - Rp, 20.5.16.1613 NMAC, 6/15/09]

20.5.16.15 REVIEW BY THE SECRETARY OR THE SECRETARY'S DESIGNEE ON WRITTEN SUBMITTALS:

A. Every request for review by the secretary or the secretary's designee on written submittals shall be in writing and shall specify the grounds upon which the firm objects to the decision to be reviewed. The request

shall be accompanied by any and all written materials and argument which the firm wishes the secretary or the secretary's designee to consider upon review. The request and all written materials and argument shall be submitted to the secretary or the secretary's designee by the deadline set out in Subsections B and C of 20.5.16.13 NMAC.

B. Within 15 days of the filing of the firm's request for review and submittal of all the firm's supporting material, department staff shall provide to the secretary or the secretary's designee any and all written materials and argument in support of the position of department staff on the issues raised by the firm.

C. For good cause shown, the secretary or the secretary's designee may permit either department staff or the firm additional time in which to submit the supporting written materials and argument allowed by Subsections A and B of this section. Any extension of time to submit written submittals shall not include the authority to extend the time to file a request for review under this part.

D. The action of the secretary or the secretary's designee on the request for review shall be based on the written materials and argument submitted pursuant to this section unless the secretary or the secretary's designee schedules a hearing on the request for review as set forth below.

E. The secretary or the secretary's designee may exercise discretion in whether to grant a hearing requested by the firm seeking review. If the secretary exercises the discretion to hold a hearing, the secretary shall provide notice of the time and place of the hearing to the firm making the request.

F. If the secretary chooses to hold a hearing as described in Subsection E of this section, the secretary shall hold the hearing within 60 days after receiving the written materials and argument described in Subsection A or after receiving the request for a hearing, whichever occurs last. In the event the department holds a hearing, the cost of the court reporter and transcript shall be paid by the party that requested the hearing. The hearing shall be conducted in accordance with 20.1.5 NMAC.

G. The action of the secretary or the secretary's designee on the request for review shall be by written order and shall state the decision and the reason therefor. The secretary or the secretary's designee shall send a copy of the order to the firm and furnish a copy to department staff promptly after the order is entered. This written order shall be the department's final action on the request for review. Any judicial review of this final order shall be as provided by applicable law.

[20.5.16.15 NMAC - Rp, 20.5.16.1614 NMAC, 6/15/09]

HISTORY OF 20.5.16 NMAC:

Pre-NMAC History: None.

History of Repealed Material:

20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors (filed 2/27/97), repealed 2/2/00.

20 NMAC 5.16, Underground Storage Tanks, Qualification of Contractors (filed 12/30/99), repealed 8/15/03.

20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action (filed 7/16/03), repealed 6/15/09.

Other History:

20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors, (filed 10/06/95) replaced by 20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors, effective 4/1/97.

20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors, (filed 02/27/97) replaced by 20 NMAC 5.16, Underground Storage Tanks, Qualification of Contractors, effective 2/2/00.

20 NMAC 5.16, Underground Storage Tanks, Qualification of Contractors, (filed 12/30/99) replaced by 20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action, effective 8/15/03.

20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action (filed 7/16/03) replaced by 20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action, effective 6/15/09.