

# **OPERATING AGREEMENT**

**FOR ACTIVITIES AND FUNCTIONS IN MANAGING THE  
STATE WATER POLLUTION CONTROL REVOLVING FUND PROGRAM**

**Also known as the CLEAN WATER STATE REVOLVING FUND**

**BETWEEN THE**

**NEW MEXICO ENVIRONMENT DEPARTMENT**

**AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 6**

**REVISION EFFECTIVE: March 2024**

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### **Attachments**

- Attachment 1: Certifications and Assurances
- Attachment 2: Project Inspection Standard Operating Procedure
- Attachment 3: Policies and Procedures
- Attachment 4: State Environmental Review Process

## **INTRODUCTION**

### **BACKGROUND**

The Water Quality Act of 1987 (the 1987 amendments to the Clean Water Act (Act)) set forth a schedule and methodology for completing the transition to full State and local responsibility for the construction of publicly owned wastewater treatment works. The Environmental Protection Agency's (EPA's) authorization to award new wastewater treatment project grants to municipalities to construct wastewater treatment facilities ended in Fiscal Year 1990. In place of the project grant program, EPA was given authority to make grants to capitalize State Water Pollution Control Revolving Funds (SWPCRFs), hereinafter referred to as the Clean Water State Revolving Fund (CWSRF). The primary purpose of the CWSRF is to provide loans and other financial assistance to entities for the construction of wastewater treatment facilities.

Beginning in Fiscal Year 1987, the States had the option to use a portion of their annual construction grants allotments for capitalization of CWSRFs. Separate appropriations for CWSRF capitalization grants were authorized beginning in Fiscal Year 1989 and continue to the present.

### **GOAL**

The goal of the CWSRF program is to establish a permanent vehicle, through capitalization grants, loan repayments, state match funds, and interest earnings that will provide a continuous source of funds for eligible activities under the Federal Water Pollution Control Act (FWPCA), also known as the Clean Water Act (CWA). This goal is commensurate with the Water Resources Reform and Development Act (WRRDA) Section 602(b)(11).

### **OPERATING AGREEMENT**

This Operating Agreement (OA) sets forth the elements of the contractual relationship between the New Mexico Environment Department (NMED), and the Environmental Protection Agency (EPA).

#### **I. SUMMARY OF BASIC PROVISIONS OF THE OA**

- A. The State's designated agency or instrumentality, which is the New Mexico Environment Department (State), will be responsible for the total management of the CWSRF program and will retain the ultimate responsibility for all aspects of the CWSRF program.
- B. The State will carry out all activities and functions in conformance with the CWA, Title VI and all other applicable Federal laws, regulations, orders, policies, and guidelines.
- C. EPA Region 6 retains responsibility for assuring that at the time a capitalization grant is awarded, the State will meet the requirements necessary to administer the CWSRF. EPA retains the responsibility for awarding capitalization grants and overseeing the State's CWSRF program. EPA will provide the State, upon award of a capitalization grant, with grant payments to the CWSRF in accordance with a mutually agreed upon

payment schedule, provided the State meets all applicable Federal laws, regulations, orders, policies, and guidelines.

## **II. OBJECTIVE OF CWSRF PROGRAM**

To provide loans and additional subsidization to qualified borrowers for eligible water quality projects including but not limited to the construction and construction updates and/or rehabilitation of publicly owned treatment works (POTW), nonpoint source (NPS) projects and other eligible water quality projects as defined in expanded eligibilities in the Water Resources Reform and Development Act (WRRDA) amendments to the CWA in 2014.

The State certifies that only the types of assistance authorized under CWA Section 603 will be awarded. The type of assistance for each project will be identified in the Intended Use Plan (IUP).

## **III. PURPOSE OF OPERATING AGREEMENT**

- A. The purpose of the OA is to describe the organizational and administrative framework and those procedures of the CWSRF program that are not expected to change annually. The OA must be incorporated by reference in the grant agreement. Execution of the OA fulfills the requirements of Section 602(a) and 40 CFR §35.3130. Development, management, and EPA oversight of the State's CWSRF program are established by Title VI and 40 CFR Part 35, Subpart K. In addition to the specific requirements of Title VI and 40 CFR Part 35, the State agrees to continue to support and work cooperatively with EPA on a wide range of general administrative and program efforts.
- B. This OA contains the necessary actions the State must take and the necessary assurances the State must provide to qualify for a capitalization grant (See Attachment 1: Certifications and Assurances).
- C. The OA sets forth the mechanisms EPA will put in place to award capitalization grants, to provide timely capitalization grant payments, and to oversee the State's management of its CWSRF program.

## **IV. POLICY**

- A. EPA's policy is to provide capitalization grants to enable the State to facilitate the establishment of a permanent vehicle in the State that will provide a continuing source of financing needed to maintain water quality.
- B. It is EPA's policy to allow the State as much flexibility in operating the CWSRF program as is permissible under the Act, 40 CFR Part 35 Subpart K and any subsequent regulations, orders, policies, and guidelines.
- C. It is EPA's responsibility to conduct oversight of the State's CWSRF program at a level sufficient to assure compliance with the Act and 40 CFR Part 35 Subpart K.

**V. EXTENT OF EPA'S ROLE**

- A. EPA shall have overall responsibility in reviewing applications and awarding capitalization grants and grant amendments, and for making payments and overseeing the State's management of the CWSRF.
- B. EPA retains responsibility for making final determinations under certain federal statutes and executive orders.
- C. EPA will conduct oversight activities in accordance with 40 CFR Part 35, including issuing oversight guidance documents, and Standard Operating Procedures (SOPs), issued by EPA Headquarters, as applicable.

**VI. STATE ASSURANCE**

The Secretary of the New Mexico Environment Department assures the EPA Region 6 Regional Administrator that the State will execute its responsibilities under this OA and any amendments thereto in conformance with all applicable Federal Laws, regulations, orders, policies, and guidelines. This OA incorporates amendments to the Clean Water Act known also known as the Water Resources Reform and Development Act (WRRDA) signed into law by President Obama on June 10, 2014.

**VII. DESIGNATED SIGNATORIES**

A. Program Changes

- 1. For the State of New Mexico:  
Secretary or Designee  
New Mexico Environment Department  
P.O. Box 5469  
Santa Fe, New Mexico 87502
- 2. For US Environmental Protection Agency:  
Regional Administrator or Authorized Representative  
Environmental Protection Agency  
Region 6  
1201 Elm Street, Suite 500  
Dallas, TX 75270

B. Other Changes

Items not significantly altering the OA (programmatic changes are significant and procedural changes are minor) will be processed by:

- 1. For the State of New Mexico:  
Bureau Chief  
Construction Programs Bureau  
Water Protection Division  
New Mexico Environment Department  
P.O. Box 5469

Santa Fe, New Mexico 87502

2. For the Federal Government:  
Associate Director  
Water Division  
US Environmental Protection Agency  
Region 6  
1201 Elm Street, Suite 500  
Dallas, Texas 75270

#### **VIII. IMPLEMENTATION OF THIS OA**

Upon notification by EPA that the State's CWSRF program meets the requirements of Title VI, 40 CFR Part 35 Subpart K and the signing of this agreement by the Regional Administrator and the Secretary of the State agency or their designees, application for capitalization grants may be processed.

#### **IX. PROCEDURES**

State policies and procedures for administering eligible projects under the CWSRF program are set forth in Attachment 3: Policies and Procedures to the OA. The State will submit revisions to the policies and procedures to EPA for review and concurrence to assure compliance with the requirements of the Act and 40 CFR Part 35 Subpart K.

#### **X. ADMINISTERING THE FUND AND CONDUCTING ACTIVITIES**

The State will provide all the necessary staffing, hiring, training, etc., to administer the CWSRF program. Funding to administer the program, per WRRDA Section 603(d)(7), may come from the capitalization grant, not to exceed four percent of all grant awards to the Fund less any amounts used in previous years, or as a percentage of the fund valuation, not to exceed ⅓ percent per year, or \$400,000 per year. The State may use the option that provides the greatest amount. The State also maintains the Clean Water State Revolving Loan Administrative Fund (Admin Fund) that is used to administer the program. The Admin Fund is funded by a variable administrative fee on loan repayments, not to exceed 5% of the total loan amount per State law and is held outside of the CWSRF. The Admin Fund is used to supplement the amount allowed from the Federal capitalization grant awards and per State law must be used solely to administer the CWSRF, which may include water quality planning, water quality analysis and protection studies if authorized by the Department. Administrative costs must be included in the Annual Report.

#### **XI. ACCOUNTING AND AUDIT PROCESS**

- A. The State agrees that the CWSRF will be immediately credited with all payments, repayments of principal and interest on loans made from the CWSRF, proceeds of any bond sale for which the CWSRF is used as security, interest earned on fund accounts, and any other source of income accruing to the fund.

- B. The State will establish and maintain internal management controls to protect against waste, fraud and abuse of public funds and will establish and maintain project level controls to ensure both technical and fiscal integrity of the program. Section 606 and/or 40 CFR § 35.3135(h) requires accounting and audit procedures to ensure fiscal integrity. The State has established technical review and inspection procedures to ensure technical integrity of the projects funded under the CWSRF (Attachment 2: Project Inspection Standard Operating Procedure).
- C. The State agency has established an accounting system in accordance with the Title VI requirements, 40 CFR Part 35 Subpart K and other applicable regulations. The accounting system properly identifies and relates State expenditures to the operation of the CWSRF program.
- D. In accordance with 40 CFR Part 35 Subpart K, and with WRRDA requirements Section 602(b)(9), annually the State will conduct, or have conducted, a financial and compliance audit of the CWSRF and the operations of the CWSRF. The State may designate an independent auditor of the State to carry out the audit or may contractually procure the service. The Office of the Inspector General may arrange for an EPA audit if the State fails to conduct the audit or if the State's review is otherwise unsatisfactory. An annual audit report will also be provided to EPA within one year of the end of the accounting period for which it was conducted.
- E. The audit report must contain an opinion on the financial statement of the CWSRF, its internal controls, and a report on compliance with Title VI requirements.
- F. The State agrees to conduct ongoing oversight of each recipient of financial assistance during project construction. The oversight activities by the State will ensure, but not be limited to, the following:
  - 1. The project accounts are maintained in accordance with generally accepted government accounting standards 40 CFR § 35.3135(h)(2).
  - 2. That the project is constructed in accordance with State approved plans and specifications, and in accordance with any mitigating environmental requirements outlined in documents created under the State Environmental Review Process (SERP)
  - 3. That all relevant construction records (materials, testing, inspection reports, shop drawings, pay estimates, etc.) are maintained by the recipient.
  - 4. That the recipient agrees to operate and maintain the project so that the project will function properly over the structural and material design life of the project. Section 603(d)(1) provides that

terms are not to exceed the lesser of 30 years and the projected useful life of the project.

5. Fiscal Sustainability Plans for all projects involving repair, replacement or expansion are required by the State; this complies with WRRDA Section 603(d)(1) I.

## **XII. OVERSIGHT OF THE STATE'S MANAGEMENT OF THE CWSRF PROGRAM**

- A. In accordance with 40 CFR Part 35 Subpart K, the Regional Administrator will conduct a formal review of the State's management of its CWSRF Program. The Annual Report will be submitted to the Regional Administrator in accordance with the capitalization grant condition(s). In accordance with 40 CFR § 35.3165, the report will provide year-end data on projects identified in the IUP, identify recipients of financial assistance, and include dates of loans, loan terms, and similar information regarding forms of financial assistance other than loans. The Annual Report will also provide reporting on all administrative funds received, used, purpose for which used, and the balance. The Annual Report will include the administrative amount utilized from the capitalization grant, the form (i.e., the four percent or as a percentage of the fund valuation, not to exceed 1/4 of one percent, or \$400,000) as well as administrative fees collected. In addition, the report will address the State's adherence to the requirements of Title VI and the federal cross-cutting authorities, and how required environmental reviews were carried out. The Annual Report shall contain planned versus actual events with annotations accounting for all performance measures and other records indicating the effectiveness of the State's management of its CWSRF program. The Annual Report will form the basis for determining whether the State has met its goals and objectives for the year. In accordance with 40 CFR § 35.3165, the State will provide the necessary information as required by the Regional Administrator for EPA to conduct the annual oversight review of the CWSRF.
- B. The review will take into consideration alternative actions taken by the State to accommodate changes to meet emergency situations at the project level; adjustments in repayments in instances of default and changes to the bond market should the State begin to utilize bonds. etc., to the extent that these alternatives were anticipated by the State and addressed in the IUP. If the oversight review determines that the State has not complied with the terms of this OA, the IUP or any other requirement of Title VI, the Regional Administrator will notify the State of the noncompliance and corrective action necessary. The corrective action procedures set forth in 40 CFR § 35.3170 will be followed.

### **XIII. CERTIFICATION PROCEDURES**

The State shall furnish a written certification to the Regional Administrator within the Annual Report certifying that all requirements of Title VI, 40 CFR Part 35 Subpart K and other applicable Federal requirements have been met (see Attachment 1: Certifications and Assurances). To the extent that the Regional Administrator determines, in conformance with IV.C, above, that additional documents are needed to support the certification, they will be submitted by the State upon request of the Regional Administrator.

### **XIV. TERMS OF THE OPERATING AGREEMENT**

- A. The terms of this Operating Agreement shall be negotiable. This agreement will continue to be in effect so long as funds are authorized and/or appropriated for Title VI.
- B. Terms for amending this agreement are set forth in Section XX. below.

### **XV. NATIONAL NEEDS AND REPORTING**

- A. The State shall provide EPA with a specific set of estimated project-level data via the IUP. This data will be continually updated by the State and formally submitted to EPA once each year as part of the State's Annual Report, to reflect actual activities and events.
- B. If needed, EPA will contact the State for more detailed "real time" information about a project or series of projects or refer citizens with inquiries to the State. The State will provide the needed information promptly.
- C. It is inevitable that unanticipated information requests will be made. Often data will be used to comply with requests from EPA Headquarters, Office of Management and Budget (OMB), and Congress. The State shall provide the needed information promptly.
- D. EPA agrees to provide the State with reasonable time, details, and reasons for the data requested.
- E. The State will continue to use the CWSRF National Information Management System (NIMS) and Clean Water Benefits Reporting System (CBR) in compliance with minimum EPA program management data.

### **XVI. SCOPE AND RULES**

- A. This agreement addresses both mutually exclusive and joint responsibilities of both the State and EPA. The State is responsible for enacting CWSRF legislation that establishes a CWSRF program and provides accounting fund safeguards for developing and implementing required rules and procedures (particularly those related to NEPA requisites and other federal requirements as provided in Title VI of the Act), for preparing annual reports and CWSRF audits, for timely and adequate staffing and, if applicable, for establishing interagency CWSRF

coordinating mechanisms needed to effectively administer the CWSRF program.

- B. The State shall develop and submit the Project Priority List (PPL), IUP and a complete capitalization grant application to EPA. The IUP will be submitted to EPA on an annual basis at the beginning of the State Fiscal Year. The capitalization grant will not be awarded until the PPL is submitted and accepted by EPA. The State agrees that assistance will not be provided to any treatment works project unless that project is on the State's PPL under Section 216 of the Act and included in the IUP; such assistance may be given without regard to the rank of the project on the PPL provided the enforceable requirements of the Act have been met. However, emergency funding may be provided for projects which require immediate attention to protect public health when an emergency is declared by the Cabinet Secretary of the New Mexico Environment Department or by the Office of the Governor. Any such project shall be identified through an amended PPL and IUP and identified in the Annual Review.
- C. The State agrees to have a professionally competent organization with the necessary mix of support staff and to provide training, as needed, to assure a quality effort will be continually maintained.
- D. The most recent version of the State Environmental Review Process (SERP) dated is embodied in this agreement (Attachment 4: State Environmental Review Process).
- E. The EPA agrees to provide funding through the awards of capitalization grants to the State upon acceptance of this OA and approval of a completed application in accordance with the Act and to make timely disbursement of grant funds in accordance with the mutually agreed upon payment schedule.
- F. The State, upon receiving the grant, agrees to manage the CWSRF in accordance with the Act.
- G. Responsibility for, or management of, this OA will not be subcontracted to private firms or other State or Federal agencies without prior written approval from the Regional Administrator.

#### **XVII. CONGRESSIONAL AND PUBLIC INQUIRIES**

Responses to congressional and public inquiries will be made by the State and coordinated with EPA where necessary. A copy of the reply, with a copy of the inquiry, will be sent to EPA when appropriate.

#### **XVIII. RECORDS**

- A. Files:  
The State will receive and review project documentation from assistance applicants. This documentation, together with the State's review memoranda and the summary checklist, will be filed in an official project

file maintained by the State. The project files shall be made available to EPA at the time annual reviews are conducted. The US Government Accountability Office (GAO) and the Office of Inspector General (OIG) shall have the same access to the State records as EPA and will have access to all CWSRF recipients' records.

B. Record Retention:

The State will retain the official project files per this agreement and will arrange for the storage of files for the period agreed upon for repayment plus three (3) years following completion of repayment. Ultimate disposition of the recipient's files shall be in accordance with State laws.

C. Access to Records:

Access to project records will be in accordance with the State Freedom of Information Act; access to capitalization grant records will be in accordance with the US Freedom of Information Act, PL 93-502.

**XIX. PUBLIC PARTICIPATION**

The State will ensure proper opportunity for public comment during the development of the PPL, and IUP, and the implementation of the National Environmental Policy Act.

**XX. REVISING THE OA**

- A. This OA may be amended at any time by agreement between the signatories in writing. Funding adjustments can only be made through a capitalization grant amendment. Revisions will be particularly considered following revisions of the annual report reviews and/or annual audit.
- B. The OA officials responsible for negotiating amendments to the OA are designated in Paragraph VII.A.
- C. Procedures may be modified at any time by agreement, in writing, between the designated EPA and State officials named in paragraph VII.B.
- D. All consultation and communication regarding modification to any attachment or procedures shall be through the designated officials named in paragraph VII.B.
- E. The OA will be revised, as necessary, to reflect significant program changes or procedural changes, as determined jointly by the EPA Regional Administrator and the State.
- F. Any changes to State law affecting the CWSRF program must be submitted to EPA for review to determine whether a modification to this OA is necessary.

**XXI. CORRECTIVE ACTIONS; WASTE, FRAUD, AND ABUSE**

- A. If the annual review or audit reveals that the State has not complied with the terms of this OA or other requirements under Title VI, the Regional Administrator will notify the State of such noncompliance and prescribe the necessary corrective action. Failures to satisfy the terms of the OA including unmet assurances or invalid certifications are grounds for a

finding of noncompliance. All corrective actions will be conducted in accordance with Title VI, Section 605, of the Act and 40 CFR Part 35 Subpart K.

- B. If waste, fraud, or abuse is found in the CWSRF program, the Regional Administrator will impose one or more of the sanctions as described in 40 CFR Parts 30, 31, Subpart I. If any recipient of financial assistance from the State's CWSRF funds exhibits evidence of waste, fraud, or abuse, the State will impose sanctions on the recipient.
- C. If the Regional Administrator determines that capitalization grant funds or funds resulting from the capitalization grant were subject to waste, fraud, or abuse, the capitalization grant may be reconvened under procedures outlined in 40 CFR § 35.3170 and 2 CFR § 200.338.

## **XXII. DISPUTES**

Determinations by the Regional Administrator concerning denial of application for a capitalization grant as well as disputes arising under capitalization grants, including suspension or termination of grant assistance, will be final and conclusive unless appealed by the State within thirty (30) days from the date of receipt of such final determination in accordance with 2 CFR Part 1500, Subpart E.

## **XXIII. STATUTORY REQUIREMENTS**

The State, in addition to the above terms, agrees to all the statutory requirements of the Clean Water Act, as amended.

**XXIV. EFFECTIVE DATE**

This modification/revision to the Operating Agreement will be effective commencing on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Authority: The authority for this Operation Agreement is found in Sections 601 through 607 of the Water Quality Act of 1987.

US Environmental Protection Agency

Region 6 Water Division

**RANDALL RUSH** Digitally signed by RANDALL  
RUSH  
Date: 2024.09.16 09:54:41 -05'00'

Date

State of New Mexico  
Environment Department

Judith L. Kahl, P.E.  
Bureau Chief, Construction Programs Bureau

**Judith L Kahl** Digitally signed by Judith L Kahl  
Date: 2024.03.11 15:24:28  
-06'00'

Date Signed pursuant the February 19, 2024, Secretary of Environment Delegation Order

**Attachment 1**  
**Operating Agreement**  
**CERTIFICATIONS AND ASSURANCES**

Sec. 602 (b) (1) Agreement to Accept Payments: The State certifies that it will accept grant payments in accordance with the negotiated payment schedule.

Sec. 602 (b) (2) Provide a Match: The State certifies that it will deposit into the CWSRF an amount equaling the required match for each capitalization grant payment. The state match must be deposited on or before the date on which the State receives each payment from the grant award.

Sec. 602(b) (3) Binding Commitments within One Year: The State agrees to enter into binding commitments with recipients to provide financial assistance from the CWSRF. These binding commitments shall be in an amount equal to 120 percent of each quarterly grant payment within one year after the receipt of each quarterly grant payment. In the case where a capitalization grant does not require a state match, the binding commitments shall be in an amount equal to 100 percent of each quarterly grant payment within one year after the receipt of each grant payment.

Sec. 602 (b) (4) Expeditious and Timely Expenditures: The State agrees to expend all funds in the CWSRF in an expeditious and timely manner.

Sec. 602 (b) (5) First Use of Funds for Enforceable Requirements: The State agrees that "all funds in the fund as a result of capitalization grants will first be used to assure maintenance of progress, as determined by the Governor, toward compliance with enforceable deadlines, goals, and requirements of the Act, including the municipal compliance deadlines."

Sec. 602(b) (6). NEPA Review and Compliance with Environmental Review Requirements: The State agrees that it will conduct environmental reviews for required projects receiving assistance from the SRF following procedures which comply with criteria established by EPA in 40 CFR Part 35.3140. The State will conduct an environmental review of all projects considered "treatment works" as defined in the FWPCA section 212. The State will apply the most recent version of the State Environmental Review Process (SERP).

Sec. 602 (b) (6) Davis Bacon Wages Required for Treatment Works Projects: The State agrees that as a condition of making a loan it will require recipients of CWSRF assistance to meet the requirements under section 513 of the Act.

Sec. 602 (b) (7) Laws and Procedures: The State agrees to commit or expend each capitalization grant payment in accordance with State law and procedures regarding the commitment or expenditure of revenues.

Sec. 602 (b) (9) Recipient Accounting and Audit Procedures: The State agrees that as a condition of making a loan or other form of assistance, it will require recipients of CWSRF assistance to maintain project accounts in accordance with "generally accepted government accounting standards," including standards relating to the reporting of infrastructure assets.

Sec. 602 (b) (10) Annual Report: The State agrees to make annual reports to the Administrator on the actual use of the funds in accordance with Section 606 (d) of the Act and negotiated State/EPA guidance.

Sec. 602 (b) (11) Perpetuity: The State will establish, maintain, invest, and credit the fund with repayments, such that the fund balance will be available in perpetuity for activities under the Act.

Sec. 602 (b) (13) Cost and Effectiveness: The State agrees to require any municipality or intermunicipal agency to meet the cost and effectiveness requirements set forth in WRRDA. This requirement at a minimum includes: the study and evaluation of the cost and effectiveness of the processes, materials, techniques, and technologies for carrying out the proposed project or activity for which the assistance is sought; the selection of a project or activity that maximizes the potential for efficient water use, reuse, recapture and conservation, and energy conservation.

Sec. 602 (b) (14) Procurement: The State agrees that all projects with architectural and engineering (A/E) contracts, funded using funds directly made available by a capitalization grant will comply with the elements of the procurement processes for A/E services as identified in 40 U.S.C. 1101 *et seq.* or the State equivalent.

Sec. 603 (c) (1-11) Eligibilities: The State recognizes the expanded project types eligible for CWSRF assistance.

Sec. 603 (d)(1) Loan Terms: The State will make loans extending up to thirty (30) years but will ensure that loan terms do not exceed the useful life of the project.

Sec 603 (d) (1) (E) Fiscal Sustainability Plan: The recipient of a loan that involves the repair, replacement, or expansion of a publicly owned treatment works will be required to certify that a fiscal sustainability plan addressing the scope of the project has been developed and implemented.

Sec. 603 (d) (7) Administrative Funds: The State recognizes that maximum annual amount of CWSRF money (excluding fees collected) that may be used to cover the reasonable cost of administering the fund is the greater of \$400,000, or 4% of all CWSRF grant awards to the State less previous amount used for administration, or 1/5 percent of the current valuation of the fund.

Sec. 603 (f) Consistency with Planning Requirements: The State certifies that it will provide financial assistance from the CWSRF only with respect to a project which is consistent with plans, if any, developed under Section 205(j), 208, 303(e), 319, and 320 of the Act.

Sec. 603 (i) (1) Funds Available for Additional Subsidization: The State certifies that it may provide additional subsidization to benefit a municipality that meets the affordability criteria that the State has established; or does not meet the affordability criteria but meets the alternative criteria set forth in WRRDA.

Sec. 603 (i) (2) Affordability Criteria: The State has established and implemented Affordability Criteria.

Sec. 603 (h) Assistance for Non-Federal Share: The State certifies it will not provide loans from the Fund to a community for the non-federal share of a project receiving construction grant assistance from the U.S. EPA unless allowed by Federal law.

Sec. 606 (a) Accounting and Auditing Procedures: The State has established fiscal controls and accounting procedures to assure proper accounting for: (1) payments received by the CWSRF; (2) disbursements made by the CWSRF; and (3) CWSRF balances at the beginning and end of the accounting period. In carrying out these requirements, the State agrees to use accounting, audit, and fiscal procedures conforming to "generally accepted government accounting standards." These standards are usually defined as, but not limited to, those contained in the US General Accounting Office (GAO) publication "Standards for Audit for Governmental Organizations, Programs, Activities, and Functions" (April 2021).

Sec. 608 American Iron and Steel: All Treatment Works (212 projects) are subject to American Iron and Steel Requirements (AIS).

Build America Buy America Pub. L. No. 117-58, §§ 70901-52: The State recognizes that all equivalency projects are subject to the Build America Buy America Act (BABA)

Signage: In alignment with the "Enhancing Public Awareness" initiative, the state requires all equivalency projects to display signage or other public notifications.

Program Overview: The State agrees that it is EPA's responsibility to conduct oversight of the State's CWSRF program at a level sufficient to ensure compliance with the Act and subsequent regulations, and that the State shall cooperate with EPA in its program oversight efforts.

Legal, Managerial, Technical, and Operational Capabilities: The State certifies that it has the legal, managerial, technical, and operational capabilities to administer the program competently.

Debarment and Suspension: The State agrees that the State and all recipients of CWSRF assistance will comply with 40 CFR Part 32, Debarment and Suspension.

Section 5012 Sec 212(2) (A) Expanded Definition of Treatment Works: The State recognizes the expanded definition of "treatment works" as to include the leasing and fee-simple purchase of

land (surface and subsurface easements included) needed to store equipment and material during construction, to locate eligible projects and land integral to the treatment process.

**Attachment 2**  
**Operating Agreement**  
**NMED CPB**  
**Project Inspection Standard Operating Procedures**

Projects being constructed using any of the funding sources that the New Mexico Environment Department (NMED) Construction Programs Bureau (CPB) manages or provides technical oversight on through an MOU or IGA should be inspected on a regular basis. The definition of regular can vary by project type, season, size of the project and other factors.

1. At a minimum, projects should be inspected on a quarterly basis. When projects are very active and there are monthly progress meetings, the CPB project manager (PM) should attend whenever possible and can perform an inspection at that time. The most recent version of the project inspection report form is located in the technical forms section of the shared drive.
2. The CPB PM shall review any previous inspection reports to determine if there are any follow up items to be addressed during the current site visit prior to going out to the construction site.
3. The CPB PM shall fill out all possible sections of the inspection form prior to travelling to the construction site. Upon arrival at the site, the CPB PM should meet with the superintendent of the construction company and get a project update and go over any concerns.
4. The CPB PM shall proceed to inspect the construction site using the approved checklist. Depending on the funding source paying for the project, not all sections of the form will apply. The CPB PM should write N/A on the form where the question is not applicable to the current project.
5. The CPB PM shall walk the construction site and note all progress that has occurred since the last inspection.
6. For SRF projects the CPB PM shall pay special attention to the sections of the checklist dealing with Davis Bacon, Disadvantaged Business Entity requirements, American Iron and Steel, and Build America Buy America requirements. For projects subject to AIS or BABA, the CPB PM must also fill out appropriate Site Visit Checklists located in the technical forms section of the shared drive.
7. Upon return to the office, the CPB PM shall complete the project inspection report and transmit the information to appropriate parties including the funding recipient, funding agency and any other necessary entities. This should be done no more than one week after the inspection takes place.
8. A copy of the inspection report will be saved in the appropriate project folder.

**Attachment Three  
Operating Agreement  
Policies and Procedures**

**Disbursement Requests**

**Purpose:**

This procedure establishes guidelines for the Disbursement Request (DR) process by which a Clean Water State Revolving Fund (CWSRF) Borrower receives payment from the NMED Construction Programs Bureau (CPB) for reimbursement of eligible costs. The process begins when a DR is received from the Borrower and ends when the Borrower is paid.

In place for agreements signed prior to SFY2023:

If tech staff Project Manager (PM) receives a DR from the community or the engineer, they will immediately send the DR to the assigned Loan Project Administrator (PA) and cc: [NMENV-cpbinfo@state.nm.us](mailto:NMENV-cpbinfo@state.nm.us). The subject line should be the Community Name, Project Number and DR Number.

**PA Administrative Check:**

- 1) Save original DR to file depot with regular naming convention and work "Original;" upload to LGTS.
- 2) Check Signatory against latest Resolution in LGTS.
- 3) Verify that the current Previous Expenditures column matches the Cumulative column from last DR and that DR number is in sequence.
- 4) Verify that American Iron and Steel (AIS) certification for pay application is submitted (CWSRF only, construction only, 1 per pay application).
- 5) Verify that Labor Standards certification form XP-214, also known as Davis-Bacon Certification is submitted (CWSRF only, construction only, 1 per pay application.)
- 6) Remove checks, wire transfer information, POs, and extraneous documents. Rotate documents to correct orientation.
- 7) Attach checklist to document.
- 8) Enter DR information into LGTS and upload document.
- 9) Save DR in transaction testing a project folder under approved EPA naming convention. "Project City-Project Number-DR#-Amount of DR".
- 10) Email assigned PM that DR is ready for review.
- 11) FINAL: Weighted Average Useful Life-Construction Only.
- 12) FINAL: Certification of FSP – Treatment Works Construction Only.
- 13) FINAL: Consent of Surety/Release of Liens—Construction Only.
- 14) FINAL: Davis Bacon Certification (Federal) and Labor Standards Certification (State) 2 docs Construction Only.
- 15) FINAL: Engineer & Community Acceptance (Construction) or Design Completion Community Acceptance (Design)
- 16) FINAL: Record Drawings/O&M Manuals Acceptance -Construction Only.

**PM Check:**

- 1) Download document: Evaluate back up invoices to ensure they match existing contracts in the file, are eligible for reimbursement, and are consistent with the intent of the funding for this project.
- 2) If invoices do not match DR amount, place appropriate reason(s) on the Invoice(s) and/or DR.
- 3) Make sure that the contracts have a Notice of Obligation entered in LGTS.
- 4) Verify that Contractor has submitted AIS certification for pay application and it is properly signed. (CWSRF only, construction only).
- 5) Verify that Contractor has submitted Labor Standards certification form XP-214, Davis-Bacon Certification is submitted and properly signed (CWSRF only, construction only).
- 6) If the project is "green" check for green expenditures. Enter the green dollar amount in LGTS in the appropriate box on the disbursement page.
- 7) Check math for total of Current Expenditures, Cumulative and Remaining columns.
- 8) Make sure the NMGRT is correctly applied.
- 9) Prepare a summary of the invoices and the amount approved for each invoice.
- 10) If all is in order approve DR – stamp and electronic signature.
- 11) Update LGTS Project Status Notes, upload and approve DR in LGTS.
- 12) Email PA and cc: [NMENV-cpbinfo@state.nm.us](mailto:NMENV-cpbinfo@state.nm.us) that the DR is ready for review.
- 13) PM is responsible for ensuring that all the necessary closeout documents are submitted and signed by the grantee.
  - a) FINAL: Weighted Average Useful Life - Must be returned as part of the DR document or uploaded to LGTS separate from the DR document.
  - b) FINAL: Certification of FSP – treatment works project only - Must be signed and dated by PM and returned as part of the DR document or uploaded to LGTS separate from the DR document.
  - c) FINAL: Consent of Surety/Release of Liens—May be included in DR document or saved to project files.
  - d) FINAL: Davis Bacon Certification (Federal) and Labor Standards Certification (State) - May be included in DR document or saved to project files.
  - e) FINAL: Engineer & Community Acceptance (Construction) or Design Completion Community Acceptance (Design) - Must be signed and dated by PM and returned with DR document or uploaded to LGTS separate from the DR document.
  - f) FINAL: Record Drawings/O&M Manuals Acceptance - May be included in DR document or saved to project files.

For agreements signed in or after SFY2023

PA Administrative Check:

- 1) Save original DR to file depot with regular naming convention and word "Original;" upload to LGTS.
- 2) Check Signatory against latest Resolution in LGTS.
- 3) Verify that current Previous Expenditures column matches the Cumulative column from last DR and that DR number is in sequence.
- 4) Verify that American Iron and Steel (AIS) certification for pay application is submitted (1 per pay application, only for Treatment Works construction).
- 5) Verify that Build America Buy America (BABA) certification for pay application is submitted (1 per pay app, only for Equivalency project construction)
- 6) Verify that Davis-Bacon Certification for pay application is submitted (1 per pay app for Treatment Works construction only.)
- 7) Remove checks, wire transfer information, POs, and extraneous documents. Rotate documents to correct orientation.
- 8) Attach checklist to document.

- 9) Enter DR information into LGTS and upload document.
- 10) Save DR in transaction testing project folder under approved EPA naming convention. "Project City-Project Number-DR#-Amount of DR".
- 11) Email assigned PM that DR is ready for review.
- 12) FINAL: Weighted Average Useful Life-Construction Only.
- 13) FINAL: Certification of FSP – Treatment Works Construction Only.
- 14) FINAL: Consent of Surety/Release of Liens—Construction Only.
- 15) FINAL: Davis Bacon Certification (Federal) and Labor Standards Certification (State) 2 docs Treatment Works Construction Only.
- 16) FINAL: Engineer & Community Acceptance (Construction) or Design Completion Community Acceptance (Design)
- 17) FINAL: Record Drawings/O&M Manuals Acceptance -Construction Only.

#### PM Check:

- 1) Download document: Evaluate back up invoices to ensure they match existing contracts in the file, are eligible for reimbursement, and are consistent with the intent of the funding for this project.
- 2) If invoices do not match DR amount, place appropriate reason(s) on the Invoice(s) and/or DR.
- 3) Make sure that the contracts have a Notice of Obligation in LGTS.
- 4) Verify that Contractor has submitted AIS certification for pay application and it is properly signed (Treatment Works Construction Only).
- 5) Verify that Contractor has submitted BABA certification for pay application and it is properly signed (Equivalency Project Construction Only).
- 6) Verify that Contractor has submitted Labor Standards Certification Form XP-214, Davis-Bacon Certification is submitted and properly signed (Treatment Works Construction Only)
- 7) If the project is "green" check for green expenditures, highlight on the pay application and enter in LGTS.
- 8) Check math for total of Current Expenditures, Cumulative and Remaining columns.
- 9) Make sure the NMGRS is correctly applied.
- 10) Prepare a summary of the invoices and the amount approved for each invoice.
- 11) If all is in order approve DR – stamp and electronic signature.
- 12) Update LGTS Project Status Notes, upload and approve DR in LGTS.
- 13) Email PA and cc: [NMENV-cpbinfo@state.nm.us](mailto:NMENV-cpbinfo@state.nm.us) that the DR is ready for review.
- 14) PM is responsible for ensuring that all the necessary closeout documents are submitted and signed by the grantee.
  - a) FINAL: Weighted Average useful life - Must be returned as part of the DR document or uploaded to LGTS separate from the DR document.
  - b) FINAL: Certification of FSP – Treatment Works projects only - Must be signed and dated by PM and returned as part of the DR document or uploaded to LGTS separate from the DR document.
  - c) FINAL: Consent of Surety/Release of Liens—May be included in DR document or saved to project files.
  - d) FINAL: Davis Bacon Certification (Federal) and Labor Standards Certification (State) - May be included in DR document or saved to project files. (Treatment Works Construction only).
  - e) FINAL: Engineer & Community Acceptance (Construction) or Design Completion Community Acceptance (Design) - Must be signed and dated by PM and returned with DR document or uploaded to LGTS separate from the DR document.
  - f) FINAL: Record Drawings/O&M Manuals Acceptance - May be included in DR document or saved to project files.

## **Implementing Federal Cross-Cutting Authorities**

### **Purpose:**

This procedure establishes guidelines for the implementation of the Federal Cross-Cutting Authorities in the Clean Water SRF Program.

### **Procedures:**

The technical staff follows the most recent version of the State Environmental Review Process (SERP) to provide the environmental review required by the CWSRF program. The SERP documents the Federal requirements that must be met to receive environmental clearance for a CWSRF funded project.

### **Changes:**

In November 2013, EPA Office of Water issued a memorandum titled "Procedures for Implementing Environmental Federal Cross-Cutting Authorities in the Clean Water and Drinking Water State Revolving Fund Programs." The memo states that, "if State SRF staff perform an internal analysis and conclusively determine that the proposed project has no potential significant impact related to a specific federal cross-cutting authority, then it is not necessary to consult with the agency responsible for that crosscutter."<sup>1</sup>

This memo has been made a part of the State of New Mexico Environment Department Construction Programs Bureau SERP. If the staff determines, based on the project specifics, that a particular crosscutter authority would not be negatively impacted by the project, then the supporting information for this determination will be placed in the project file.

### **Oversight:**

All determinations by the technical staff that a specific cross-cutting authority does not apply to a project will be reviewed by the Technical Section Manager and the Bureau Chief. Any revisions to that determination and the review will be documented in the project file in the environmental section.

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<sup>1</sup>EPA memo is available at [https://www.epa.gov/sites/production/files/2020-08/documents/implementing\\_environmental\\_federal\\_cross-cutting\\_authorities\\_in\\_srf.pdf](https://www.epa.gov/sites/production/files/2020-08/documents/implementing_environmental_federal_cross-cutting_authorities_in_srf.pdf)

## **Charging of Costs to Federal Awards**

### **Overview:**

It is the policy of NMED Construction Programs Bureau (CPB) that only costs that are reasonable, allowable, and allocable to a Federal award shall be charged to that award directly or indirectly. All unallowable costs shall be appropriately segregated from allowable costs to assure that unallowable costs are not charged to Federal awards.

### **Segregating Unallowable from Allowable Costs:**

The following steps shall be taken to identify and segregate costs that are allowable and unallowable with respect to each federal award:

1. The budget and grant or contract for each award are reviewed by the Project Manager for costs specifically allowable or unallowable.
2. The CWSRF Program Administrator, the Loan Administrator, the Loan Manager, the Financial Manager, and all Project Managers are familiar with the allowability of costs provisions of 2 CFR Part 200 Subpart E—Cost Principles, particularly:
  - a. The list of specifically unallowable costs, such as alcoholic beverages, bad debts, contributions, fines and penalties, lobbying, etc.
  - b. Those costs requiring advance approval from Federal agencies in order to be allowable in accordance with §200.407, Prior written approval.
3. No costs are charged directly to any Federal award until the cost has been determined to be allowable under the terms of the award and/or 2 CFR Part 200 Subpart E—Cost Principles.
4. For each Federal award, a general ledger account is established in the chart of accounts of NMED CPB to reflect the categories of allowable costs identified in the award or the award budget.
5. All items of miscellaneous income or credits, including the subsequent write-offs of uncashed checks, rebates, refunds, and similar items, are reflected for grant accounting purposes as reductions in allowable expenditures if the credit relates to charges that were originally charged to a Federal award or to activity associated with a Federal award. The reduction in expenditure is reflected in the year in which the credit is received (i.e., if the purchase that results from the credit took place in a prior period, the prior period is not amended for the credit.)

### **Criteria for Allowability:**

It is the policy of NMED CPB that all costs must meet the following criteria in order to be treated as allowable direct or indirect costs under a Federal award.

The cost must be "reasonable" for the performance of the award, considering the following factors:

- A. Whether the cost is of a type that is generally considered as being necessary for the operation of the organization or the performance of the award.
- B. Restraints imposed by such factors as generally accepted sound business practices, arm's length bargaining, Federal and state laws and regulations, and the terms and conditions of the award.
- C. Whether the individuals concerned acted with prudence in the circumstances.
- D. Consistency with established policies and procedures of the NMED CPB, deviations from which could unjustifiably increase the costs of the award; and
- E. The cost must be "allocable" to an award by meeting one of the following criteria:
  - i. The cost is incurred specifically for a Federal award.
  - ii. The cost benefits both the Federal award and other work, and can be distributed in reasonable proportion to the benefits received; or
  - iii. The cost is necessary to the overall operation of the NMED CPB, but, where a direct relationship to any particular program or group of programs cannot be demonstrated.

The cost must conform to any limitations or exclusions of 2 CFR Part 200 or the Federal award itself. Treatment of costs must be consistent with policies and procedures that apply to both Federally financed activities and other activities of the NMED CPB; costs must be consistently treated over time; the cost must be determined in accordance with generally accepted accounting principles; costs may not be included as a cost of any other Federally financed program in the current or prior periods; and the cost must be adequately documented.

#### **Direct Costs:**

Direct costs include those costs that are incurred specifically for an award or non-Federal function. NMED CPB identifies and charges these costs exclusively to each award or program. Each invoice is coded with the appropriate account number reflecting which program received direct benefit from the expenditure. Invoices are approved by the Project Manager and reviewed by the Program Administrator.

Charges to Federal awards for salaries and wages are based on records that accurately reflect the work performed. These records must:

- Be supported by a system of internal control which provides reasonable assurance that the charges are accurate, allowable, and properly allocated.
- Be incorporated into the official records of the non-Federal entity.
- Reasonably reflect the total activity for which the employee is compensated by the non-Federal entity, not exceeding 100% of compensated activities.
- Encompass both federally assisted, and all other activities compensated by NMED CPB.
- Comply with other established accounting policies and practices of NMED CPB; and

- Support the distribution of the employee's salary or wages among specific activities or cost objectives if the employee works on more than one Federal award; a Federal award and non-Federal award; an indirect cost activity and a direct cost activity; two or more indirect activities which are allocated using different allocation bases; or an unallowable activity and a direct or indirect cost activity.

Records may reflect categories of activities expressed as a percentage distribution of total activities.

Budget estimates (estimates determined before the services are performed) alone do not qualify as support for charges to Federal awards but may be used for interim accounting purposes. These estimates produce reasonable approximations of the activity performed. Any significant changes in the corresponding work activity are identified and entered into the records in a timely manner by the Bureau Financial Manager. Short term (such as one or two months) fluctuation between workload categories need not be considered if the distribution of salaries and wages is reasonable over the longer term. NMED CPB reviews after-the-fact interim charges made to a Federal award based on budget estimates. NMED makes all necessary adjustments such that the final amount charged to the Federal award is accurate, allowable, and properly allocated.

Time sheets or personnel activity reports are submitted on a regular basis reflecting employees' work and which programs directly benefited from their effort. Time sheets or personnel activity reports serve as the basis for charging salaries directly to Federal awards and non-Federal functions.

Equipment purchased for exclusive use on a Federal award and reimbursed by a Federal agency is accounted for as a direct cost of that award (i.e., such equipment shall not be capitalized and depreciated).

### **Indirect Costs:**

Indirect costs are those costs that either benefit more than one award (overhead costs) or non-federal functions or that are necessary for the overall operation of NMED CPB.

NMED CPB maintains an annual indirect cost budget. Use of the automatic extension is considered and may be deemed appropriate if the activities of NMED CPB have not altered significantly from the previously approved indirect cost rate. If the automatic extension is not chosen or cannot be used, a new indirect cost budget is prepared and submitted to the Cognizant or Oversight Agency for approval. The approved indirect cost rate is used when determining the overhead applied to each federal award.

Examples of the types of expenditures normally included in the indirect cost pool are:

- General administration
- Salaries and benefits of the executive officers, finance, accounting, and administrative personnel

- Depreciation of equipment and buildings
- Office rent and maintenance
- General office repairs and maintenance

NMED CPB's independent auditor is responsible for reviewing the indirect cost rates. Indirect cost rates are submitted to the Cognizant or Oversight Agency and are binding on all other Federal agencies and their contracting officers unless specifically prohibited by statute.

### **Accounting for Specific Elements of Cost:**

NMED CPB utilizes the following methods of charging specific elements of cost to federal awards as direct or indirect costs:

Salaries and Wages - Salaries and wages are charged directly and indirectly based on the functions performed by each employee, as documented on each employee's timesheet, as follows:

- Direct costs - The majority of the employees charge their time directly since their work is specifically identifiable to specific grants or other (non-federal) programs or functions of the organization.
- Indirect costs – Some staff charge 100 percent of their salary costs indirectly.
- Mixed charges - Some employees may charge their salary costs to both direct and indirect activities.

Compensated absences (e.g., vacation leave earned, sick leave used, and holiday pay) are considered part of salary costs. The accounting system of NMED CPB records salaries associated with compensated absences as a direct or indirect cost in the same manner that salary costs are recorded.

Employee Benefits – NMED CPB incurs costs for the following statutory and non-statutory employee benefits:

- FICA
- Unemployment insurance
- Worker's compensation
- Health insurance
- Contributions to pension plan

Since the accounting system tracks employee benefit costs by individual employee, each such benefit cost is charged directly and indirectly in the same proportion as everyone's salary.

Occupancy Expenses - Monthly rent expense and related pass-through expenses are allocated directly and indirectly, based on approximate square footage of space utilized, as follows:

Direct costs - The cost of space occupied by staff whose salaries are directly charged to federal awards is charged directly to those same awards.

Indirect costs - The costs of space occupied by staff whose salaries are indirectly charged is also charged indirectly. The cost of space for staff whose salaries are charged on a mixed basis (directly and indirectly) is allocated on a mixed basis in the same ratio as their salaries are allocated. The cost of space associated with common areas, such as hallways, restrooms, and conference rooms, is accounted for as an indirect cost.

Utilities - Utilities costs incurred include electricity and water. Such utilities costs are charged directly and indirectly in the same proportion as occupancy costs.

Supplies and Materials - To the maximum extent possible, office supplies and materials are charged directly to the grant or program/function that uses the supplies or materials. All supplies and materials used by staff engaged in indirect activities are charged indirectly.

Postage and Shipping - To the maximum extent possible, postage and shipping costs are charged directly to the grant or program/function that benefits from the postage or shipping costs, based on the postage log kept near the postage machine and the UPS/FedEx shipping logs.

Photocopying and Printing - Photocopying costs include all paper and copy supplies, copier maintenance charges and the actual lease cost or depreciation expense of the copier. Photocopying costs are charged directly and indirectly based on the user codes input into the copier prior to making photocopies. All printing costs are charged directly to the benefiting grant or program/function.

Communications - Communications costs include the cellular service, the costs of local telephone service and long-distance telephone charges, including charges associated with telephone calls, facsimile transmissions, and Internet dial-up connections. Local telephone service costs are charged directly and indirectly based upon the number of telephone units assigned to NMED CPB. Each telephone unit is identified to either a direct or an indirect activity, as determined annually based on an approximation of time charges of employees associated with each telephone unit. Long-distance telephone calls are charged either directly or indirectly based upon whether a direct or indirect activity benefits from the transmission.

Outside Services – NMED CPB incurs outside service costs for its annual audit, legal fees, and for staff development specialists. Outside service costs are charged as follows:

Audit fees - Cost of the financial statement audit and preparation of Form 990 is charged as an indirect cost. Additional audit costs associated with that portion of the audit associated with a single audit are charged directly to the audited programs, based on estimates received from the independent CPA firm.

Legal fees - Legal fees are charged directly to the program/function that benefits from the services. Legal fees that are not identifiable with specific direct grants or programs are charged indirectly.

Staff Development Specialists - Costs associated with staff development specialists are charged directly to the program/function that benefits from the services. Fees that are not identifiable with specific direct grants or programs are charged indirectly.

Insurance - To the extent that insurance premiums are associated with insurance coverage for specific grants or programs, those premium costs are charged directly. All insurance costs that are not identifiable with specific direct grants or programs (such as the NMED CPB's general liability coverage) are charged indirectly.

Credits - The applicable portion of any credits resulting from cash discounts, volume discounts, refunds, and the write off of stale outstanding checks, trade-ins, scrap sales or similar credits are credited directly or indirectly in the same manner as the purchase that resulted in the credit.

**Conflict of Interest Procedures and Policy**  
**NMED Code of Conduct**

A. Pursuant to the New Mexico Environment Department Code of Conduct, NMED Policy and Procedure 01-02: **Introduction**. NMED employees shall perform their job and conduct Department business with integrity and in a manner that excludes consideration of personal or financial advantage or gain. Employees must avoid any conflict of interest, or creating the appearance of a conflict, which may affect, or which may be viewed as compromising what otherwise must be their objective and independent judgment when performing their duties. No employee shall accept any money, gift, benefit of any kind, or offer of future employment under circumstances from which the purpose may be deemed to unethically or inappropriately influence or persuade that employee to diverge from an ethical, appropriate, or lawful course of action. Any employee concerned that a particular matter or situation may create a conflict, or create the appearance of a conflict, shall disclose to, and discuss the matter with the employee's immediate supervisor. The immediate supervisor shall elevate the concern about a conflict of interest to the Bureau Chief, Division Director and NMED's Human Resources Bureau.

B. **Avoiding Conflicts of Interest.**

(1) NMED employees, their spouses, domestic partners, children, or children of their spouses or domestic partners shall not acquire a direct financial interest in any business or entity regulated by NMED, or with whom NMED does business, including consulting firms, contractors, and professional services. Any candidate for hire, transfer, or promotion shall disclose any and all such interest in a

diligent, transparent, and timely manner and, may be hired, transferred, or promoted only upon full and complete relinquishment of all rights, possession, and control of such interest. Any employee who acquires such an interest through inheritance, marriage, or similar circumstance during employment shall promptly report such interest in writing to the Secretary of State, pursuant to the Financial Disclosure Act, NMSA 1978 §§ 10-16A-1 to -8. Any such employee must either relinquish all rights, possession, and control of such interest or, must be reassigned duties to an extent wherein that employee's assigned duties cannot create the existence or the appearance of impropriety regarding that same interest. Employees shall also disclose such information to their respective chains of command and to HRB for the purpose of preventing, mitigating, or eliminating any and all conflicts of interest.

(2) NMED employees shall not accept, directly or indirectly, favors, gifts, services, gratuities, or anything of significant value that is offered in

connection with a person's status as an NMED employee. However, employees may receive gifts or items which do not exceed \$50.00 in value, provided they disclose the receipt of such gifts in writing to their immediate supervisors. Gifts of nominal value may include, for example, occasional, small gifts of food such as a box of chocolates, or popcorn given as a holiday gift, or refreshments and snacks made available to participants of a meeting, training or similar work-related activity. An employee shall return to the sender, if received, or reject, if offered, any gift of more than a nominal value. Examples of gifts of more than nominal value include but are not limited to rounds of golf, jackets, trips, entertainment tickets, bottles of alcohol, expensive meals or any other items or services typically exceeding a value of \$50.00. Employees should exercise courtesy and sound judgment in complying with these requirements. In furtherance of governmental accountability and transparency, NMED employees shall report in writing all nominal gifts as soon as possible to the immediate supervisor upon receipt or offer.

(3) NMED employees may accept items of *de minimis* value typically used for promotion, such as pens, pencils, notepads, coffee mugs, caps, calendars, or other similar, inexpensive items but shall disclose the receipt of such gifts in writing to their immediate supervisors.

(4) NMED employees shall refuse any honorarium offered for providing information related to the employee's tenure with NMED. If there is any uncertainty as to whether an employee should refuse an honorarium, the employee shall report the matter to the direct supervisor who shall consult with the bureau chief to determine an appropriate course of action.

(5) NMED employees may accept meals, beverages, travel or lodging expenses from other government agencies, contractors, sub-contractors or non-profit entities if they are on official state business, including, but not limited to giving a speech, making a presentation, touring a site or facility, attending an NMED approved conference or training, or participating in fact-finding. Accepting out-of-state travel or lodging expenses is subject to the Cabinet Secretary's or designee's prior written approval.

(6) The lawful social activities of NMED employees are not subject to the Code of Conduct as long as the activity is independent of the employee's responsibilities as a NMED employee, occurs outside of normal or extended work hours, and does not compromise an employee's ability or standing to perform their duties free of conflict.

**C. Procurement.** No employee shall participate directly or indirectly in a procurement process if the employee knows or should reasonably know that the employee, the employee's spouse or domestic partner, child, or the child of the spouse or domestic partner has a financial interest in the business, person or entity who submits a procurement bid or proposal to NMED. A financial interest may include employment with or ownership in the business or entity that submits a procurement bid or proposal. An employee, the employee's spouse, domestic partner, child, or the child of the employee's spouse or domestic partner who holds a financial interest in a disclosed, blind trust shall not be deemed to have a financial interest with regard to matters pertaining to that trust.

**D. Resolving Conflicts of Interest.** NMED employees shall avoid engaging in any conflict of interest and avoid creating any appearance of a conflict of interest. If a conflict of interest arises, an employee shall notify their chain of command and HRB. In all cases, the employee shall disclose the conflict of interest and seek guidance and approval from the employee's bureau chief and division director as to how to address and resolve the conflict of interest.

### **Governor's Code of Conduct**

NMED CPB will adhere to the most recent Governor's Code of Conduct, including the Conflict-of-Interest provisions for current and former officers and employees. The Governor's Code of Conduct is available on the New Mexico State Personnel Office website <https://www.spo.state.nm.us/>

## **Subrecipient Procedures and Policy**

### **Making of Subaward:**

NMED CPB makes subawards of federal funds to communities/local authorities as defined in the Wastewater Facility Construction Loan Act. All sub-awards are subject to the same procurement policies described in the Procurement Policy. In addition, all subrecipients must agree to the subrecipient monitoring provisions described in the next section.

NMED CPB shall review, at a minimum, the most recent 3 years' audit reports.

### **Elements of Subaward:**

Beginning with state fiscal year 2023, NMED CPB will apply equivalency by reporting one or more projects in the Federal Funding and Transparency Act website. NMED Subaward agreements identify all applicable audit requirements, including the requirement to obtain an audit in accordance with 2 CFR Part 200 Subpart F. Subawards include a listing of all applicable Federal requirements that each subrecipient must follow.

Subawards require that subrecipients submit financial and program reports to the NMED CPB on a basis defined in the award agreement. Subawards require that subrecipients permit NMED CPB and auditors' access to the subrecipient's records and financial statements as necessary.

### **Monitoring of Subrecipients:**

When NMED CPB utilizes Federal funds to make subawards to subrecipients, NMED CPB is subject to a requirement to monitor each subrecipient to provide reasonable assurance that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. In fulfillment of its obligation to monitor subrecipients, the following policies apply to all subawards of Federal funds made by NMED CPB to subrecipients:

- NMED CPB reviews programmatic and financial reports prepared and submitted by the subrecipient and follows up on areas of concern.
- NMED CPB reviews all subrecipients audits and follows up with the subrecipient if the audit is not submitted.
- NMED CPB will cease all funding of subrecipients failing to meet the requirement to undergo a Single Audit in accordance with 2 CFR Part 200 Subpart F.
- NMED CPB ensures that the subrecipients takes timely and appropriate action on all deficiencies pertaining to the subaward detected through audits, on-site review, and other means.

- NMED CPB will issue a management decision for audit findings pertaining to the subaward as required by 2 CFR § 200.521 Management decision.
- NMED CPB will consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to the pass-through entity's own records.

Ongoing monitoring of subrecipients by NMED CPB will inherently vary from subrecipient to subrecipient, based on the nature of work assigned to each subrecipient. NMED CPB will evaluate each subrecipient's risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring, which may include consideration of such factors as:

- The subrecipient's prior experience with the same or similar subawards.
- The results of previous audits including whether the subrecipient receives a Single Audit in accordance with 2 CFR Part 200 Subpart F, and the extent to which the same or similar subaward has been audited as a major program.
- Whether the subrecipient has new personnel or new or substantially changed systems; and  
The extent and results of Federal awarding agency monitoring (i.e., if the subrecipient also receives Federal awards directly from a Federal awarding agency).

Depending upon the NMED CPB's assessment of risk posed by the subrecipient, the following monitoring tools may involve any or all of the following:

- Regular contacts with subrecipients and appropriate inquiries regarding the program.
- Monitoring subrecipient budgets.
- Performing site visits to the subrecipient to review program operations, financial and programmatic records and assess compliance with applicable laws, regulations, and provisions of the subaward;
- Providing subrecipients with training and technical assistance on program-related matters; and
- Establishing and maintaining a tracking system to assure timely submission of all reports required of the subrecipient.

Documentation is maintained in support of all efforts associated with NMED CPB's monitoring of subrecipients.

### **Time Sheets**

#### **Purpose:**

Employees of the Construction Programs Bureau, New Mexico Environment Department must allocate time worked to codes assigned by funding source (Combo Codes) so the time may be billed to the appropriate state or federal funding source.

#### **Step 1:**

Employees use the Personnel Activity Report (PAR) provided by the Bureau. Employee ID number, name and title must be completed. The beginning date of the pay period should be entered. All compensated time must be reported on this document. Employees also enter their time in

SHARE, the statewide human resources and accounting software, and this time should coincide with that entered on the PAR.

**Step 2:**

The PAR allows for multiple combo codes to be entered for each workday. The description section of the PAR is used to document the work that pertains to the corresponding combo code. Descriptions should be detailed as to the name of the project worked on, the project number, and the nature of the work performed. Hours allocated to each combo code must accurately reflect time spent on projects for that allocation.

CPB combo code allocations include Clean Water State Revolving Fund, the CWSRF Administrative Fund, the Rural Infrastructure Fund, Sewer Overflow and Stormwater Reuse Municipal Grants Program, and the Corrective Action Fund. Combo code allocations also include Other funding programs that may vary from year to year.

PAR's must be signed and dated by the employee and submitted to their supervisor for review and signature.

**Step 3:**

Employees that allocate to any combo code other than CAF, must enter their time worked and the appropriate combo code allocation in SHARE. Employees that allocate solely to CAF have preset time entered already and should only enter time exceptions such as annual or sick leave.

**Step 4:**

Time entered and processed is then audited by the financial staff to ensure SHARE and PAR's match. Allocated entities are then billed or monies drawn to complete the process.



# New Mexico Environment Department Construction Programs Bureau State Environmental Review Process (SERP)



Los Alamos County White Rock Water Resource Recovery Facility Construction – CWSRF 110

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NEW MEXICO ENVIRONMENT DEPARTMENT  
CONSTRUCTION PROGRAMS BUREAU  
STATE ENVIRONMENTAL REVIEW PROCESS

**PURPOSE**

This procedure was developed by the New Mexico Environment Department (NMED) Construction Programs Bureau (CPB) to comply with the National Environmental Policy Act (NEPA) review requirements for federally capitalized Clean Water State Revolving Fund (CWSRF) loans. The procedure is based on implementing the regulations for NEPA (40 Code of Federal Regulations [CFR] Parts 6, 25, 35, and 1500) as followed by the Environmental Protection Agency (EPA), and State regulations New Mexico Administrative Code (NMAC) 20.7.7. These regulations govern the NMED State Environmental Review Process (SERP).

**IMPLEMENTATION**

Environmental reviews will be conducted for all treatment works<sup>1</sup> projects receiving assistance from the CWSRF. CWSRF projects that do not meet the definition of treatment works are not required to conduct environmental reviews. The reviews could result in three possible actions. The CPB can (i) grant a Categorical Exclusion (CE) if the action falls into a defined category where little environmental impact is expected, or (ii) prepare an Environmental Assessment (EA) along with a preliminary Finding of No Significant Impact (FONSI), or (iii) find that potential impacts might be significant and direct that an Environmental Impact Statement (EIS) be prepared. These processes are explained in more detail in **Attachment 1 -NEPA REVIEW PROCESS SUMMARY**.

**DOCUMENTATION**

To document the NEPA review process, CPB project managers shall prepare and maintain the applicable items on **Attachment 2 - NEPA PROJECT FILE CHECKLIST** in the project files.

Project files will be maintained in the CPB electronic files until the project is complete, all final documents have been received, and the project is officially closed. Closed projects will be archived in accordance with CPB and EPA policy.

**EXISTING ENVIRONMENTAL DOCUMENTS**

Existing environmental documents may be used and referenced in the preparation of the EID and EA. Information used in a previous assessment must be less than five years old, per 40 CFR 6.200(h). If the prior-decision document is older than five (5) years and there are no changes to the project, CPB will reaffirm the document. If there are modifications CPB will ensure that the document reflects the changes, and if applicable, provide the public with an opportunity to comment. CPB will publish the reaffirmation or modification on the CWSRF Program website.

Any prior-decision document submitted must contain information applicable and pertinent to the proposed project and have logical relevancy to and bearing on the action being proposed. In particular, the scope of the proposed project must be the same project identified in the prior-decision document.

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<sup>1</sup> A "treatment works" is a project determined by NMED to meet the definition of 33 U.S.C § 1292(2)(A) and (B).

When prior-decision documents are submitted, an evaluation of the current environmental impacts of the proposed project must be conducted. New impacts not addressed in the prior-decision documents must be addressed in the current environmental document.

Previous assessments conducted by another agency can be incorporated by reference into the current assessment but cannot substitute for a current assessment. CPB will determine whether to reaffirm, supplement, or reassess information that is more than five years old. All referenced materials must be included in the appendix of the EID maintained in the project file.

### **APPEALS**

The issuance of the finalized FONSI/EA and the Final Determination letter are final agency actions subject to review as provided under the laws of New Mexico. Any appeal of a final agency action in this instance may be appealed to the district court pursuant to Rule 1-075 NMRA (New Mexico Rules Annotated).

**ATTACHMENT 1**  
**NEW MEXICO ENVIRONMENT DEPARTMENT**  
**CONSTRUCTION PROGRAMS BUREAU**  
**NEPA REVIEW PROCESS SUMMARY**

The applicant will present the scope and nature of the project to the New Mexico Environment Department Construction Programs Bureau (CPB) to assist in determining the level of environmental review necessary. The environmental review process will be conducted in light of guidelines developed for the National Environmental Policy Act (NEPA) as detailed below. The CPB review can result in three possible actions: (i) grant a Categorical Exclusion (CE) if the action falls into a defined category where little environmental impact is expected, or (ii) prepare an Environmental Assessment (EA) along with a preliminary Finding of No Significant Impact (FONSI), or (iii) find that potential impacts might be significant and direct that an EIS be prepared.

1) Based on this discussion of the scope and nature of the project, CPB may advise the applicant that the project may qualify for a CE. CEs may be granted for projects that involve minimal disturbance, such as minor rehabilitation. The applicant must complete the Categorical Exclusion Request form. CPB will review the request and either approve or deny it. If the CE request is approved, no further environmental review action is required, CPB will prepare a Notice of Categorical Exclusion for publication, and the project may proceed (note: based on the location of the project, NMED may determine that a Section 106 consultation must occur for certain CE projects). If the CE request is denied, the applicant must proceed with the steps below.

2) If the project does not qualify for a CE, the applicant must prepare a PER in accordance with USDA RUS Bulletin 1780-2 or a technical memorandum and an EID for CPB review and approval. The EID will follow **Attachment 3 – EID Outline**. The USDA RUS bulletin is available on the NMED CPB website at: <https://www.env.nm.gov/forms/>.

3) If applicable to the complexity and scope of the project, the applicant may conduct a public scoping meeting to identify issues of concern, identify a preliminary range of alternatives to be considered, identify potential cooperating agencies, and identify consultation requirements (see 40 CFR 6.203). Notice of the meeting will be sent to all applicable cross-cutting agencies on the consultation list and other stakeholders, posted as appropriate in the community, and published in a newspaper of general circulation forty-five days in advance of the meeting. The notice shall contain an agenda for the meeting and a description of the purpose (a sample notice is included as **Attachment 10 – NOTICE OF PUBLIC SCOPING MEETING**). A copy of the notice, certification of publication, and list of posting locations shall be provided to CPB. The applicant shall maintain and provide copies to CPB of a sign-in sheet with names and addresses of attendees to be used for future consultation and included in the project mailing list and provide minutes of the meeting.

4) CPB will review the EID to determine potential impact to environmental cross-cutting laws based on information provided by the applicant in Section 3.0 “Affected Environment/Environment Consequences” of the EID. CPB will document this review using **Attachment 4 - NEPA EID EVALUATION CHECKLIST**.

5) The applicant shall actively pursue a consultation/coordination effort to identify all applicable cross-cutting authorities and interested parties and obtain comments on the proposed project. The applicant must make a good faith effort to identify potential issues of interest and potentially interested parties.

**Attachment 5 - NEPA Consultation/Coordination Mailing List** should be used to ensure all appropriate agencies and potentially interested parties are consulted and included in the mailing list. The CPB project manager shall review the project mailing list for completeness and assist in agency consultation/coordination. The applicant will send a consultation/request for comment letter with project summary sheet to all applicable cross-cutting agencies and interested parties. A draft letter and project summary sheet must be provided to CPB for review and approval before it is distributed by the applicant.

**Attachment 6 – SAMPLE AGENCY CONSULTATION/REQUEST FOR COMMENT LETTER** and **Attachment 9 – GUIDELINES FOR PROJECT SUMMARY SHEET** are provided in this package. A Consultation/Coordination Tracking Table is provided in **Attachment 5 - NEPA CONSULTATION/COORDINATION MAILING LIST** for the applicant to complete to help track and associate issues with and comments from interested parties. A copy of the completed tracking table shall be provided to CPB for review and comment.

6) The applicant must comply with the consultation processes required by Section 106 of the National Historic Preservation Act (see 36 CFR Part 800), particularly the consultation with Native American Indian tribes. Tribal contacts have been provided in **Attachment 5 - NEPA CONSULTATION/COORDINATION MAILING LIST** and a Consultation/Coordination Tracking Table (included in Attachment 5) must be maintained to document when written notices were sent and what comments (if any) were received. **Attachment 7 – SAMPLE TRIBAL CONSULTATION/REQUEST FOR COMMENT LETTER, Attachment 8 – COUNTY TRIBAL CONSULTATION LIST** and **Attachment 9 – GUIDELINES FOR PROJECT SUMMARY SHEET** are provided in this package. Tribal consultation letters must be on NMED letterhead, and the consultation letters signed by the Cabinet Secretary. Tribal consultation letters need only be sent to those tribes listed in the County in which the project will be constructed (see **Attachment 8 – COUNTY TRIBAL LIST**). A draft letter and project summary sheet will be prepared by the applicant and sent to the CPB Project Manager (PM). The CPB PM will route consultation letter for signature by the Cabinet Secretary, mail out consultation letters and provide copies to the applicant. The CPB PM will coordinate tracking the tribal consultation process and share responses with the applicant.

7) Applicant shall complete a draft PER and EID and submit them to CPB for review and comment. To the maximum extent possible, the PER/EID shall strive to mitigate concerns and impacts identified in the environmental review and consultation/coordination process. Mitigation measures shall be clearly identified in the EID.

8) Applicant shall conduct at least one public meeting to review the draft PER/EID (see 40 CFR 25.5). A notice of the public meeting will be mailed to all agencies and tribes on the consultation/coordination list and all parties on the project mailing list, posted as appropriate in the community and surrounding area (e.g., applicant's web site), and published in a newspaper of general circulation 45 days (may be reduced to no less than 30 days with CPB approval) in advance. The public meeting notice shall contain an agenda and a description of the purpose of the meeting (a sample notice is included as **Attachment 11 – NOTICE OF PUBLIC MEETING**). A copy of the notice, certified affidavit of publication (if published in a newspaper), copy of website publication, and list of posting locations shall be provided to CPB. The applicant shall maintain and provide copies to CPB of a sign-in sheet with names and addresses of attendees, provide a record of the public meeting, and prepare a responsiveness summary (see **Attachment 12 – RESPONSIVENESS SUMMARY**) of the comments received and action taken to address those comments (see 40 CFR 25.8).

9) The applicant shall revise the PER/EID to incorporate comments from CPB, the consultation/coordination process, and the public meeting. The final PER/EID shall be submitted to CPB for review and approval.

10) Upon approval of the EID, CPB will prepare an Environmental Assessment based upon the information provided by the applicant and in accordance with the Environmental Assessment Outline.

11) If CPB determines, through the environmental assessment process, that the proposed CWSRF project will have no significant impacts, a preliminary Finding of No Significant Impact (FONSI) will be prepared, distributed to the project mailing list, published in a newspaper of general circulation in the project area, and may be noticed on the applicant's website or other appropriate locations. The notice will state the intention to approve the PER/EID, outline the preliminary determination, and provide a minimum of 30 days for comment in agreement or disagreement with the finding. If a FONSI is not supported or based on NMAC 20.7.7.19 it is determined by the responsible official that a project may cause any of the conditions described in that section, then an EIS will be required. The steps required in preparing an EIS are described in NMAC 20.7.7.20.

12) At the conclusion of the comment period, CPB will address all comments received in the final EA and the FONSI and EA may be amended in response to any comments received and the FONSI republished. After the comment period has closed and all comments have been addressed, if the FONSI is still supported, CPB will issue a notice of Final Determination regarding the FONSI and approval of the EA. The notice will be distributed to the project mailing list. If the FONSI cannot be supported, CPB will issue a notice that an EIS must be prepared.

13) Parties wishing to contest the final determination of CPB may appeal. The issuance of the finalized FONSI/EA and Final Determination letter are final agency actions subject to review as provided under the laws of New Mexico.

14) The CPB project manager will document the NEPA review process recording events, as applicable, on the NEPA Project File Checklist and maintain the record in the project files. Project files will be maintained in the CPB office until the project is complete, all final documents have been received, and the project is officially closed. Closed projects will be archived in accordance with CPB and EPA policy.

**ATTACHMENT 2****NEW MEXICO ENVIRONMENT DEPARTMENT  
CONSTRUCTION PROGRAMS BUREAU  
NEPA PROJECT FILE CHECKLIST**

Project Name: \_\_\_\_\_ Project Number: \_\_\_\_\_

Project Manager (PM): \_\_\_\_\_

DOCUMENT	DATE	PM
Notice of Public Scoping Meeting (if applicable)		
Proof of Public Scoping Meeting Notice (if applicable)		
List of Public Scoping Meeting Posting Locations (if applicable)		
Attendance Sign-in Sheet for Public Scoping Meeting (if applicable)		
Project Mailing List		
Draft PER/EID		
NMED comment letter on Draft PER/EID		
Notice of Public Meeting		
Proof of Public Meeting Notice		
List of Public Meeting Posting Locations		
Record of Public Meeting – copies of notes, or other		
Attendance Sign-in Sheet for Public Meeting		
Public Meeting Responsiveness Summary		
Final PER/EID		
NMED approval letter of final PER/EID		
NMED Environmental Assessment		
FONSI - NMED		
Concurrence letter from SHPO for NHPA		
Proof of Publication of FONSI		
NMED Final Determination Letter		

### ATTACHMENT 3

**NEW MEXICO ENVIRONMENT DEPARTMENT  
CONSTRUCTION PROGRAMS BUREAU  
ENVIRONMENTAL INFORMATION DOCUMENT (EID) OUTLINE**

#### Table of Contents

1.0	PURPOSE AND NEED FOR PROJECT	3.8	Archeological, Cultural, and Historic Resources
1.1	Project Description	3.9	Socioeconomic/ Environmental Justice
1.2	Purpose and Need for Project	3.10	Other Resources
2.0	ALTERNATIVES (include proposed action)	3.10.1	Public Health & Safety
2.1	Alternative A - No Action	3.10.2	Energy
2.2	Alternative B - Preferred Action	3.10.3	Transportation
2.3	(etc.)	3.10.4	Visual Impacts
3.0	AFFECTED ENVIRONMENT/ ENVIRONMENT CONSEQUENCES	3.10.5	Noise
3.1	Environmental Setting	3.11	Cumulative Impacts
3.2	Land Use	4.0	SUMMARY OF MITIGATION MEASURES
3.2.1	General Land Use	4.1	Physical Resources Measures
3.2.2	Growth and Population Trends	4.2	Biological Resource Measures
3.2.3	Important Farmland	4.3	Threatened and Endangered Species Measures
3.2.4	Soils	4.4	Socioeconomic/Environmental Justice Measures
3.2.5	Formally Classified Lands	4.5	Archeological, Cultural, and Historic Resources Measures
3.3	Floodplains	4.6	Environmentally Sensitive Areas
3.4	Wetlands	4.7	Other Resources
3.5	Water Resources	4.8	Cumulative Impact Measures
3.5.1	Surface Water	5.0	CONSULTATION, COORDINATION, AND PUBLIC INVOLVEMENT
3.5.2	Ground Water	5.1	Agencies Consulted
3.6	Air Quality	5.2	Public Involvement
3.7	Biological Resources	5.3	Responsiveness Summary
3.7.1	Vegetation	6.0	REFERENCES
3.7.2	Wildlife		
3.7.3	Threatened and Endangered Species		

## ENVIRONMENTAL INFORMATION DOCUMENT

for

{Community}

{County},

New Mexico

Project No.

~~~~~

{Date}

{Brief Descriptive Project Title}

**Total Estimated Project Cost: \$ ~~~~~ and list of agencies that may provide funding.**

### 1.0 PURPOSE AND NEED FOR PROJECT

*{Describe the conditions that create a need for the project and how the project will meet this need. Reference 40 CFR 6.205(e) (1) (i)}*

#### 1.1 Project Description.

*{Summarize facility improvement and construction activities, include location and vicinity map}*

#### 1.2 Purpose and Need for Project.

*{Establish the underlying purpose of the proposed project. This will be the basis for evaluating the reasonable and practical alternatives.}*

### 2.0 ALTERNATIVES

*{Describe in detail each alternative considered, even if eliminated. Reference 40 CFR 6.205(e) (1) (ii). The discussion should include engineering design alternatives, siting locations, and system capacities and should refer back to the PER for a full explanation of the alternatives and their evaluation.}*

#### 2.1 Alternative A - No Action.

*{This is the baseline against which other alternatives are judged. Consequences of no action should be described.}*

#### 2.2 Alternative B - Preferred Action.

#### 2.3 (etc.)

### 3.0 AFFECTED ENVIRONMENT/ENVIRONMENTAL CONSEQUENCES

*{Describe the existing environment as it relates to each topic in the project area. Reference 40 CFR 6.205(e) (1) (iii) and (iv) Discuss environmental consequences of the proposed action as they relate to the preferred alternative. The discussion should consider physical, legal, and institutional constraints; flow and waste reduction measures such as inflow/infiltration reduction and pretreatment; appropriate water conservation measures; alternative waste management techniques such as reuse, individual systems, and land application; appropriate energy reduction measures; improving effluent quality through operation and maintenance; construction phasing; multiple uses such as recreation and open*

space; alternative methods for managing sludge; environmental benefit; and capital and operating costs as they relate to this specific project. Only discuss those that are applicable.

3.1 *Discuss the relationship between short-term benefits of this project and the long-term impact on preserving and enhancing the environmental resources, including commitment of any irreversible and irretrievable resources. The discussion should clearly state the reason(s) for rejecting any alternatives. The impacts and potential environmental consequences on the following topics should be discussed for the preferred alternative. Mitigation measures for any impacts identified should be detailed.*

3.2 Environmental Setting.

*{Briefly summarize the setting for the project, including, but not limited to, such things as general location, geology, soil types, water resources, climate, history, population characteristics, and economy as appropriate.}*

3.3 Land Use.

3.3.1 General Land Use.

*{This should include present zoning and use of the proposed project area, total land area required for the project, and homes and businesses that may be affected. Consider displacing population or altering the character of existing residential areas. See 40 CFR 6.204(b) (7)}*

3.3.2 Growth and Population Trends

*{This section should describe historic and expected population growth that could affect the project. The rationale and justification for the projections of growth should be clearly described and referenced.}*

3.3.3 Important Farmland.

*{Determine whether the project will convert farmland to nonagricultural uses. Consider whether the project takes place on farmland, land of statewide or unique importance, or any other land that is not water or urban built-up land. If the project will impact farmland, consult with USDA Natural Resources Conservation Service (NRCS) to determine if soils have been classified as prime farmlands, prime rangelands, or prime forest land. Discuss how the proposed project will affect these lands. See 40 CFR 6.204(b) (5)}*

3.3.4 Soils.

*{Discuss soil types and how the proposed project will affect erosion and disturbance of the area.}*

### 3.3.5 Formally Classified Lands.

*{These lands include national parks, landmarks, historic sites, wilderness areas, wildlife refuges, wild and scenic rivers, grasslands, state parks, and Native American owned lands. Identify any of these lands that may exist in the project area and discuss the impacts from the proposed project. See 40 CFR 6.204(b) (5)}*

### 3.4 Floodplains.

*{Determine whether the proposed project will be located in or affect a flood plain by utilizing maps prepared by the Federal Emergency Management Agency (FEMA) or other state or local floodplain resources and the Federal Flood Risk Management Standard methods described in EO 13690. If the proposed project will be located in or affect a floodplain, a floodplain/wetlands assessment must be prepared. If necessary, consult with FEMA, local Floodplain Administrator, State Floodplain Coordinator within the NM Department of Homeland Security and Emergency Management, and FEMA flood insurance rate map panels. If the project is located in or near a floodplain and there is no feasible alternative location, identify the impacts of the proposed action and document mitigating measures or design modifications that will be taken to reduce the risk of flood damage. In conjunction with the public notice procedures in the SERP, the project area community must be informed why the proposed project is to be in a floodplain. See FEMA guidance on implementing EO 13690.*

### 3.5 Wetlands.

*{Use the USFWS Wetlands Mapper Tool to determine whether the project is located in or may affect a wetland. If the project is located in or may affect a wetland, consult with the U.S. Army Corps of Engineers to determine what impacts the project will have on them. See EO 11990}*

### 3.6 Water Resources.

#### 3.6.1 Surface Water.

*{Consult with NMED Surface Water Quality and/or Drinking Water Bureaus to determine stream standards, consider both quality and quantity and any applicable impacts to Drinking Water sources.}*

#### 3.6.2 Ground Water.

*{Consult with NMED Groundwater Quality and/or Drinking Water Bureaus and State Engineer Office and address both quantity and quality issues.}*

### 3.7 Air Quality.

*{See 40 CFR 6.204(b) (6). Refer to USEPA's Green Book website (<https://www.epa.gov/green-book>) to determine if the project will take place in a Nonattainment or Maintenance Area for Ozone, Sulfur Dioxide, Carbon Monoxide, Particulate Matter, Lead or Nitrogen Dioxide. If the*

*project is not in a Nonattainment or Maintenance area, no further action is required. If the project is in a Nonattainment or Maintenance area and the project is expected to contribute to one of the six criteria pollutant loadings, consult with the NMED Air Quality Bureau. Determine if any population projections have been prepared for the project area as part of the State Implementation Plan and, if so, include those projections. Evaluate direct and indirect emissions and their impact on air quality. For projects located in an air nonattainment or maintenance area, provide necessary air emissions data to allow EPA to make a general conformity determination under 40 CFR Part 93 for consistency with the New Mexico Air State Implementation Plan.}*

3.8 Biological Resources.

3.8.1 Vegetation.

*{Describe vegetation in the proposed project area and potential effects. Discuss requirements for clearing, short- and long-term effects, and any future maintenance practices.}*

3.8.2 Wildlife.

*{Describe fish and wildlife resources in the project area. Discuss short- and long-term impacts. See 40 CFR 6.204(b) (5)}*

3.8.3 Threatened and Endangered Species.

*{Refer to the FWS IPaC database or consult with U.S. Fish & Wildlife Service and NM Department of Game & Fish to identify listed species in the proposed project area. Discuss not only direct impacts on the species, but also impacts on critical habitat. Classify the project as No Effect, May Affect, or Likely to Adversely Affect. If the project is classified as No Effect, no further consultation is required. Otherwise, coordinate with Fish & Wildlife to obtain a no impact letter or to develop mitigation measures. See 40 CFR 6.204(b) (3) and 50 CFR 402}*

3.9 Archeological, Cultural, and Historic Resources.

*{Consult with the NM Historic Preservation Division State Historic Preservation Officer (SHPO) to identify registered site within the proposed project area. Conduct field studies as required. Coordinate with SHPO to obtain a no impact letter or to develop mitigation measures. See 36 CFR 800 and 40 CFR 6.204(b) (4)}*

3.10 Socioeconomic/ Environmental Justice.

3.10.1 Socioeconomic Issues.

*{Describe present socioeconomic conditions and how the proposed project may impact them. Include cost of connection and user fees and relate to income levels in the project area and potential impacts. Impacts could be beneficial or adverse.}*

3.10.2 Environmental Justice.

*{See EO 12898 and 40CFR6.204(b)(2)}*

*To generate the necessary EJ reports and maps to support the Environmental Justice assessment, the use of EJSCREEN or the most recent EJ mapping tool available through the Environmental Protection Agency is necessary. It can be found at <https://ejscreen.epa.gov/mapper>. Instructions for EJSCREEN can be found at <https://www.epa.gov/ejscreen>.*

*Send in the results along with the CE or EA/FNSI request}*

### 3.11 Other Resources.

#### 3.11.1 Public Health and Safety.

*{Describe any existing permits and the compliance status and discuss safety issues such as traffic control.}*

#### 3.11.2 Energy.

*{As appropriate, consider energy consumption and any special needs.}*

#### 3.11.3 Transportation.

*{As appropriate, consider effects of proposed project on transportation facilities such as highways, railroads, and airports.}*

#### 3.11.4 Visual Impacts.

*{As appropriate, consider effects on visual and aesthetic resources such as scenic vistas and skylines. Mitigation measures could include landscaping and architectural designs.}*

#### 3.11.5 Noise.

*{As appropriate, consider construction and operation of the proposed project on noise sensitive areas.}*

### 3.12 Cumulative Impacts.

*{Discuss any irreversible or irretrievable commitments of resources to the proposed project. Identify whether the proposed project can induce growth and have secondary impacts such as increased water demand or increased generation of wastewater and the consequences. Are there impacts that result from the interaction of this project with other past, present, or future activities in the area?}*

## 4.0 SUMMARY OF MITIGATION MEASURES

*{List and describe all mitigation measures identified in Section 3, how they will reduce the impact to less than significant level, and how they will be implemented, include both structural and nonstructural measures. See 40 CFR 6.205(e) (3)}*

### 4.1 Physical Resources Measures.

*{Includes land, water, and air resources}*

### 4.2 Biological Resource Measures.

### 4.3 Threatened and Endangered Species Measures.

- 4.4 Socioeconomic/Environmental Justice Measures.
- 4.5 Archeological, Cultural, and Historic Resources Measures.
- 4.6 Environmentally Sensitive Areas.  
*{Includes farmlands, classified lands, floodplains, and wetlands.}*
- 4.7 Other Resources.
- 4.8 Cumulative Impact Measures.

## 5.0 CONSULTATION, COORDINATION, AND PUBLIC INVOLVEMENT

### 5.1 Agencies Consulted.

*{List all agencies consulted and include example of letter(s) used. Include all responses in an Appendix. Include a log that documents when letters were sent, responses received, and follow-up contact made. Written responses must be received from all applicable cross-cutting agencies. Comments indicating a significant impact must be addressed in Section 3 with mitigation measures summarized in Section 4.*

*The list must include the following:*

- *New Mexico Department of Cultural Affairs, Historic Preservation Division, State Historic Preservation Officer*
- *Applicable Tribal Contacts*
- *U.S. Department of Interior - National Park Service, Intermountain Region*
- *U.S. Department of Interior - Fish and Wildlife Service, New Mexico Ecological Services Field Office*
- *New Mexico Department of Game and Fish, Conservation Services Division*
- *New Mexico Energy, Minerals, and Natural Resources Department, Forestry Division*
- *U.S. Army Corps of Engineers - Albuquerque District, Regulatory Branch*
- *U.S. Department of Agriculture - Natural Resources Conservation Service, New Mexico State Office*
- *New Mexico Environment Department, Environmental Impact Review Coordinator - env.review@env.nm.gov*
  - *New Mexico Environment Department, Surface Water Quality Bureau*
  - *New Mexico Environment Department, Ground Water Quality Bureau*
  - *New Mexico Environment Department, Drinking Water Bureau*
  - *New Mexico Environment Department, Air Quality Bureau (Projects located in air non- attainment or maintenance areas require Federal general conformity determination. Appropriate air emissions information will be required for EPA to perform the determination.)*
  - *U.S. Environment Protection Agency, Region VI, Air Planning Section (Consultation is only required for projects located in air non-attainment or maintenance areas.)*
  - *U.S. Environment Protection Agency, Source Water Protection Branch/Groundwater Section (Must be consulted for projects located over a sole source aquifer.)*
- *New Mexico Office of the State Engineer*
- *New Mexico Department of Transportation*
- *Federal Emergency Management Agency, Region VI*
- *Local Flood Plain Administrator*

*Additionally, the following contacts may be necessary:*

- *New Mexico Environment Department, Solid Waste Bureau*
- *Local officials such as city and county governments*
- *Irrigation District (such as MRGCD, EBID, etc.)*
- *Any other Local Special Interest Groups or Neighborhood Associations*
- *Sierra Club, Forest Guardians, and other environmental groups*
- *United States EPA Office of Environmental Justice, Tribal and International Affairs}*

5.2 Public Involvement.

*{Include public notice, meeting minutes, project mailing list, and transcripts as an appendix}*

5.3 Responsiveness Summary.

*{Summarize comments received from the public involvement process and describe the modifications to the PER/EID to accommodate the comments. See 40 CFR 25.8}*

6.0 REFERENCES

*{List all references used in preparation of the document. When sources are quoted or referred to, they should be properly annotated in the document.}*

**ALL REFERENCES WILL BE AVAILABLE FOR REVIEW IN THE COMMUNITY'S OFFICES.**

# ATTACHMENT 4

## NEW MEXICO ENVIRONMENT DEPARTMENT CONSTRUCTION PROGRAMS BUREAU NEPA EID EVALUATION CHECKLIST

Project Name: \_\_\_\_\_ Project Number: \_\_\_\_\_

Project Manager (PM): \_\_\_\_\_

(Y = yes, N = no, N/A = not applicable. Select "N/A" if no documented coordination is necessary because the project will not affect the applicable crosscutter and provide explanation in the comments.)

| ITEM                                                                                                                                                                           | Y, N, N/A | COMMENT |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|---------|
| 1.0 PURPOSE AND NEED FOR PROJECT                                                                                                                                               |           |         |
| 1.1 Is the proposed action clearly described in sufficient detail so the potential impacts can be identified?                                                                  |           |         |
| 1.1 As appropriate, is the project description written broadly enough to encompass future modifications?                                                                       |           |         |
| 1.2 Does the statement of purpose clearly define the need for the project?                                                                                                     |           |         |
| 1.2 Is the statement of purpose written so that it does not inappropriately narrow the range of reasonable alternatives?                                                       |           |         |
| 2.0 ALTERNATIVES                                                                                                                                                               |           |         |
| 2.0 Does the EID address an appropriate range of reasonable alternatives?                                                                                                      |           |         |
| 2.0 If there are alternatives that appear obvious or have been identified by the public, but are not analyzed, does the EID explain why they were excluded from consideration? |           |         |
| 2.1 Does the EID include the "NO ACTION" alternative described in sufficient detail so that its scope is clear, and the potential impacts can be identified?                   |           |         |
| 2.1 If appropriate, does the NO ACTION alternative discuss legal ramifications of no action?                                                                                   |           |         |

| ITEM                                                                                                                                                                                                                                                                                              | Y, N, N/A | COMMENT |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|---------|
| 2-- If appropriate, does the EID discussion of alternatives include: Physical/legal and institutional constraints? Any other comments regarding alternatives?                                                                                                                                     |           |         |
| 2.2 Does the PER adequately state the reason(s) for ranking and rejecting alternatives? Does the PER contain an adequate analysis of each alternative performed to clearly describe benefits and impacts?                                                                                         |           |         |
| <b>3.0 AFFECTED ENVIRONMENT/ ENVIRONMENTAL CONSEQUENCES</b>                                                                                                                                                                                                                                       |           |         |
| 3.1 Environmental Setting – Overall, is the affected environment adequately described?                                                                                                                                                                                                            |           |         |
| 3.2 Land Use – Does the EID address general land use, population projections, important farm and range lands, soils, and formally classified lands such as national parks and wild and scenic rivers? Are mitigation measures described as needed?                                                |           |         |
| 3.3 Floodplains – Does the EID identify whether the proposed project is within a floodplain utilizing the methods in EO 13690? Does the EID document coordination with the floodplain administrator and FEMA (if necessary)? Are mitigation measures or design modifications described as needed? |           |         |
| 3.4 Wetlands – Does the EID identify whether the project is located in or may affect a wetland? If so, does it document coordination with the U.S. Army Corps of Engineers? Are mitigation measures described as needed?                                                                          |           |         |
| 3.5 Water Resources (including NPDES permits, Ground Water DP's, 404 permits, etc.) – Does the EID document consultation with NMED DWB, GWQB, & SWQB's and SEO for surface and ground water quality and quantity (if necessary)? Are mitigation measures described as needed?                     |           |         |

| ITEM                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Y, N, N/A | COMMENT |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|---------|
| <p>3.6 Air Quality – Does the EID document whether the project is located in a nonattainment or maintenance area, and if so, whether the project will contribute emissions to the criteria pollutants? Does the EID document coordination with NMED AQB regarding air quality standards compliance and population projections for the State Implementation Plan (if necessary)? Are emissions data for projects located in an air nonattainment or maintenance area included? Are mitigation measures described as needed?</p> |           |         |
| <p>3.7 Biological Resources – Does the EID adequately describe existing vegetation and wildlife? Does the EID indicate whether the project may affect listed or proposed species and/or critical habitat? Does the EID document coordination with U.S. Fish &amp; Wildlife and NM Dept. of Game &amp; Fish (if necessary)? Does the EID document a no impact finding from U.S. Fish &amp; Wildlife or appropriate mitigation measures?</p>                                                                                     |           |         |
| <p>3.8 Archeological, Cultural, and Historic Resources – Does the EID document coordination with SHPO? Does the EID document consultation with Indian tribes? Have required field studies been completed? Does the EID document a no impact finding from SHPO or appropriate mitigation measures?</p>                                                                                                                                                                                                                          |           |         |
| <p>3.9 Socioeconomic/ Environmental Justice – Does the EID adequately describe socioeconomic conditions? Does the EID document the EJ index in accordance with EJSCREEN or other established tools? Are mitigation measures described as needed?</p>                                                                                                                                                                                                                                                                           |           |         |
| <p>3.10 Other Resources – including public health &amp; safety, energy, transportation, visual impacts, and noise. Does the EID adequately address these issues? Are mitigation measures described as needed?</p>                                                                                                                                                                                                                                                                                                              |           |         |

| ITEM                                                                                                                                 | Y, N, N/A | COMMENT |
|--------------------------------------------------------------------------------------------------------------------------------------|-----------|---------|
| 3.11 Cumulative Impacts – Does EID adequately address secondary and cumulative impacts? Are mitigation measures described as needed? |           |         |
| 4.0 SUMMARY OF MITIGATION MEASURES                                                                                                   |           |         |
| 4.1 Are mitigation measures specifically listed for: Physical resources                                                              |           |         |
| 4.2 Biological Resources                                                                                                             |           |         |
| 4.3 Threatened & Endangered Species                                                                                                  |           |         |
| 4.4 Socioeconomic/ Environmental Justice                                                                                             |           |         |
| 4.5 Archeological, Cultural, and Historic Resources                                                                                  |           |         |
| 4.6 Environmentally Sensitive Areas                                                                                                  |           |         |
| 4.7 Other Resources                                                                                                                  |           |         |
| 4.8 Cumulative Impacts                                                                                                               |           |         |
| 5.0 CONSULTATION, COORDINATION, & PUBLIC INVOLVEMENT                                                                                 |           |         |
| 5.1 Are the agencies contacted for consultation clearly identified, including Tribes where appropriate?                              |           |         |
| 5.1 Is a sample consultation letter or other notice included along with a mailing list?                                              |           |         |
| 5.1 Are responses included from all agencies contacted?                                                                              |           |         |
| 5.1 Does the EID contain a contact log documenting when letters were sent, responses received, and follow-up contacts made?          |           |         |
| 5.2 Are the minutes and/or transcripts of public meetings included?                                                                  |           |         |
| 5.3 Does the EID include a Responsiveness Summary for all public meetings?                                                           |           |         |
| OVERALL CONSIDERATIONS                                                                                                               |           |         |
| Is the EID easy to follow, technical terms defined, logical transitions, etc.?                                                       |           |         |
| Are consistent references and terms used throughout the document?                                                                    |           |         |
| Are the references complete and adequate for the document?                                                                           |           |         |

|         |  |  |
|---------|--|--|
| Other – |  |  |
|---------|--|--|

## ATTACHMENT 5

### NEW MEXICO ENVIRONMENT DEPARTMENT CONSTRUCTION PROGRAMS BUREAU NEPA CONSULTATION/COORDINATION MAILING LIST

Consultation and coordination with public agencies and other stakeholders is **required**. The EID will not be considered complete without documentation of such coordination. As outlined in the November 5, 2013, memo from USEPA Headquarters (Attached), if the State SRF staff performs an internal analysis and conclusively determines that the proposed project has no potential impact on a related federal cross-cutting authority then it is not necessary to consult with the agency responsible for that crosscutter.

This analysis must be written by the CPB project manager and saved in the project file with the other NEPA documents. Written responses must be received from all applicable cross-cutting agencies in situations where the project may affect or will affect the resource protected by the cross-cutting law. The following list is provided as a starting point for the coordination process but should not be considered complete. Local officials and other interest groups should be identified and included in the project mailing list as developed in the Coordination Matrix.

Refer to **Attachment 13 - State Revolving Fund Crosscutter Memo and Handbook** for more instructions on determining whether a project is likely to affect each federal cross-cutting authority.

#### **CONSULT WITH THE NMHPD SHPO FOR ALL PROJECTS:**

*Contact the Historic Preservation Division to determine whether the proposed project will affect any cultural, archeological, or historic resources, including properties listed on the National Register of Historic Places. They are also responsible for Section 106 Consultation and can assist with identification of tribes that have an interest in the project area. A county-by-county working list of the appropriate tribal contacts is contained on their website at:*

*<http://www.nmhistoricpreservation.org/outreach/native-american-consultations.html>. They will require the information outlined in the Project Summary Sheet to complete their review which is elaborated on their website at: <http://www.nmhistoricpreservation.org/programs/review-compliance/section-106.html>. A letter of no impact or required mitigation measures must be included in the EID:*

Director  
New Mexico Historic Preservation Division  
Department of Cultural Affairs  
407 Galisteo Street, Suite 236 Santa Fe,  
NM 87501  
phone 505-827-6320, fax 505-872-6338  
<http://www.nmhistoricpreservation.org/>

**CONSULT WITH THE FOLLOWING AGENCIES ONLY IF THE PROJECT MAY AFFECT THE AGENCY OR APPLICABLE CROSS-CUTTING AUTHORITY:**

**Project may affect a listed or proposed species or proposed or designated critical habitat:**

U.S. Department of Interior - Fish and Wildlife Service New  
Mexico Ecological Services Field Office  
2105 Osuna Rd NE Albuquerque, NM  
87113-1001  
phone 505-346-2525, fax 505-346-2542  
<http://www.fws.gov/southwest/es/NewMexico/>

New Mexico Department of Game and Fish  
Conservation Services Division  
P.O. Box 25112  
Santa Fe, NM 87504 phone 505-  
476-8000  
<http://www.wildlife.state.nm.us/conservation/wildlife-species-information/>

New Mexico Energy, Minerals, and Natural Resources Department Forestry  
Division  
1220 S. St. Francis Drive – PO Box 1948 Santa Fe, NM  
87505-1948  
phone 505-476-3325 fax 505-476-3330  
<http://www.emnrd.state.nm.us/SFD/ForestMgt/Endangered.html>

*If CPB determines that there may be an effect to species or habitat, then informal consultation is required, as is a concurrence letter from USFWS. If there are significant adverse effects from a project, then a Biological Opinion is required from the USFWS resulting from Section 7 formal consultation.*

**Project will affect a designated or studied Wild and Scenic River:**

Contact the Natural Resource Office of the National Park Service to discuss potential impacts to wild and scenic rivers (<http://www.rivers.gov/new-mexico.php>), national natural landmarks (<http://www.nature.nps.gov/nnl/state.cfm?State=NM>), or wilderness areas (<http://www.wilderness.net/NWPS/stateView?state=NM>)

U.S. Department of Interior - National Park Service  
Intermountain Region  
12795 Alameda Pkwy  
Denver, CO 80225  
phone 303-969-2500  
email [IMRextrev@nps.gov](mailto:IMRextrev@nps.gov) – please send all correspondence by email.

**Project will affect a national natural landmark or wilderness area:**

Contact the Natural Resource Office of the National Park Service to discuss potential impacts national natural landmarks (<http://www.nature.nps.gov/nnl/state.cfm?State=NM>), or wilderness areas (<http://www.wilderness.net/NWPS/stateView?state=NM>)

U.S. Department of Interior - National Park Service  
Intermountain Region  
12795 Alameda Pkwy  
Denver, CO 80225  
phone 303-969-2500  
email [IMRextrev@nps.gov](mailto:IMRextrev@nps.gov) – please send all correspondence by email.

**Historic properties are discovered after the project has begun and potential adverse effects may occur:**

*Contact the Natural Resource Office to coordinate data recovery and preservation activities when the proposed project may cause irreparable loss or destruction of significant scientific, prehistoric, historic, or archeological data. Guideline NPS-28 outlines the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation:*

U.S. Department of Interior - National Park Service  
Intermountain Region  
12795 Alameda Pkwy  
Denver, CO 80225  
phone 303-969-2500  
email [IMRextrev@nps.gov](mailto:IMRextrev@nps.gov) – please send all correspondence by email.

**Project is located in or affects a wetland:**

*The Corps of Engineers must be consulted regarding wetlands determination and floodplain management. They are responsible for issuing 404 permits for any work in the waterways:*

U.S. Army Corps of Engineers - Albuquerque District Regulatory  
Branch  
4101 Jefferson Plaza NE Albuquerque,  
NM 87109-3435  
phone 505-342-3374, fax 505-344-1461  
<http://www.spa.usace.army.mil/Missions/RegulatoryProgramandPermits.aspx>

**Project has potential adverse effects on important farmlands:**

*The Natural Resources Conservation Service should be consulted to determine whether prime farmlands exist in the project area and may be adversely affected. The Conservation Service uses Form AD-1006 (10-83), Farmland Conversion Impact Rating, as a tool for considering impacts to prime farmland. They also publish a Prime Farmland Survey that lists prime farmland by county according to soil type:*

State Conservationist  
U.S. Department of Agriculture - Natural Resources Conservation Service New Mexico  
State Office  
6200 Jefferson NE  
Albuquerque, NM 87109-3734  
phone 800-410-2067 fax 855-538-6003  
<http://www.nrcs.usda.gov/wps/portal/nrcs/site/nm/home/>

**Project involves new or increased discharges: The New Mexico Environment Department Environmental Impact Review Coordinator should be contacted for all projects in New Mexico. All other NMED Bureaus contacted should be done so by courtesy copy (cc) to the Bureau of the letter to the Coordinator:**

Environmental Impact Review Coordinator -  
New Mexico Environment Department  
ENV.Review@env.nm.gov  
P.O. Box 5469  
Santa Fe, NM 87502-5469  
phone 505-827-2855

*The Surface Water Quality Bureau (SWQB) should be contacted to regard any discharges to surface water, including non-point source and temporary discharges such as dewatering operations and erosion control requiring a Storm Water Pollution Prevention Plan (SWPPP) when five (5) or more acres will be disturbed. The SWQB must concur with Corps of Engineer 404 permits and certify that water quality will not be adversely affected. They also evaluate plans for land application of sewage sludge to determine compliance with EPA Part 503 regulations and for compliance with Section 208 Planning:*

cc: Chief  
New Mexico Environment Department  
Surface Water Quality Bureau  
P.O. Box 5469  
Santa Fe, NM 87502-5469  
phone 505-827-0187 fax 505-827-0160  
<https://www.env.nm.gov/swqb/>

*The Ground Water Quality Bureau (GWQB) should be consulted whenever waste discharges might affect ground water quality. They are responsible for issuing permits (Discharge Permits) for facilities that discharge to the ground water:*

cc: Chief  
New Mexico Environment Department  
Ground Water Quality Bureau  
P.O. Box 5469  
Santa Fe, NM 87502-5469  
phone 505-827-2900 fax 505-827-2965  
<https://www.env.nm.gov/gwb/>

**Project modifies a community water supply system:**

*The Drinking Water Bureau (DWB) should be consulted whenever community water systems are involved in the project. They are responsible for reviewing and approving all modifications to a community water supply system:*

cc: Chief  
New Mexico Environment Department  
Drinking Water Bureau  
P.O. Box 5469  
Santa Fe, NM 87502-5469  
phone 877-654-8720  
<https://www.env.nm.gov/dwb/index.htm>

**Project involves solid waste facilities:**

*The Solid Waste Bureau (SWB) should be consulted whenever solid waste facilities are involved in the project. They are responsible for ensuring that solid waste is managed in such a way as to minimize impact on the environment and public health:*

cc: Chief  
New Mexico Environment Department  
Solid Waste Bureau  
P.O. Box 5469  
Santa Fe, NM 87502-5469  
phone 505-827-0197 fax 505-827-2902  
<https://www.env.nm.gov/swb/>

**Project emissions will exceed de minimis thresholds for nonattainment pollutants:**

*The Air Quality Bureau is responsible for determining compliance with the State Air Quality Implementation Plan (SIP) and will review the proposed project for changes in air quality. Of particular concern is consistency of population projections in the SIP and the PER: Projects located in air non-attainment or maintenance areas require Federal general conformity determination. Appropriate air emissions information will be required for EPA to perform the determination.*

cc: Chief  
New Mexico Environment Department Air  
Quality Bureau  
525 Camino de los Marquez  
Suite #1  
Santa Fe, NM 87505-1816  
phone 505-476-4300 fax 505-476-4375  
<https://www.env.nm.gov/aqb/>

*The EPA Air Planning Section is responsible for reviewing and approving a “general conformity applicability analysis” and determining regulation requirements. Consultation is only required for projects located in air non-attainment or maintenance areas:*

Air Planning Section (6PD-L)  
Multimedia Planning and Permitting Division EPA Region 6  
1445 Ross Avenue, Suite 700  
Dallas, TX 75202-2733  
phone 214-665-2200

**Project involves transfer of water rights or dam modifications:**

*The Office of the State Engineer is responsible for administering all water rights within the State of New Mexico. Land application of wastewater may affect return flow credits and the State Engineer should be consulted. The Engineer also reviews dam design and construction:*

State Engineer  
New Mexico Office of the State Engineer PO Box  
25102  
Santa Fe, NM 87504-5102  
phone 505-827-6091 fax 505-827-3806  
<http://www.ose.state.nm.us/>

**Project impacts state highways:**

*The NMSHTD must review and approve projects that could impact state highways or require permits for construction within their right-of-way:*

New Mexico Department of Transportation  
Environmental Design Bureau  
P.O. Box 1149  
Santa Fe, NM 87504-1149  
phone 505-827-5100 fax 505-827-5469  
[http://dot.state.nm.us/en/Program\\_Management.html#EDS](http://dot.state.nm.us/en/Program_Management.html#EDS)

**Project is located in or affects a floodplain:**

Contact the Local Flood Plain Administrator for the relevant county, and

**Project requires a Floodplain Development Permit:**

Federal Emergency Management Agency Region VI  
FRC 800 N. Loop 288  
Denton, TX 76209-3698  
phone 940-898-5399  
<https://www.fema.gov/region-vi-arkansas-louisiana-new-mexico-oklahoma-texas>

The Environmental Information Document describing mitigating and design measures must be submitted by the SRF applicant to the state SRF agency, which prepares a preliminary finding on whether the applicant has ensured compliance with Executive Order No. 11988, as amended by Executive Order No. 13690. Notice of this finding should be given to FEMA, which may provide recommendations for improving mitigation measures or further modifying the project’s design to enhance flood protection. Public notification and review are required for each plan or proposal for action taking place within a floodplain and the project area community must be informed why the

proposed project is located in a floodplain.

**Project is in the vicinity of a sole source aquifer:**

*The Environmental Protection Agency, Source Water Protection Branch must be contacted for projects located over a sole source aquifer:*

U.S. Environment Protection Agency Region 6  
Source Water Protection Branch/Groundwater Section (6WQ-SG)  
1201 Elm Street, Suite 500  
Dallas, Texas 75270  
800-887-6063  
214-665-2760 (Outside of Region 6)

**Other Local (Project Specific) Contacts:**

Local officials such as city and county governments  
Irrigation District (such as MRGCD, EBID, etc.)  
Any other Local Special Interest Groups or Neighborhood Associations  
Sierra Club, Forest Guardians, and other environmental groups

*The National Historic Preservation Act requires notification of American Indian tribes that may have occupied or have historical ties to the project area. The New Mexico Historic Preservation Division maintains a county-by-county working list for determining which Native American Indian tribes want to be consulted for proposed projects in various geographic parts of New Mexico and contact information for pueblos and reservations are available for download from the New Mexico Historic Preservation Division Native American Consultations website at*  
<http://www.nmhistoricpreservation.org/outreach/native-american-consultations.html>

[illegible]

## ATTACHMENT 6

### ***{SAMPLE AGENCY CONSULTATION/REQUEST FOR COMMENT LETTER}***

*{Date}*

*{Contact Addressee}*

*{Address}*

**RE:** *{Project Name and identifying CWSRF number}*

The *{community}* has *{requested or received}* funding for a *{project and funding type}* through the Clean Water State Revolving Loan Fund (CWSRF), administered by the New Mexico Environment Department Construction Programs Bureau (NMED-CPB). We are gathering information for an environmental review of the referenced project. The project is described in the attached project summary sheet and the location is depicted on the attached location map. *{Provide detailed description such that reviewer will understand scope and nature of project and the nature of the comment you expect from them – see Guidelines for Project Summary Sheet}*

*{Insert for NMED Air Quality Bureau: Please inform us if any population projections have been prepared for this area as part of the State Implementation Plan and, if so, please provide those projections. Your evaluation of direct and indirect emissions and their impact on air quality would be appreciated.}*

The environmental review process requires coordination with pertinent agencies and interested parties. Your review and comment on the proposed project are an important element in the overall review.

To provide verbal comments or for more information, please contact *{name and telephone number}*.

*{Name and signature}*

*{Title}*

#### **ACKNOWLEDGEMENT:**

As a representative for the referenced organization, the undersigned acknowledges receipt of this request for comment, and having reviewed the attached project summary and additional information,

☐ have no comments,

☐ have comments (Please describe in the space below or on another sheet of paper).

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Comments:

## ATTACHMENT 7

### ***{SAMPLE TRIBAL CONSULTATION/REQUEST FOR COMMENT LETTER}***

*{Date}*

*{Contact Addressee}*

*{Address}*

**RE:** *{Project Name and identifying CWSRF number}*

The *{community}* has *{requested or received}* funding for a *{project and funding type}* through the Clean Water State Revolving Loan Fund (CWSRF), administered by the New Mexico Environment Department Construction Programs Bureau (NMED-CPB). The NMED is gathering information for an environmental review of the referenced project. The project is described in the attached project summary sheet and the location is depicted on the attached location map. *{Provide detailed description such that reviewer will understand scope and nature of project and the nature of the comment you expect from them – see Guidelines for Project Summary Sheet}*

In accordance with the NMED's environmental review procedures for wastewater construction loans funded by the CWSRF program as outlined in the State Environmental Review Process (SERP), NMED-CPB is seeking comments on the proposed project and whether consultation may be appropriate.

Section 106 of the National Historic Preservation Act requires consultation be offered to all tribes, nations, and pueblos with current land ownership in New Mexico and notice provided to those tribes with historical use and occupancy that request it to determine whether the proposed project has the potential to disturb areas considered important or culturally significant. Culturally significant areas might include traditional plant use areas, traditional mineral areas, shrines or important geologic formations, archeological sites, or any other areas deemed culturally significant to the tribes, pueblos, and nations with historical ties to New Mexico. We would appreciate your determination if you have religious or cultural ties to the project area. Please provide any comments or concerns you may have about the proposed project described in the attached documents and whether consultation may be appropriate. You may fill out the attached acknowledgement form or provide a separate letter with any pertinent information. Please return any information within 33 days of the date of this letter.

Please mail the attached form or other correspondence to *{NMED CPB PM, address and e-mail}* or provide verbal comments or inquiry by calling *{NMED CPB PM, phone #}*.

Thank you for your attention to this matter.

Sincerely,

*{Cabinet Secretary}*  
Cabinet Secretary

**NAME:** {Contact Addressee}  
**ENTITY:** {Tribe/Pueblo/Nation}

*{Project Name and Identifying CWSRF number}*

**ACKNOWLEDGEMENT:**

As an official representative for the referenced government, the undersigned acknowledges receipt of this request for comment, and having reviewed the attached project summary and additional information, states:

- ☐ No comment
- ☐ Comments (Please describe in the space below or on another sheet of paper and identify whether consultation may be appropriate).

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed  
Name: \_\_\_\_\_ Title: \_\_\_\_\_

Comments:

**ATTACHMENT 8**  
**COUNTY TRIBAL CONSULTATION LIST**

This is a county-by-county working list generated by the NM Historic Preservation Division.  
Verify the current list at:

<http://www.nmhistoricpreservation.org/outreach/native-american-consultations.html>

|                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                               |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b><u>BERNALILLO</u></b><br/> Hopi Tribe<br/> Isleta Pueblo<br/> Laguna Pueblo<br/> Navajo Nation<br/> Ohkay Owingeh (San Juan) Pueblo<br/> Sandia Pueblo<br/> White Mountain Apache Tribe<br/> Ysleta del Sur</p> | <p><b><u>COLFAX</u></b><br/> Comanche Indian Tribe<br/> Kiowa Tribe<br/> Jicarilla Apache Nation<br/> Mescalero Apache Tribe<br/> Taos Pueblo</p>                                                                                                                             |
| <p><b><u>CATRON</u></b><br/> Acoma Pueblo<br/> Fort Sill Apache Tribe<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Laguna Pueblo<br/> Mescalero Apache Tribe<br/> Navajo Nation<br/> White Mountain Apache Tribe</p>       | <p><b><u>CURRY</u></b><br/> Apache Tribe of Oklahoma<br/> Comanche Indian Tribe<br/> Kiowa Tribe<br/> Mescalero Apache Tribe</p>                                                                                                                                              |
| <p><b><u>CHAVES</u></b><br/> Apache Tribe of Oklahoma<br/> Comanche Indian Tribe<br/> Kiowa Tribe<br/> Mescalero Apache Tribe<br/> Tesuque Pueblo<br/> Ysleta del Sur Pueblo</p>                                      | <p><b><u>De BACA</u></b><br/> Comanche Indian Tribe<br/> Isleta Pueblo<br/> Kiowa Tribe<br/> Mescalero Apache Tribe<br/> Navajo Nation</p>                                                                                                                                    |
| <p><b><u>CIBOLA</u></b><br/> Acoma Pueblo<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Laguna Pueblo<br/> Mescalero Apache Tribe<br/> Navajo Nation<br/> Zuni Pueblo</p>                                                   | <p><b><u>DONA ANA</u></b><br/> Comanche Indian Tribe<br/> Fort Sill Apache Tribe<br/> Isleta Pueblo<br/> Kiowa Tribe (east half of county)<br/> Mescalero Apache Tribe<br/> Navajo Nation<br/> Tesuque Pueblo<br/> White Mountain Apache Tribe<br/> Ysleta del Sur Pueblo</p> |

|                                                                                                                                                                                       |                                                                                                                                                                                                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b><u>EDDY</u></b><br>Comanche Indian Tribe<br>Kiowa Tribe<br>Mescalero Apache Tribe<br>Tesuque Pueblo<br>Ysleta del Sur Pueblo                                                       | <b><u>LEA</u></b><br>Apache Tribe of Oklahoma<br>Comanche Indian Tribe<br>Kiowa Tribe<br>Mescalero Apache Tribe<br>Ysleta del Sur Pueblo                                                                              |
| <b><u>GRANT</u></b><br>Acoma Pueblo<br>Fort Sill Apache Tribe<br>Hopi Tribe<br>Isleta Pueblo<br>Mescalero Apache Tribe<br>Navajo Nation<br>White Mountain Apache Tribe<br>Zuni Pueblo | <b><u>LINCOLN</u></b><br>Comanche Indian Tribe<br>Isleta Pueblo<br>Kiowa Tribe<br>Mescalero Apache Tribe<br>White Mountain Apache Tribe<br>Ysleta del Sur Pueblo                                                      |
| <b><u>GUADALUPE</u></b><br>Comanche Indian Tribe<br>Isleta Pueblo<br>Jicarilla Apache Nation<br>Kiowa Tribe<br>Mescalero Apache Tribe<br>Navajo Nation                                | <b><u>LOS ALAMOS</u></b><br>Cochiti Pueblo<br>Comanche Indian Tribe<br>Hopi Tribe<br>Jemez Pueblo<br>Navajo Nation<br>Ohkay Owingeh (San Juan) Pueblo<br>Santa Clara Pueblo<br>San Ildefonso Pueblo<br>Tesuque Pueblo |
| <b><u>HARDING</u></b><br>Comanche Indian Tribe<br>Jicarilla Apache Nation<br>Kiowa Tribe<br>Mescalero Apache Tribe                                                                    | <b><u>LUNA</u></b><br>Fort Sill Apache Tribe<br>Hopi Tribe<br>Mescalero Apache Tribe<br>White Mountain Apache Tribe<br>Ysleta del Sur Pueblo                                                                          |
| <b><u>HIDALGO</u></b><br>Fort Sill Apache Tribe<br>Hopi Tribe<br>Mescalero Apache Tribe<br>White Mountain Apache Tribe                                                                | <b><u>McKINLEY</u></b><br>Acoma Pueblo<br>Hopi Tribe<br>Isleta Pueblo<br>Laguna Pueblo<br>Navajo Nation<br>Tesuque Pueblo<br>Zuni Pueblo                                                                              |

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b><u>MORA</u></b></p> <p>Comanche Indian Tribe<br/> Hopi Tribe<br/> Jicarilla Apache Nation<br/> Kiowa Tribe<br/> Mescalero Apache Tribe<br/> Navajo Nation<br/> Taos Pueblo<br/> Tesuque Pueblo</p> | <p><b><u>RIO ARRIBA</u></b></p> <p>Comanche Indian Tribe<br/> Hopi Tribe<br/> Jicarilla Apache Nation<br/> Kiowa Tribe<br/> Navajo Nation<br/> Ohkay Owingeh (San Juan) Pueblo<br/> Picuris Pueblo<br/> Pojoaque Pueblo<br/> San Ildefonso Pueblo<br/> Santa Clara Pueblo<br/> Southern Ute Tribe<br/> Taos Pueblo<br/> Tesuque Pueblo<br/> Zia Pueblo</p>                                                            |
| <p><b><u>OTERO</u></b></p> <p>Comanche Indian Tribe<br/> Isleta Pueblo<br/> Kiowa Tribe<br/> Mescalero Apache Tribe<br/> White Mountain Apache Tribe<br/> Ysleta del Sur Pueblo</p>                      | <p><b><u>ROOSEVELT</u></b></p> <p>Apache Tribe of Oklahoma<br/> Comanche Indian Tribe<br/> Kiowa Tribe<br/> Mescalero Apache Tribe</p>                                                                                                                                                                                                                                                                                |
| <p><b><u>QUAY</u></b></p> <p>Apache Tribe of Oklahoma<br/> Comanche Indian Tribe<br/> Isleta Pueblo<br/> Jicarilla Apache Nation<br/> Kiowa Tribe<br/> Mescalero Apache Tribe<br/> Pawnee Tribe</p>      | <p><b><u>SANDOVAL</u></b></p> <p>Cochiti Pueblo<br/> Comanche Nation<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Jemez Pueblo<br/> Jicarilla Apache Nation<br/> Laguna Pueblo<br/> Navajo Nation<br/> Ohkay Owingeh (San Juan) Pueblo<br/> San Felipe Pueblo<br/> San Ildefonso Pueblo<br/> Sandia Pueblo<br/> Santa Ana Pueblo<br/> Santa Clara Pueblo<br/> Santo Domingo Pueblo<br/> Tesuque Pueblo<br/> Zia Pueblo</p> |

|                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b><u>SAN JUAN</u></b></p> <p>Acoma Pueblo<br/> Hopi Tribe<br/> Laguna Pueblo<br/> Kiowa Tribe<br/> Navajo Nation<br/> Ohkay Owingeh (San Juan) Pueblo<br/> Southern Ute Tribe<br/> Tesuque Pueblo<br/> Ute Mountain Ute Tribe<br/> Zia Pueblo</p>                                                                                                                       | <p><b><u>SIERRA</u></b></p> <p>Comanche Nation<br/> Fort Sill Apache Tribe<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Kiowa Tribe (east half of county)<br/> Mescalero Apache Tribe<br/> Navajo Nation<br/> White Mountain Apache Tribe<br/> Ysleta del Sur Pueblo</p>                     |
| <p><b><u>SAN MIGUEL</u></b></p> <p>Apache Tribe of Oklahoma<br/> Cochiti Pueblo<br/> Comanche Indian Tribe<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Jicarilla Apache Nation<br/> Jemez Pueblo<br/> Kiowa Tribe<br/> Mescalero Apache Tribe<br/> Navajo Nation<br/> Tesuque Pueblo<br/> Wichita and Affiliated Tribes<br/> Zuni Pueblo</p>                                    | <p><b><u>SOCORRO</u></b></p> <p>Acoma Pueblo<br/> Comanche Indian Tribe<br/> Fort Sill Apache Tribe (west half of county)<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Kiowa Tribe (east half of county)<br/> Mescalero Apache Tribe<br/> Navajo Nation<br/> White Mountain Apache Tribe</p> |
| <p><b><u>SANTA FE</u></b></p> <p>Cochiti Pueblo<br/> Comanche Nation<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Jicarilla Apache Nation<br/> Kiowa Tribe<br/> Nambe Pueblo<br/> Navajo Nation<br/> Ohkay Owingeh (San Juan) Pueblo<br/> Pojoaque Pueblo<br/> San Ildefonso Pueblo<br/> Sandia Pueblo<br/> Santa Clara Pueblo<br/> Santo Domingo Pueblo<br/> Tesuque Pueblo</p> | <p><b><u>TAOS</u></b></p> <p>Comanche Indian Tribe<br/> Hopi Tribe<br/> Isleta Pueblo<br/> Jicarilla Apache Nation<br/> Kiowa Tribe<br/> Navajo Nation<br/> Ohkay Owingeh (San Juan) Pueblo<br/> Picuris Pueblo<br/> Southern Ute Tribe<br/> Taos Pueblo<br/> Tesuque Pueblo</p>        |

|                                                                                                                                                                                                                      |                                                                                                                                                              |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b><u>TORRANCE</u></b><br>Comanche Indian Tribe<br>Hopi Tribe<br>Isleta Pueblo<br>Jicarilla Apache Nation<br>Kiowa Tribe<br>Mescalero Apache Tribe<br>Navajo Nation<br>Tesuque Pueblo<br>White Mountain Apache Tribe | <b><u>UNION</u></b><br>Apache Tribe of Oklahoma<br>Comanche Indian Tribe<br>Jicarilla Apache Nation<br>Kiowa Tribe<br>Mescalero Apache Tribe<br>Pawnee Tribe |
| <b><u>VALENCIA</u></b><br>Comanche Indian Tribe<br>Hopi Tribe<br>Isleta Pueblo<br>Laguna Pueblo<br>Navajo Nation<br>White Mountain Apache Tribe                                                                      |                                                                                                                                                              |

## ATTACHMENT 9

### GUIDELINES FOR PROJECT SUMMARY SHEET (To be included with request for comment/consultation letter)

At a minimum the project summary sheet should include the information listed below. Items include information required by the State Historic Preservation Division for Section 106 consultation. The objective is to provide sufficient information to the reviewer such that the environmental consequences of the proposed project can be completely evaluated.

1. Detailed description of the proposed project, including related activities to be carried out in conjunction with the project and the land status of real property in the area of effect. This description should explain the scope of work. Preliminary drawings or plans of the project design on USGS and/or other appropriate map should be included. It should provide the setting to determine the potential impacts on air quality, floodplains, wetlands, biologic, and cultural resources at a minimum.
2. Descriptions of the size of the project area, terrain, and present land uses of the project and adjacent land. Current photographs of the land to be used for the proposed project are helpful, particularly of any potential historic structures. Any additional information on kind and degree of prior or existing surface disturbance should also be included.
3. A portion of the USGS 7.5' quadrangle map **must** be attached with the project area clearly marked on it. The name of the quadrangle and the township, range, and section of the project area **must** be included with the map or displayed on it. A legible photocopy is acceptable.
4. Include a written description of the proposed boundaries of the project's *Area of Potential Effects* (APE). This should also be marked on the map if the APE does not coincide with the project area. For example, effects may extend beyond the area of ground disturbance.
5. A detailed description of efforts that are being made or on-going to identify and evaluate properties (including historic structures and archaeological sites) in the APE that are listed on or eligible to the National Register of Historic Places and the NM State Register of Cultural Properties. Results from these efforts must be provided to the State Historic Preservation Division (SHPO) before a determination of effect can be made. Any archaeological sites, historic buildings, or other cultural resources identified in the general area must be noted.
6. A description of efforts to identify whether Native American tribes that may be culturally affiliated with traditional cultural properties or other kinds of sites within the APE have any concerns related to the proposed undertaking. (*SHPO can assist with this.*)
7. Identification of all funding sources: federal, state, state trust, private, local, or combination.
8. Description of any cultural or biological studies that have been completed, their results, and recommendations.

## ATTACHMENT 10

### SAMPLE NOTICE OF PUBLIC SCOPING MEETING

*{COMMUNITY NAME}*

*{DESCRIPTIVE PROJECT NAME}*

*{PROJECT NUMBER}*

**Date:** *{At least 45 days after notice is published}*

**Time:** *{Should be scheduled to maximize public participation}*

**Place:** *{Should be conveniently located}*

**Agenda:** *{From Time A to Time B - presentation of project background and purpose}*

*{From Time C to Time D - presentation of alternatives identified to date and process to follow}*

*{From Time E to Time F - public question and answer and comments}*

**Purpose:** The *{Community}* has applied for funding from the Clean Water State Revolving Fund (CWSRF) loan program to *{describe project}*. The purpose of this public meeting is to provide notice of the proposed project, identify issues of concern, identify a preliminary range of alternatives to be considered, identify potential cooperating agencies and other stakeholders, and enlist public participation in development of the project plan.

For more information contact: *{Name, address, telephone number}*

**NOTICE TO PERSONS WITH DISABILITIES:** If special assistance is required to participate in this public meeting, please contact the person above at least three days prior to the meeting so arrangements can be made. *{Add as appropriate}*

## ATTACHMENT 11

### SAMPLE NOTICE OF PUBLIC MEETING

*{COMMUNITY NAME}*

*{DESCRIPTIVE PROJECT NAME}*

*{PROJECT NUMBER}*

**Date:** *{At least 30 days after notice is published}*

**Time:** *{Should be scheduled to maximize public participation}*

**Place:** *{Should be conveniently located}*

**Agenda:** *{From Time A to Time B - review project background and purpose}*

*{From Time C to Time D - summary of preliminary engineering report/ environment information document}*

*{From Time E to Time F - public question and answer and comments}*

**Purpose:** The *{Community}* has *{applied for/been granted/etc.}* funding from the *{Clean Water State Revolving Fund Loan/State and Tribal Assistance Grant/etc.}* program to *{describe project including timetable in which a decision will be reached, the issues under consideration, any alternative courses of action or tentative determinations made}*.

The purpose of this public meeting is to present applicable laws and/regulations, to review the draft preliminary engineering report and environmental information document, seek public comment, identify issues of concern, present the range of alternatives considered, and enlist public participation in development of the project plan.

**Contact:** For copies of available documents or for more information contact: *{Name, address, and telephone number}*

**NOTICE TO PERSONS WITH DISABILITIES:** If special assistance is required to participate in this public meeting, please contact the person above at least three days prior to the meeting so arrangements can be made. *{Add as appropriate}*

## ATTACHMENT 12 RESPONSIVENESS SUMMARY

| <b>IN THE MATTER OF THE PUBLIC MEETING REGARDING:</b><br><i>(Describe the Project subject to the public meeting)</i>    |                                    |                                                                |
|-------------------------------------------------------------------------------------------------------------------------|------------------------------------|----------------------------------------------------------------|
| <b>Summary of Public Comments:</b><br><i>(Provide a general summary of the comments received at the public meeting)</i> |                                    |                                                                |
| <b>Specific Public Comment<sup>1</sup></b>                                                                              | <b>Agency Response<sup>2</sup></b> | <b>Modifications in response to public comment<sup>3</sup></b> |
| 1)                                                                                                                      |                                    |                                                                |
| 2)                                                                                                                      |                                    |                                                                |
| 3)                                                                                                                      |                                    |                                                                |
| 4)                                                                                                                      |                                    |                                                                |
| 5)                                                                                                                      |                                    |                                                                |
| 6)                                                                                                                      |                                    |                                                                |
| 7)                                                                                                                      |                                    |                                                                |
| 8)                                                                                                                      |                                    |                                                                |

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1 List each specific, significant public comment.

2 Provide a response to comment.

3 Explain what changes were made in the project or environmental document in response to the comment or why the comment was rejected.

**Attachment 13-State Revolving Fund Crosscutter Memo and Handbook**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

November 5, 2013

OFFICE OF WATER

MEMORANDUM

SUBJECT: Procedures for Implementing Environmental Federal Cross-Cutting Authorities in the Clean Water and Drinking Water State Revolving Fund Programs

FROM: George Ames, Chief *George Ames*  
Clean Water State Revolving Fund Program

Charles Job, Chief *Charles Job*  
Infrastructure Branch

TO: SRF Regional Coordinators  
Region I-X

This memorandum clarifies procedures for applying federal environmental cross-cutting authorities to projects and activities receiving assistance under the Clean Water and Drinking Water State Revolving Funds. Federal environmental cross-cutting authorities are the requirements of certain federal laws and Executive Orders that apply where projects and activities receive federal financial assistance. In the SRF programs, the requirements of federal environmental cross-cutting authorities apply to projects and activities in an amount equal to the federal capitalization grant. See 40 CFR Parts 35.3140 and 35.3575.

The requirements of the federal environmental cross-cutting authorities have been further explained in EPA's handbook entitled "Cross-Cutting Federal Authorities: A Handbook on their Application in the Clean Water and Drinking Water State Revolving Fund Programs." Recent questions from EPA Regions indicate that Regions are unsure how the information in the Cross-Cutter Handbook relates to their review of State SRF program compliance during the Annual Review. Specifically, they have asked whether the records that are reviewed should reflect that each federal agency responsible for administering a cross-cutting authority has been consulted regarding all proposed SRF projects, and whether this consultation must include a response letter from the cross-cutter agency.

As explained further, records do not necessarily need to show that each federal agency responsible for administering a cross-cutting authority has been consulted on the particular project. Specifically, if State SRF staff perform an internal analysis and **conclusively determine that the proposed project has no potential impact related to a federal cross-cutting authority**, then it is not necessary to consult with the agency responsible for that cross-cutter. Because the cross-cutter federal agencies throughout the country may have different preferences depending on geographic area, Regional Coordinators should encourage State SRF programs, as a best practice, to discuss with their cross-cutter federal agency contacts whether the agencies wish to receive notice of all SRF projects, including those with no potential impact. It is important to note that all SRF project files (for projects equaling the amount of the capitalization grant) should contain evidence that the State SRF staff performed an internal analysis considering potential impacts to protected resources addressed by the relevant federal environmental

cross-cutting authorities. Documentation may include a reference in the State's Environmental Assessment, SERP decision document, memo to the file, or other format as determined by the State. This documentation should also occur for projects not subject to the State Environmental Review Process (such as nonpoint source and estuary projects), if included in the group of projects equal to the capitalization grant, and for DWSRF set-aside projects that are subject to a SERP.

This memorandum is intended to supplement the cross-cutter handbook by clarifying EPA's expectations for compliance with the federal environmental cross-cutting authorities. Any questions about the process outlined in this memo should be directed to Sheila Platt, CWSRF Team Lead, at (202) 564-0686 or to Peter Shanaghan, DWSRF Team Lead, at (202) 564-3848.

cc: Joanne Hogan, OGC  
Aimee Hessert, OFA

**CROSS-CUTTING FEDERAL AUTHORITIES:**

**A HANDBOOK ON THEIR APPLICATION IN THE**

**CLEAN WATER AND DRINKING WATER STATE REVOLVING FUND PROGRAMS**

**October 2003**



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## SECTION I: INTRODUCTION

## Purpose

This handbook describes how cross-cutting federal authorities apply to projects and activities receiving assistance under the Clean Water State Revolving Fund (CWSRF) program authorized by Title VI of the Clean Water Act and the Drinking Water State Revolving Fund (DWSRF) program authorized by section 1452 of the Safe Drinking Water Act (together, the SRF programs). The basic rules for complying with cross-cutting federal authorities in the two programs are set-out in the CWSRF regulations at 40 C.F.R. § 35.3145 and in the DWSRF regulations at 40 C.F.R. § 35.3575.

Cross-cutting federal authorities are the requirements of other federal laws and Executive Orders that apply in federal financial assistance programs. Often, these authorities are expressly applied by the statute authorizing the assistance itself. More frequently, the requirements are not cited in the authorizing statute, but apply broadly by their own terms to a wide range of federal financial assistance programs. In the SRF programs, these include environmental laws such as the Endangered Species Act, the National Historic Preservation Act and executive orders on the protection of wetlands and flood plains, social policy authorities such as executive orders on equal employment opportunity in federally assisted programs, and economic authorities such as rules implementing executive orders on the debarment and suspension of persons who have engaged in misconduct.

In the SRF programs, the requirements of cross-cutting federal authorities apply to projects and activities whose cumulative SRF funding equals the amount of the capitalization grant. Generally, projects and activities funded with monies in amounts greater than the capitalization grant amount are not subject to these requirements. However, all programs, projects and activities undertaken in the SRF programs are subject to federal anti-discrimination laws, including the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, section 13 of the Federal Water Pollution Control Act Amendments of 1972, and Executive Order 11246 on affirmative action in federal contracting.

The Environmental Protection Agency (EPA) retains ultimate responsibility for ensuring that states and assistance recipients comply with the cross-cutting federal authorities. However, because of the unique nature of the SRF programs – which are managed by the states who, unlike EPA, have a direct relationship with the recipients that must comply with the authorities – compliance activities are carried out mainly by the states and assistance recipients, to the extent authorized under each cross-cutter.

This handbook is intended to serve as an information resource for EPA regional personnel with responsibilities for the SRF programs, for state SRF program managers, and for assistance recipients in the two programs. It summarizes the requirements of applicable cross-cutting authorities that are pertinent to the SRF programs, and the procedures states and recipients must follow to attain compliance. More detailed procedures must be worked out between the EPA regional offices and the states as part of the capitalization grant agreement process. State SRF program managers and assistance recipients should also refer to the applicable laws and regulations for the actual requirements of the law (this handbook is a mere

summary) to ensure that new requirements have not been enacted by statute or implemented by regulation. Finally, SRF personnel should be aware that the list of applicable cross-cutters in this handbook may change if revisions to existing laws are made or new laws are enacted.

### **The State Revolving Fund Programs**

The Water Quality Act of 1987, Pub. L. No. 100-4, established the CWSRF program in the new title VI of the Federal Water Pollution Control Act, which is more commonly known as the Clean Water Act (CWA). 33 U.S.C. § 1251, *et. seq.* Under Title VI, 33 U.S.C. §§ 1381 - 1387, EPA awards grants to states (capitalization grants) to establish and capitalize revolving funds. From these funds, which are further capitalized by a 20 percent match and other state contributions, the states may provide loans and other types of assistance for the construction of publicly owned wastewater treatment facilities, the implementation of non-point source management programs, and the development and implementation of estuary conservation and management plans.

The Drinking Water State Revolving Fund (DWSRF) program at section 1452 of the Safe Drinking Water Act (SDWA), was authorized by the SDWA Amendments of 1996, Pub. L. No. 104-182, 42 U.S.C. § 300j-12. The DWSRF was created to assist public water systems maintain or achieve compliance with the drinking water standards of the SDWA and to protect public health. As in the CWSRF, EPA awards grants to states to capitalize revolving funds, which are further capitalized by the required state match and any other funding the state contributes to the DWSRF. The DWSRF may provide low cost loans and other types of assistance to eligible public water systems. In contrast to the CWSRF program, a state can also set aside up to 31% of its DWSRF capitalization grant funds and use the funds for state drinking water programs and activities that support source water protection and enhance water systems management (e.g., operator certification, capacity development). The amount of a capitalization grant that is used for these “set-aside” purposes is not deposited in the state’s revolving fund.

Under the SDWA, a state may administer its DWSRF in combination with other state loan funds unless expressly prohibited by state law. 42 U.S.C. §300j-12(g)(1). The funds must be accounted for separately and used solely for specified purposes. One year after a DWSRF program receives its first capitalization grant, it may transfer up to one-third of the amount of its DWSRF capitalization grant(s) to its CWSRF or an equivalent amount from its CWSRF to its DWSRF. By allowing states to transfer funds between the CWSRF and DWSRF programs, Congress indicated its intent for the two SRFS to be implemented and managed in a similar manner. EPA developed policies and procedures for the DWSRF that are consistent with the previously established CWSRF.

### **State Revolving Funds and Cross- Cutting Authorities**

The structure and intent of the SRF programs are substantially different from that of

most EPA grant programs, such as the CWA construction grant program.<sup>1</sup> These differences affect the application of federal cross-cutting authorities. Significant among these differences is the relationship between the federal government and the ultimate assistance recipient. In the CWA construction grant program (and, still, in most other Agency grant programs), EPA awarded grants directly to the local recipient for an identified project or activity. EPA remained involved at the project level, ensuring that these projects complied with cross-cutting authorities in accordance with federal regulations applicable to activities directly funded by federal agencies.<sup>2</sup> In the SRF programs, grant funds flow from EPA to the SRFs, which are further capitalized by the required state matching contribution. States may also provide funds from other sources, such as bond proceeds, if the state elects to leverage SRF assets. These funds are then made available by the state, not by EPA, to local recipients as loans or other types of non-grant assistance. EPA does not select or approve projects to receive SRF assistance. Those decisions are made by the states, which must set priorities for funding based on the requirements of the two statutes. See CWA § 603(g) and 606(c), SDWA § 1452(b).

In enacting the SRF programs, Congress intended to place the responsibility for financing water infrastructure needs and managing these programs on the states. See, e.g., S. Rep. No. 99-50 at 8, 99<sup>th</sup> Cong. 1<sup>st</sup> sess.(1985), H. Rep. No. 104-632 at 11, 104<sup>th</sup> Cong. 2d sess. (1996). Unlike the CWA construction grants program, in the SRF programs the states, rather than EPA, play a paramount role in day-to-day project level activities. For the most part, EPA's role in the SRFs is limited to ensuring that the state-established programs comply with the requirements of CWA title VI and SDWA section 1452, and annually reviewing the performance of the state programs. Although EPA will remain ultimately responsible for ensuring compliance with cross-cutting federal authorities, it will do so largely through its review of state programs.

### **Application of Cross-Cutting Authorities in the SRF Programs Generally**

In the SRF programs, compliance with federal cross-cutting authorities begins with a commitment made by the state SRF agency to comply, and to require certain recipients to comply, with applicable authorities. 40 C.F.R. § 35.3145 (CWSRF); 40 C.F.R. § 35.3575 (DWSRF). This commitment is explicitly contained in the capitalization grant or operating agreements. The EPA regional office reviews a state's compliance with cross-cutters as part of the Annual Review.

Cross-cutters apply to the SRF agency as the grant recipient and to projects and

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<sup>1</sup> The CWA's Title II construction grant program was the predecessor to the CWSRF program. It was a more traditional federal financial assistance program under which federal funds were granted directly to local communities for the construction of wastewater facilities. 1990 was the last year in which Congress appropriated funds for Title II.

<sup>2</sup> Although EPA retained final authority over cross-cutter activities, in the CWA's construction grants program, much of the work involved in attaining compliance was carried out by the grant recipient or by the delegated state agency. See e.g., 40 C.F.R. § 35.3015.

activities receiving federal financial assistance.<sup>3</sup> Because SRFs may consist of funds from several sources (federal grants, state match, loan repayments, or bond proceeds), states must apply cross-cutter requirements to projects whose cumulative funding is equal to the amount of the federal capitalization grant.

### **Application of Cross-Cutting Federal Authorities in the CWSRF Program**

To ensure that the federal interest in the fund is protected, the CWSRF program requires that cross-cutting authorities requirements must be met by projects or activities whose cumulative funding equals the amount of the federal capitalization grant to the state.<sup>4</sup>

The state decides which projects will be used to meet this requirement and must ensure that these projects comply with federal cross-cutting authorities.<sup>5</sup> Once the state determines which projects will receive funding that cumulatively equals the amount of the capitalization grant, other projects funded with CWSRF monies are not generally subject to cross-cutting authorities.<sup>6</sup> However, the state may require compliance with cross-cutters by projects whose cumulative funding is greater than the amount of the federal capitalization grant. If the state does this, it may bank the excess to meet future requirements.<sup>7</sup>

### **Application of Cross-Cutting Federal Authorities in the DWSRF Program**

Because of its similarities to the CWSRF, and because many aspects of the two

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<sup>3</sup> This describes only those cross-cutting requirements that apply at the project level in the SRF programs. It does not address cross-cutting authorities that apply only to the state as the grant recipient (e.g., The Drug-Free Workplace Act, Pub. L. No. 100-690 (1988)) nor those that apply whether or not federal assistance is involved (e.g., the Occupational Safety and Health Act, Pub. L. No. 91-596).

<sup>4</sup> Title VI of the CWA used the term “directly made available by” capitalization grants to delineate the federal interest, see CWA § 602(b)(6), but this phrase was also used for a more specific purpose of identifying projects which must comply with several identified requirements, including requirements carried over from the CWA Title II construction grant program.

<sup>5</sup> To the extent each cross-cutting authority permits, project-level involvement by EPA will be limited to cases in which disputes arise concerning compliance.

<sup>6</sup> All programs, projects, and activities undertaken by the SRF programs are subject to the federal anti-discrimination laws, including the Civil Rights Act of 1964, Pub. L. No. 88-352 §601, 78 Stat. 252 (codified as amended at 42 U.S.C. §2000d), the Rehabilitation Act of 1973, Pub. L. No. 93-1123, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794), and the Older Americans Amendments of 1975, Pub. L. No. 94-135, § 303, 89 Stat. 713, 728 (codified at 42 U.S.C. § 6102). Further, these broader anti-discrimination laws apply by their own terms to the entire organization receiving federal financial assistance, not just to the project itself.

<sup>7</sup> Required compliance under the minority-owned and women-owned business enterprise (DBE) laws by projects whose cumulative funding is greater than the amount of the federal capitalization grant is not “bankable.”

programs are often run in conjunction by the states, the concept that cross-cutting authorities apply to projects and activities whose cumulative funding equals the amount of the grant has been applied to the DWSRF program. Unlike the CWSRF, however, as much as 31% of the DWSRF capitalization grant can be set aside and used for state program activities and certain local initiatives. Because these “set-aside” funds are held in accounts outside the loan fund, only federal dollars are used to support set-aside activities (with the possible exception of a 1:1 cash match a state may provide to support one of the allowable set-asides. See 42 U.S.C. § 300j-12(g)(2)). Therefore, federal cross-cutters must be applied to all set-aside expenditures. A state cannot meet the cross-cutting requirement for set-aside activities by applying cross-cutting authorities to an excess of projects receiving assistance from the loan fund. For infrastructure projects receiving assistance from the DWSRF loan fund, requirements imposed by cross-cutters will only apply to those projects whose cumulative funding is equal to the amount of the capitalization grant deposited into the loan fund (i.e., the capitalization grant less the amount directed to set-asides).

As an example, State A’s drinking water capitalization grant is \$1.3 million this year. State A will use \$300,000 of the grant to fund set-aside activities. The state will be required to ensure compliance with cross-cutter authorities on the entire \$300,000 used for set-asides, to the extent that the use of those funds implicate the authorities.<sup>8</sup> The remaining \$1 million of the grant, and other state funding, including the state’s required match, brings the total deposit to the DWSRF loan fund to \$1.6 million. State A has 10 projects on its priority list. One project is eligible for a \$300,000 loan, another for a \$200,000 loan, 2 projects are each eligible for loans of up to \$250,000, and the remaining 6 projects are each eligible for loans of \$100,000. State A has determined that the four projects eligible for the largest loans (totaling the capitalization grant of \$1 million deposited into the Fund) will be the projects that must comply with federal cross-cutting requirements. The other six projects funded with the remaining \$600,000 are not subject to these requirements. However, State A is going to require compliance by all 10 projects, and next year, if the capitalization grant amount deposited into the fund remains at \$1 million, the state will have a credit of \$600,000 that it can apply towards cross-cutting requirements for projects receiving assistance from the loan fund.

## **Structure of the Handbook**

The cross-cutting authorities are arranged in this handbook according to three general categories: Environmental, Social Policy, and Economic and Miscellaneous authorities. Each section begins with a brief description of the overall category. For example, the Environmental Authorities section is preceded by a discussion of how the process for complying with cross-cutting environmental authorities should be accomplished in conjunction with an approved state environmental review process (SERP).

Within each category, each individual cross-cutter is presented. The particular authority

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<sup>8</sup> In most cases, the activities being conducted under the set-asides will not implicate factors that require application of cross-cutting authorities. For example, using set-aside funds for the salaries of staff administering the program is not an “undertaking” that will have an “effect” on historic properties under section 106 of the National Historic Preservation Act.

is briefly described and a relevant excerpt is usually quoted, with citations given to both the Public Law and the United States Code. This general discussion is followed by a summary of the implementation process under the CWSRF and the DWSRF. Citations to implementing regulations and other useful documents are included whenever appropriate.<sup>9</sup>

### A Note on Conventions Used in the Handbook

For ease of both the drafting and the use of this handbook, certain short-hand phrases are often used to describe various institutions. The Environmental Protection Agency is referred to throughout as **EPA**. The state agency primarily responsible for administering the SRF program is referred to as the **SRF agency**.<sup>10</sup> The EPA regional office that is overseeing the state's SRF program is referred to simply as the **EPA regional office**. Where an environmental cross-cutting authority is the responsibility of another office in the EPA Region, that office is called the **EPA regional program office**. A federal government agency other than EPA that has statutory responsibility for a cross-cutting federal authority is termed the **responsible federal agency**, while its state counterpart, if one exists, is designated the **responsible state agency**.

In the SRF programs, the entity initially responsible for compliance activities is designated as the **SRF assistance recipient** or simply the **assistance recipient** (e.g., a municipality or public water system). Compliance activities in the SRF programs may, and in some instances, must, occur before assistance is awarded.

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<sup>9</sup> With the exception of NEPA, where states follow the EPA approved "State environmental review process," in carrying out the federal cross-cutting requirements, states must follow the applicable regulations and prescribed processes since the states are complying with the cross-cutters on EPA's behalf.

<sup>10</sup> The term "SRF agency" will be used to describe the various combinations of environmental agencies primarily responsible for the implementation of the CWA and the SDWA as well as any other agencies or departments with delegated authority to implement the SRF programs.

## SECTION II: ENVIRONMENTAL AUTHORITIES

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### **A. National Environmental Policy Act Pub. L. No. 91-190 (1970) 42 U.S.C. § 4321 et. seq.**

The National Environmental Policy Act (NEPA), which was signed into law on January 1, 1970, instructs federal agencies to thoroughly analyze the environmental consequences of their actions in an open and public manner. NEPA was the first statute to incorporate the "impact statement" approach to federal agency decision-making processes. The impact statement requirement directs responsible federal officials to prepare detailed environmental assessments for "major federal actions significantly affecting the quality of the human environment" (42 U.S.C. § 4332(C)). The cross-cutting effect of this requirement extends to nearly all federal financial assistance programs.

NEPA does not require that agencies achieve a particular environmental result in their undertakings. Instead, it directs agencies to adhere to a process that aims to minimize the adverse environmental impacts of their activities. EPA's NEPA regulations at 40 C.F.R. Part 6, Subpart C, incorporate requirements that are designed to result in compliance with the substantive requirements of a host of other, more specifically focused environmental laws, such as the Clean Air Act (CAA) and the Endangered Species Act.

EPA regulations at 40 C.F.R. §35.3140 and §35.3580 require recipients to conduct an environmental review, or NEPA-like review, for projects and activities funded with SRF program funds. State SRF recipients may comply with the environmental review requirement by complying with EPA's NEPA regulations at 40 C.F.R. Part 6.<sup>11</sup> The specific application of the NEPA-like review in the SRF programs is detailed below.

### **NEPA Implementation in the SRF Programs**

#### **1. The Clean Water Act**

Under the Clean Water Act and 40 C.F.R. § 35.3140(a), EPA requires that all section 212 projects undergo a NEPA-like environmental review. These projects include the familiar wastewater treatment projects as well as nonpoint source pollution control and estuary projects that can also fit the definitions of "construction" and "treatment works" in CWA § 212.

Because of the nature of the CWSRF program – conferring, as it does, a greater responsibility on the states than in traditional grant programs – and because EPA seeks to promote an environmental ethic in the states, the Agency has required states to adopt procedures for conducting environmental reviews that are consistent with the intent of NEPA but that are carried out solely by state agencies under state statutes and policies. 40 C.F.R.

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<sup>11</sup> EPA's Part 6 NEPA regulations are currently under review. EPA will advise states if this review results in any changes or new requirements which may have an impact on the SRF.

§35.3140. States still have the option to adopt the federal regulations set out at 40 C.F.R. Part 6, or to apply their own “NEPA-like” process for conducting reviews.

EPA's regulations implementing the CWSRF program at 40 C.F.R. Part 35 Subpart K extract the fundamental principles of EPA's 40 C.F.R. Part 6 NEPA regulations in a way that fits the unique structure of the CWSRF program. They set forth the minimum requirements that must be incorporated in state environmental review processes (SERPs) for all projects. These requirements allow state agencies to distinguish between the environmental review procedures that must be applied to projects that receive funds equaling the amount of the grant, and that are the focus of this handbook, and alternative procedures that may be applied to other projects. The Regional Administrator must review and approve the SERP and any subsequent significant changes to the SERP using the criteria at Appendix A to 40 C.F.R. Part 35, Subpart K. In general terms, the Regional Administrator will approve a SERP that contains the following elements:

- proper legal authority to conduct environmental reviews;
- an interdisciplinary approach for identifying and mitigating any environmental effects caused by the projects;
- a procedure to fully document the information, processes and premises that influence decisions;
- public notice and participation procedures; and,
- a process for evaluating alternatives and measures to avoid, minimize, or mitigate adverse impacts.

## **2. The Safe Drinking Water Act**

The DWSRF environmental review process, see 40 C.F.R. § 35.3580, is based on the principles developed for the CWSRF program.

Projects whose cumulative funding equals the amount of the capitalization grant must be reviewed under a SERP that is functionally equivalent to EPA's NEPA review or the “NEPA-like” review process created by the state. 40 C.F.R. § 35.3580(c). As noted in the Introduction, because all set-aside activities are funded with federal dollars they must meet federal cross-cutting authorities to the extent that they are implicated. This includes environmental review. In most cases, the use of the funds for activities conducted under set-asides (e.g., funding state staff positions, contracts to provide technical assistance) will not implicate environmental review requirements, because these activities do not have a significant effect on the environment.

The Regional Administrator must review and approve the SERP and any subsequent significant changes to the SERP using the criteria at Appendix A to 40 C.F.R. Part 35, Subpart L. In general terms, the Regional Administrator will approve a SERP that contains the following elements:

- proper legal authority to conduct environmental reviews;
- an interdisciplinary approach for identifying and mitigating any environmental effects caused by the projects;
- a procedure to fully document the information, processes and premises that influence decisions;
- public notice and participation procedures; and,
- a process for evaluating alternatives and measures to avoid, minimize, or mitigate adverse impacts.

### **3. Tier II SERPS**

States must conduct environmental reviews of CWSRF and DWSRF projects, but for those activities funded in an amount greater than the capitalization grant, a state may elect to apply an alternative SERP (i.e., Tier II review). See 40 C.F.R. § 35.3140(c) and 40 C.F.R. § 35.3580(d).

### **4. The SERP and Compliance with Other Environmental Authorities**

The intent underlying the SERP process is to ensure that recipients consider environmental impacts early in the planning process, to resolve compliance issues through prudent planning, and to integrate under the SERP umbrella procedures for compliance with the other cross-cutting environmental laws. Most of these other environmental authorities must also be addressed early in the planning process of a project or activity. As stated previously, in the SRF programs, compliance with federal cross-cutting authorities begins with a commitment made by the state SRF agency to comply, and to require certain assistance recipients to comply, with the applicable cross-cutters. States may also receive compliance assistance through the appropriate official in the EPA regional program office.

With some variations to account for differences in the laws or in the roles of the different levels of government, there is a series of steps in the process of achieving compliance with the environmental cross-cutters through the SERP process.

(1) With the assistance of the SRF agency, the assistance recipient must first conduct the necessary studies and analyses and prepare documentation demonstrating that the proposed project is in compliance with the cross-cutting environmental authorities, or that appropriate mitigation measures are included in its planning. These studies should be done in conjunction with the SERP's broader environmental analysis. The assistance recipient may also need to consult with representatives of responsible state agencies on particular cross-cutters to resolve compliance issues before the state-level review begins.

(2) The state SRF agency conducts an independent review of the documents prepared in step one and drafts the SERP documentation, which should include a preliminary

determination regarding compliance with relevant cross-cutters, or the measures the assistance recipient must take to achieve compliance.

(3) The state SRF agency must notify the responsible state or federal agency of its findings. If the responsible state or federal agency concurs in the SRF agency's determination (for example, where the Fish and Wildlife Service issues a "No Affect" letter), the SRF agency may then issue its final decision document and proceed with the project. If the responsible state or federal agency objects to the SRF agency's findings, the SRF agency must either revise its findings or seek to resolve outstanding issues directly with the responsible agency.

When the SRF agency and the responsible federal agency cannot resolve issues between themselves, these issues must be raised with the EPA regional office. During this process, the EPA regional office may consult with the responsible federal agencies. The SRF agency must maintain a file on each project, which documents the SRF agency's actions with respect to environmental cross-cutters (e.g., including the letter requesting comments on the preliminary determination and a summary of comments).

## **5. The SERP and Compliance with Environmental Justice**

Executive Order No. 12898, signed February 11, 1994, directs all federal agencies to "make achieving environmental justice part of its mission." Each agency is required to identify and address any "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." EPA has defined its vision of environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." Further, environmental justice requires that "no group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from . . . the execution of federal, state, local, and tribal programs and policies." ([www.epa.gov/compliance/environmentaljustice/](http://www.epa.gov/compliance/environmentaljustice/)).

One vehicle for EPA's efforts to address environmental justice concerns is the NEPA analysis. As a matter of policy, EPA has integrated environmental justice concepts into NEPA analyses through guidelines outlining the steps that should be taken to ensure environmental justice concerns have been addressed during the NEPA process. Identifying potential adverse effects on minority and low-income populations, as well as encouraging early public participation and the development of alternative or mitigating options is emphasized. Like NEPA's procedural requirements, the purpose of the SERP process is to help ensure that environmental consequences are fully considered and addressed before actions are taken. Therefore, states must comply with Executive Order No. 12898 by integrating environmental justice into their SERP process.

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## B. Historic Resources

### **National Historic Preservation Act Pub. L. No. 89-665, as amended, 80 Stat. 917 (1966) 16 U.S.C. §470 *et. seq.***

The National Historic Preservation Act (NHPA) embodies a long-standing national policy to preserve historic sites, buildings, structures, districts and objects of national, state, tribal, local, and regional significance and, among other things, to protect such historic properties from adverse impacts caused by activities undertaken or funded by federal agencies. NHPA expanded the scope of the 1935 Historic Sites Act, Pub. L. No. 74-292 by establishing the National Register of Historic Places, a listing of historical and cultural resources maintained by the U.S. Department of the Interior (DOI).

The fundamental responsibilities of federal agencies are expressed in Section 106 of the Act, which reads:

The head of any Federal agency having direct or indirect jurisdiction over a proposed or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act (16 U.S.C. §§ 470i *et. seq.*) a reasonable opportunity to comment with regard to such undertaking.  
*16 U.S.C. §470(f)*<sup>12</sup>

The NHPA is administered by the DOI and the Advisory Council on Historic Preservation (the Council). The Council implements section 106 of the NHPA and has promulgated regulations for consultation regarding how to determine the effects of federal agency undertakings on historic properties. 36 C.F.R. Part 800. Although under certain circumstances the Council may become directly involved in such consultations, the procedures generally call for consultation between the federal agency and relevant state or tribal historic preservation officers (SHPOs and THPOs) and other interested parties.

### **Implementation in the SRF Programs**

The SRF agency, in consultation with the Advisory Council or SHPO/THPO, as well as other interested parties, must first determine whether a project might affect historic properties that are included or eligible for inclusion on the National Register. This step is done by

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<sup>12</sup> Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including: those carried out by or on behalf of the agency; those carried out with federal financial assistance; those requiring a federal permit, license, or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency. 16 U.S.C. § 470w(7), 36 C.F.R. § 800.16(y).

identifying whether there are historic properties in the project area. The SRF agency reviews background information, consults with the SHPO/THPO and others, seeks information from knowledgeable parties, and conducts additional studies as necessary. Unlisted properties are evaluated against the National Park Service's published National Register criteria, in consultation with the SHPO/THPO and any Indian Tribe or Native Hawaiian organization that may attach religious or cultural importance to them.

If the SRF agency finds that historic properties are present, the next step is to assess possible adverse effects. Again, consultation must occur with the SHPO/THPO and other interested parties. If they agree that there will be no adverse effect, the agency proceeds with the undertaking and any agreed upon conditions. If the parties cannot agree or they find that there is an adverse effect, the agency begins consultation to identify ways to avoid, minimize, or mitigate adverse effects. This process also requires consultation with the SHPO/THPO and others, including Indian Tribes and Native Hawaiian organizations, local governments, and members of the public.

Before the SRF agency issues its environmental decision document on the project, the 106 process should be completed. If, because of disagreement among the appropriate parties, the SRF agency cannot issue a determination that no historic or cultural properties are in the project area, that resources do exist in the project area but will not be adversely affected, or that adequate mitigating measures will be taken to avoid or reduce adverse effects to resources in the project area, the SRF agency must notify the EPA regional office. The EPA regional office will then enter into consultations with all parties to resolve the dispute.

### **Additional References**

- 36 C.F.R. Part 800. Protection of Historic Properties. See also [www.achp.gov](http://www.achp.gov) for additional reference materials and guidance.
- Programmatic Agreement Among the Environmental Protection Agency, The Advisory Council On Historic Preservation, And The National Conference Of State Historic Preservation Officers Concerning Compliance With The National Historic Preservation Act Under EPA's State Water Pollution Control Revolving Fund Program (1991).<sup>13</sup>

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### **Archeological and Historic Preservation Act Pub. L. No. 93-291 (1974) 16 U.S.C. §469a-1**

The intent of the Archeological and Historic Preservation Act (AHPA) is to limit the loss of important historical data that would result from federal, or federally authorized, construction

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<sup>13</sup> EPA has entered into a Programmatic Agreement with the Council and the National Conference of State Historic Preservation Officers establishing procedures for NHPA compliance in the CWSRF program. Because the two programs are similar, the DWSRF program follows the programmatic agreement as a matter of practice. Under this agreement, the SRF agency in the first instance carries out the responsibilities of the NHPA section 106 process.

activities. Unlike section 106 of the NHPA, which principally addresses adverse effects to historic properties identified within a project area prior to project initiation, the requirements of the AHPA are typically invoked when historic properties are discovered after the project has begun and potential adverse effects may occur. (The NHPA regulations do have a provision that addresses late discoveries of historic properties).

The AHPA requires federal agencies to identify relics, specimens, and other forms of scientific, prehistorical, historical, or archaeological data that may be lost during the construction of federally sponsored projects and to nominate for the register resources under the agency's control, to ensure that these resources are not inadvertently transferred, sold, demolished or substantially altered, or allowed to deteriorate significantly. If such items are discovered, the DOI must be notified to recover the data or recommend measures to mitigate potential losses. The Department's standards and guidelines (48 Fed. Reg. 44716 (Sept. 9, 1983)) detail accepted archeological preservation activities and methods. This publication is the standard for all data recovery activities undertaken in the SRF programs for discovery situations under the AHPA, or for avoiding or mitigating adverse impacts on known historic properties under the NHPA.

16 U.S.C. § 469a-1 reads in part:

(a) Notification and request for preservation of data

Whenever any federal agency finds, or is notified, in writing, by an appropriate historical or archeological authority, that its activities in connection with any federal construction project or federally licensed project, activity or program, may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, such agency shall notify the Secretary [of the Interior], in writing, and shall provide the Secretary with appropriate information concerning the program, project or activity. Such agency may request the Secretary to undertake the recovery, protection, and preservation of such data . . . . “

When discoveries are made on a project that required the involvement of the SHPO/THPO during the early planning stages of the project, compliance with the AHPA can be satisfied by continuing to work through the SHPO/THPO under procedures of the NHPA. Alternatively, whether or not it is necessary to consult with the SHPO/THPO on a project involving NHPA compliance, compliance with the AHPA may be accomplished by working directly with the DOI, National Park Service's Departmental Consulting Archeologist.

### **Implementation in the SRF Programs**

The SRF agency may involve the SHPO/THPO in determining the significance of discoveries of scientific, prehistoric, historical, or archeological data made during construction. Agreements for data recovery, and mitigation measures if necessary, made between the SRF agency and the SHPO/THPO will satisfy EPA's compliance obligations. The EPA regional office needs to be notified and involved only when disputes cannot be resolved. If, however, the SRF agency fails to work through the SHPO/THPO, the EPA regional office must be notified and will coordinate with the DOI to ensure compliance with the AHPA.

Recovery or mitigation measures may require alteration of the project's approved plans. The results of the consultations and approved data recovery mitigation plan must be included in the assistance recipient's environmental documentation for the project.

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### **C. Environmentally Sensitive Lands**

#### **Protection of Wetlands <sup>14</sup>**

##### **Executive Order No. 11990 (1977), as amended by Executive Order No. 12608 (1997)**

A national policy aimed at protecting wetlands, which include marshes, swamps, bogs, ponds, and other areas that are regularly inundated with water, has been pursued, at least implicitly, since the passage of the Rivers and Harbors Act of 1899. A number of laws, including the CWA and the Coastal Zone Management Act, Pub. L. No. 92-583, 16 U.S.C. §1451 *et. seq.*, in some manner regulate the management of wetlands.

National wetlands policy applicable to the activities of federal agencies is set forth in Executive Order No. 11990, which was issued by President Carter in 1977 and which President Clinton amended 20 years later by Executive Order No. 12608. The Executive Order broadly directs all agencies of the federal government to carefully consider the effects on wetlands from the discharge of any of their responsibilities, and to minimize the destruction, loss, or degradation of wetlands in any manner when there are feasible alternatives to the action. Section 2(a) of the order requires that:

. . . each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

The Executive Order also requires public notice of any plans to support new construction in wetlands.

### **Implementation in the SRF Programs**

SRF assistance recipients must first determine, in consultation with the state environmental agency, whether a proposed project will be located in or affect a wetland.<sup>15</sup> If so, further consultations must be held to develop and evaluate alternative locations for the project or other mitigating measures.

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<sup>14</sup> See *also* Pub. L. No. 99-645, 1998, as codified at 16 U.S.C. § 3901 *et. seq.*

<sup>15</sup> Under 16 U.S.C. § 3931, the DOI is directed to prepare the National Wetlands Inventory Maps and other documents as part of the National Wetlands Inventory Project. (1998).

If this evaluation determines that there are no practicable alternatives that would avoid impacts to wetlands, the assistance recipient, in consultation with the state environmental agency, shall design or modify the project to minimize adverse impacts to the wetlands and provide an opportunity for public review and comment on the proposed project.

Two other important aspects of complying with Executive Order No. 11990 in the SRF programs must be considered by the assistance recipient. Under the EPA's "no net loss of wetlands" policy, where natural wetlands will be destroyed by project construction, assistance recipients must devise plans to construct substitute or "mitigation" wetlands. Secondly, the recipient should seek the assistance of the U.S. Fish and Wildlife Service when developing measures to mitigate adverse impacts on wetlands, to ensure that these measures adequately protect the diversity and the habitat of species living in the affected wetland.

During the environmental review of the project, the SRF agency must furnish both the U.S. Fish and Wildlife Service and the EPA regional office with documentation demonstrating that (1) all alternatives to locating the project in or affecting the wetland were carefully considered, (2) the alternative selected was the only practicable one, and (3) adequate measures will be taken to mitigate damage to the wetland, including its natural systems. The SRF agency will be responsible for ensuring that any comments by the Service and the EPA regional office are taken into account in the project's design.

#### **Additional References**

- 40 C.F.R. Part 6 Appendix A: Statement of Procedures on Floodplain Management and Wetlands Protection.

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#### **Flood Plain Management**

##### **Executive Order No. 11988 (1977), as amended by Executive Order No. 12148 (1979)**

Federal policy designed to promote the prudent management of flood plains has been in effect since 1968, with the passage of the National Flood Insurance Act. Pub. L. No. 90-448, 42 U.S.C. § 4001 *et seq.* By providing federal subsidies for private flood insurance and by requiring flood-prone communities to have the insurance as a condition to receiving federal assistance, that law and the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 939 (1973), recognized the serious economic and environmental damage that can result from flooding in developed lowland areas.

Executive Order No. 11988 regulates the actions of federal agencies that affect flood plains.<sup>16</sup> This order requires all agencies undertaking, financing, or assisting proposed activities to determine whether they will occur in or affect a flood plain and to evaluate potential measures to avoid adversely affecting the plain. Locations of flood plains can be determined by examining

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<sup>16</sup> Executive Order No. 12148, 3 C.F.R. §412, transferred functions for flood plain management to the Federal Emergency Management Agency.

maps available from the U.S. Department of Housing and Urban Development, Federal Emergency Management Agency (FEMA), the U.S. Department of Agriculture, and state water resource planning agencies. Agencies must select, if they are available, viable alternative locations for their undertakings that will not affect flood plains.

If construction or improvements will be undertaken or supported in a flood plain because no practicable alternative locations are available, and the SRF agency has otherwise complied with the Executive Order, measures must be taken to minimize the risk of flood damage to or within the flood plain, such as flood proofing the facility to be constructed, elevating structures above base flood levels, or providing compensatory flood storage. In addition, public review is required for each plan or proposal for action taking place within a flood plain.

### **Implementation in the SRF Programs**

In consultation with the state SRF agency, the SRF assistance recipient must first determine whether the proposed project will be located in or affect a flood plain.

If the proposed project will be located in or will affect a flood plain, the assistance recipient must prepare a flood plain/wetlands assessment. If there are no practicable alternatives to the proposed site, the assistance recipient must document the mitigating measures or design modifications that will be taken to reduce the threats from locating the project in the flood plain. In conjunction with the public notice procedures in the SERP, the project area community must be informed why the proposed project is to be located in a flood plain.

The environmental information documentation describing mitigating and design measures must be submitted by the assistance recipient to the SRF agency, which prepares a preliminary finding on whether the assistance recipient has complied with Executive Order No. 11988. Notice of this finding should be given to FEMA, which may provide recommendations for improving mitigation measures or further modifying the project's design to enhance flood protection.

### **Additional References**

- 40 C.F.R. Part 6 Appendix A: Statement of Procedures on Flood Plain Management and Wetlands Protection.
- 43 Fed. Reg. 6030 (1978): Water Resources Council's Flood Plain Management Guidelines issued to aid all other federal agencies in amending their regulations and procedures to comply with Executive Order No. 11988. The Guidelines include an eight-step decision-making process.
- "Further Advice on Executive Order 11988 Flood Plain Management," issued by FEMA and the Interagency Task Force on Flood Plain Management, in 1987.

**Farmland Protection Policy Act**  
**Pub. L. No. 97-98 (1981)**  
**7 U.S.C. §4201 et. seq.**

In the 1970s, federal assistance for large-scale construction projects became pervasive and concerns developed in several agencies that many projects were being undertaken without due regard to their effect on the productive capacity of the nation's agricultural lands. These concerns gave rise to a series of policy statements, issued by the U.S. Department of Agriculture, the Council on Environmental Quality and the EPA (*EPA Policy to Protect Environmentally Significant Agricultural Lands*, signed by the Administrator on September 8, 1978), instructing federal program managers to more carefully consider the effect of a project on agricultural land and to take alternative or mitigating measures, when appropriate, to ensure that valuable farmland is preserved.

This policy direction culminated in 1981 with the passage of the Farmland Protection Policy Act, which was included in the 1981 Farm Bill (Agriculture and Food Act of 1981, Pub. L. No. 97-98, 7 U.S.C. § 4201 et. seq.). In the Act, Congress directed federal agencies to use criteria developed by the Soil Conservation Service (SCS) to identify the potential adverse effects of federal programs on farmland and its conversion to nonagricultural uses, to mitigate these effects, and to ensure that programs are carried out in a manner that is compatible with the farmland preservation policies of state and local governments, and private organizations.

7 U.S.C. § 4202(b) calls upon all federal agencies to:

. . . identify and take into account the adverse effects of federal programs on the preservation of farmland; consider alternative actions, as appropriate, that could lessen such adverse effects; and assure that such federal programs, to the extent practicable, are compatible with state, unit of local government, and private programs and policies to protect farmland.

### **Implementation in the SRF Programs**

Early in the planning phase of a project, the SRF agency and SRF assistance recipient should seek technical assistance from the state conservationist or local representative regarding the alternative sites proposed for the project. The state conservationist can offer advice on what further actions must be taken by the assistance recipient and the SRF agency to further evaluate important farmlands; the significance of all identified important farmlands; the sizing of the project as it relates to secondary growth; the continued viability of farming and farm support services in the project area; and alternatives or mitigation measures the SRF agency and assistance recipient should take to reduce potential adverse effects on important farmlands.

Before proceeding with the project, the SRF agency must notify the state conservationist or local representative about measures that the SRF assistance recipient will take to avoid, minimize, or mitigate effects on important farmlands.

### Additional References

- 7 C.F.R. Part 658: Department of Agriculture criteria for identifying and taking into account the adverse effects of federal programs on the preservation of farmlands.
- *EPA Policy to Protect Environmentally Significant Agricultural Lands*, September 8, 1978.

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### D. Coastal Area Protection

#### **Coastal Zone Management Act Pub. L. No. 92-583 (1972), as amended 16 U.S.C. § 1451 *et. seq.***

In 1972, Congress amended the Marine Resources and Engineering Development Act to establish a national policy for the protection, beneficial use, and effective management and development of the nation's coastal zones.<sup>17</sup> The Act is also applicable to the coasts of the Great Lakes. The Coastal Zone Management Act, Pub. L. No. 101-508, 104 Stat. 1388-300 (1990), authorizes the Secretary of Commerce to assist states in the development of management plans designed to regulate land and water use in coastal areas. The Act also calls on all federal agencies to ensure that their activities in coastal areas are consistent with the state coastal zone management plans that have been approved by the Department of Commerce.

16 U.S.C. §1456(c)(1)(A) states:

(c)(1)(A) Each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs.

Generally, before any federally supported activity can be undertaken in a coastal zone, a determination that the project is consistent with the coastal zone management plan (consistency determination) must be secured from the responsible state agency.

### Implementation in the SRF Programs

The Coastal Zone Management Act places primary responsibility for complying with its provisions in the state Coastal Zone Management agency. SRF assistance recipients should

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<sup>17</sup> The coastal zone encompasses coastal waters including the lands therein and thereunder and the adjacent shore lands and the waters therein and thereunder. The coastal zone includes islands, intertidal areas, salt marshes, wetlands and beaches. The zone extends inland from the shorelines only to the extent necessary to control the shore lands. See 16 U.S.C. § 1453(1)

consult directly with the state Coastal Zone Management agency during the planning stages to ensure that the project will be consistent with the state's coastal zone management plan. Consistency can be achieved through appropriate siting of the facility and its components or by incorporating adequate mitigating measures in the project's design. The SRF assistance recipient must then provide the SRF agency with documentation that the project is consistent with the coastal zone management plan. The SRF agency will review the documentation and may propose additional mitigating measures before forwarding a certification of consistency to the state Coastal Zone Management agency. If the Coastal Zone Management agency determines that the project is consistent with the state management plan (a consistency determination), the SRF assistance may be provided.

If the Coastal Zone Management agency cannot issue a consistency determination, the SRF agency must resume consultation with the assistance recipient and the Coastal Zone Management agency in an effort to resolve consistency issues. Conflicts can be addressed through informal discussions with the Coastal Zone Management Act's administering agencies, the National Oceanic and Atmospheric Administration (NOAA), or through mediation by the Department of Commerce, Office of Ocean and Coastal Resource Management.

### **Additional References**

- 15 C.F.R. Part 930 Subpart F: Consistency for Federal Assistance to State and Locals with Approved Coastal Zone Management Programs.
- 15 C.F.R. Part 923: Coastal Zone Management Program Regulations.

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### **Coastal Barriers Resources Act Pub. L. No. 97-348, 96 Stat. 1653 (1982) 16 U.S.C. §3501 *et. seq.***

In 1982, Congress enacted legislation intended to discourage development in the Coastal Barrier Resources System,<sup>18</sup> a collection of undeveloped and ecologically sensitive barrier formations along the Atlantic and Gulf Coasts of the United States, and the shore areas of the Great Lakes. The Coastal Barrier Resources Act restricts federal financial expenditures and assistance that would encourage development in the Coastal Barriers Resources System and the adjacent wetlands, marshes, estuaries, inlets, and near-shore waters. 16 U.S.C. § 3504(a) reads in part:

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<sup>18</sup> The Coastal Barrier Resources System is established at 16 U.S.C. §3503. The areas in the system are depicted on maps on file with the Secretary of DOI titled, "Coastal Barrier Resources System."

### Limitations on Federal Expenditures Affecting the System

(a) . . . no new expenditures or new financial assistance may be made available under authority of any federal law for any purpose within the [Coastal Barrier Resources System], including, but not limited to --

(1) the construction or purchase of any structure, appurtenance, facility, or related infrastructure . . . .

16 U.S.C. §3505 provides a number of exceptions to this limitation on federal funding, including exceptions for facilities necessary to explore and extract energy resources and for "the maintenance, replacement, reconstruction, or repair, but not the expansion of, publicly-owned or operated . . . structures or facilities that are essential links in a larger network or system." 16 U.S.C. §3505(a)(3).

### **Implementation in the SRF Programs**

During the planning phase of a proposed project and with the assistance of the state SRF agency, the SRF assistance recipient should consult with the state Coastal Zone Management agency to determine whether a proposed project will have an effect on the Coastal Barrier Resources System and, if so, the alternative sites or mitigating measures that must be incorporated in the project's design.

The state SRF agency must then provide the state Coastal Zone Management agency and the U.S. Fish and Wildlife Service with a certification, supported by sufficient documentation, that the proposed project will not affect the system, or documentation on the alternative site or mitigating measures that will be taken to avoid any effect on the system. The U.S. Fish and Wildlife Service is responsible for commenting on this information directly to the state SRF agency or the Coastal Zone Management program. Any recommendations offered by the U.S. Fish and Wildlife Service or the Coastal Zone Management agency to further minimize the effect of the proposed project must be considered for integration in the project's design by the SRF agency before it may provide assistance.

### **Additional References**

- 48 Fed. Reg. 45664 (1983): DOI, U.S. Fish and Wildlife Service, Coastal Barrier Act Advisory Guidelines.

**E. Wild and Scenic Rivers Act**  
**Pub. L. No. 90-542, 82 Stat. 913 (1968)**  
**16 U.S.C. §1271 *et. seq.***

Congress passed the Wild and Scenic Rivers Act to preserve the special scenic, cultural, historic, recreational, geologic, and fish and wildlife values of the nation's free flowing rivers and related adjacent land. The Act established the national Wild and Scenic River System, which includes rivers designated by Act of Congress and rivers that the Secretary of the DOI approves for addition to the list upon the petition of state governors. The Wild and Scenic Rivers Act establishes requirements for proposed projects that may effect the river, river segments, or the adjacent land.

The Wild and Scenic Rivers Act prohibits federal assistance for water resource projects<sup>19</sup> that would have direct and adverse effects on, invade, or unreasonably diminish, the special values of a designated wild and scenic river. This restraint is contained in 16 U.S.C. §1278(a), which reads in part:

. . . no department or agency of the United States shall assist by loan, grant, or otherwise in the construction of any water resource project that would have a direct and adverse effect on the values for which such river was established.

Similar language is used to describe the protection due rivers that are being studied for possible inclusion in the system (study rivers). 16 U.S.C. §1278(b).

### **Implementation in the SRF Programs**

During the planning of a proposed project, the SRF assistance recipient should consult with appropriate state or federal officials and the SRF agency to determine whether the project or any alternatives under consideration may affect a designated or study river. The appropriate agency is the one that has jurisdiction over the rivers in the project area and includes the National Park Service, the U.S. Forest Service, or, in some cases, the DOI's Bureau of Land Management (BLM). The cross-cutting requirements of the Wild and Scenic Rivers Act are satisfied if there are no designated or study rivers in the project area, or if the project will not have a direct and adverse effect on a designated or study river.

With the assistance of the SRF agency and other appropriate state and federal officials, the SRF assistance recipient must evaluate further the alternatives under consideration that may affect a wild and scenic river. If those evaluations demonstrate that an alternative will have an adverse effect on a wild and scenic river, it must be eliminated from consideration and other alternatives or planning adjustments must be pursued.

Documentation of any evaluations done by the assistance recipient to determine the

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<sup>19</sup> "Water resource projects" are defined in the Services' regulations to include "construction of developments which would affect the free-flowing characteristics of a designated or proposed Wild and Scenic River or Study River." "Construction" is defined as any action carried out with federal assistance affecting the free-flowing characteristics or the scenic or natural values of a Wild and Scenic River or a Study River." 36 C.F.R. § 297.3.

effect of a proposed alternative on a wild and scenic river, along with documentation demonstrating that the selected plan will not adversely affect the river, must be furnished to the SRF agency. The SRF agency must then submit this information for review and comment to the federal agency charged with administering the river at least 60 days in advance of the planned action. 16 U.S.C. § 1278(a). SRF assistance cannot be provided to the applicant without the consent of the federal administering agency.

### Additional References

- 36 C.F.R. Part 297 Subpart A: Wild and Scenic Rivers, Water Resources Projects.
- 47 Fed. Reg. 39457 (1982): Joint DOI National Park Service and Department of Agriculture (DOA) Forest Service Final Revised Guidelines for Eligibility Classification and Management of River Areas.

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### F. Endangered Species Act Pub. L. No. 93-205 (1973), as amended 16 U.S.C. §1531 *et. seq.*

Congress passed the Endangered Species Act in response to the risks posed to plants, fish, and wildlife by development and economic growth. The DOI's U.S. Fish and Wildlife Service and the Department of Commerce's National Marine Fisheries Service prepare and maintain a list of endangered and threatened species. The Act requires all federal agencies to ensure that their activities are not likely to jeopardize, destroy, or adversely modify listed or proposed endangered and threatened species, or the designated critical habitat on which they depend. The Act also prohibits federal agencies and all other "persons" from "taking," e.g., harming (including, in some cases, habitat modification), harassing, or killing, endangered, and most threatened, animal species, without prior authorization for incidental taking from the applicable Service.

Actions that may affect listed species or their critical habitat must be reviewed through a consultation process between the federal agency and either the U.S. Fish and Wildlife Service, which is responsible for terrestrial and freshwater species, or the National Marine Fisheries Service, which is responsible for most marine species. Federal agencies also must "confer" with the Service(s) if their actions are likely to jeopardize the continued existence of species proposed for listing or result in the destruction or adverse modification of habitat proposed for designation as critical. The consultation and conference processes are established by Section 7 of the Act, which reads in part:

(a) Federal Agency Actions and Consultations.

\* \* \* \* \*

(2) Each federal agency shall, in conjunction with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered

species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected states, to be critical. . . .

\* \* \* \* \*

(4) Each federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.

16 U.S.C. §§1536(a)(2) and (4)

Finally, all “persons” in the U.S., including federal agencies, states, and other non-federal entities, are prohibited from “taking” (e.g., harming, harassing, or killing) individuals of listed animal species under section 9 of the ESA. Detailed regulations governing consultation, conferences, and take issues associated with agency actions are set forth at 50 CFR Part 402. These regulations allow for federal agencies to fulfill certain ESA duties through designated non-federal representatives. 50 CFR § 402.08.

### Implementation in the SRF Programs

During project planning, the SRF assistance recipient should obtain a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area and consult with the regional office of the appropriate Service to determine whether any listed or proposed species or critical habitat may be affected by the proposed project. The project can proceed if the state SRF agency conclusively determines that listed or proposed species or critical habitat will not be affected in any way -- adversely or beneficially, directly or indirectly -- by the project or interrelated or interdependent activities.

If the proposed project may affect a listed or proposed species or critical habitat, the state SRF agency and the appropriate Service must consult to determine the nature of that effect. A biological assessment must be prepared by the SRF agency (with the SRF assistance recipient’s assistance, if appropriate) to serve as a basis for the determination that there will be no likely adverse effect on any listed species or critical habitat, or to support EPA in formal consultation with the appropriate service.<sup>20</sup> In order for the consultation to be concluded through an informal process, the appropriate service must provide written concurrence with the determination that the action is not likely to adversely affect listed species or critical habitat. In other words, the consultation does not conclude until the Service issues either (1) a biological opinion or (2) a concurrence letter agreeing that the action is not likely to adversely affect any listed species (informal consultation).

When formal consultation is necessary, the appropriate Service will render a biological opinion. If the opinion concludes that a proposed project is likely to jeopardize a listed species

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<sup>20</sup> While biological assessments are mandated for “major construction activities” as defined by the Act’s regulations, they are not mandatory for projects that are not “major construction activities.” In that case, however, a biological evaluation or other analysis similar to a biological assessment that analyzes the project’s potential effects on species and critical habitat is required in order for the consultation process to proceed.

or destroy or adversely modify a critical habitat, the Service will propose reasonable and prudent alternatives to the project that will not result in jeopardy of destruction or adverse modification, if possible. The EPA regional office, after consulting with the state SRF agency, will likely require an alternative or modified plan for the project that is not likely to jeopardize the species or habitat. In addition, if the opinion concludes that the proposed project will result in the incidental “taking” of a listed animal species, the Service generally will provide an incidental take statement that authorizes take so long as the state SRF agency and the SRF assistance recipient comply with specified reasonable and prudent measures necessary or appropriate to minimize impact on the species, and terms and conditions to implement those reasonable and prudent measures.

For either informal or formal consultation, ESA consultation does not conclude until the Service issues either (1) a concurrence letter agreeing that the action is not likely to adversely affect any listed species (informal consultation) or (2) a biological opinion (formal consultation). There are time frames by which the Service is supposed to respond, but the SRF agency cannot proceed until the Service acts.

### **Additional References**

- 50 C.F.R. Part 402: DOI and Department of Commerce Procedures for Implementing Section 7 of the Endangered Species Act.
- 50 C.F.R. 17.11 and 17.12: U.S. Fish and Wildlife Lists of Endangered or Threatened Species.
- 50 C.F.R. 17.95, 17.96 and Part 226: U.S. Fish and Wildlife Critical Habitats.
- 50 C.F.R. 222.23(a) and 227.4: National Marine Fisheries Service’s List of Endangered or Threatened Marine Species.
- Final Endangered Species Act Consultation Handbook for Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, U.S. Fish & Wildlife Service and National Marine Fisheries Service (March 1998), found at <http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm>

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### **G. Essential Fish Habitat Consultation Process under the Magnuson-Stevens Fishery Conservation and Management Act**

**Pub. L. 94-265 (1976), as amended**

**16 U.S.C. §1801 et. seq.**

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended, was designed to manage and conserve national fishery resources. Eight Regional Fishery Management Councils (RFMC) were established to maintain the fisheries in their

geographic region through Fishery Management Plans (FMP). The National Oceanic and Atmospheric Administration (NOAA), through the National Marine Fisheries Service (NMFS), evaluates FMP and issues necessary regulations.

In 1996, reflecting Congressional concern with marine habitat loss, the MSA was amended. The Sustainable Fisheries Act of 1996 added new requirements for the identification and protection of Essential Fish Habitat (EFH)<sup>21</sup> for species included in the fishery management unit. Each RFMC was required to designate EFH in its region, as well as identify adverse effects on EFH. Federal agencies are required to consult with the NMFS regarding “any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter.” 16 U.S.C. § 1855(b)(2).

The NMFS issued final EFH regulations in 2002 for coordination and consultation with federal and state agencies concerning actions that may adversely effect EFH. (50 C.F.R. 600.905 et. seq.). Actions completed prior to an EFH designation will not require a consultation; however renewals, reviews or substantial revisions will require a consultation if the renewal, review or revision may adversely affect EFH. Importantly, “EFH consultation is required for any federal funding of actions that may adversely effect EFH.” (50 C.F.R. 600.920(a)(1)).

### **Implementation in the SRF Programs**

EFH consultations are only required for actions that may adversely effect EFH. Thus, with the assistance of the SRF agency, the assistance recipient must first determine whether a proposed project may adversely effect EFH. The NMFS will make maps and/or other information on the locations of EFH available as well as provide information on ways to promote conservation of EFH, in order to facilitate this assessment. If an action may adversely effect EFH, the SRF assistance recipient must complete an EFH consultation in conjunction, generally within the SERP process.

When a SERP document is transmitted to the NMFS for comment, the document or the transmittal letter should clearly state that the agency is initiating EFH consultation. For example, if the agency wants to use the EA process for EFH consultation, it must give the NMFS a draft EA and delay signing a Finding of No Significant Impact (FONSI) until after the agency responds to NMFS EFH recommendations. If an agency does not wish to provide a draft EA to the NMFS, it may use some other process for EFH consultation.

If an SRF assistance recipient prepares an EFH Assessment, it must provide that assessment to NMFS for comment. The NMFS will respond informally or in writing. The NMFS

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<sup>21</sup>EFH is defined as “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.” 16 U.S.C. 1802(10). The NMFS has further interpreted this statutory definition at 50 C.F.R. 600.10.

comments may include EFH Conservation Recommendations, if appropriate. If so, the SRF recipient must respond to any NMFS EFH Conservation Recommendations, explaining the project's proposed measures for addressing, avoiding or mitigating the adverse effect of the project on EFH. In the event that such a response is inconsistent with the Conservation Recommendations, the SRF agency should first consult with the EPA regional office before explaining the reasons for not following the recommendations.

### **Additional References**

- 50 C.F.R. 600.920 Federal agency consultation with the Secretary. Includes details on the requirements of EFH Assessments. "EFH Assessment Template issued by Habitat Conservation Division, National Marine Fisheries Service, June 14, 2001, available at [www.nwr.noaa.gov/1habcon/habweb/efh/templates/efh\\_assessment\\_template.pdf](http://www.nwr.noaa.gov/1habcon/habweb/efh/templates/efh_assessment_template.pdf).
- "Essential Fish Habitat Consultation Guidance" issued by Office of Habitat Conservation, National Marine Fisheries Service, available at [www.nmfs.noaa.gov/habitat/efh/Consultation/TOC.html](http://www.nmfs.noaa.gov/habitat/efh/Consultation/TOC.html).
- "Guidance for Integrating Magnuson-Stevens Fishery Conservation and Management Act EFH Consultations with Endangered Species Act Section 7 Consultations" issued by National Marine Fisheries Service, January 2001, available at [www.nmfs.noaa.gov/habitat/habitatprotection/images/guidance1.pdf](http://www.nmfs.noaa.gov/habitat/habitatprotection/images/guidance1.pdf).
- "National Finding for use of Endangered Species Act Section 7 Consultation Process to Complete Essential Fish Habitat Consultations" issued by National Marine Fisheries Service, February 28, 2001, available at [w.nwr.noaa.gov/1habcon/habweb/efh/national\\_finding\\_2-01.pdf](http://w.nwr.noaa.gov/1habcon/habweb/efh/national_finding_2-01.pdf)

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### **H. Clean Air Act Conformity**

**Pub. L. No. 95-95 (1977), as amended**

**42 U.S.C. §7401 *et. seq.***

Because of the nature and scope of the problem to be remedied, the Clean Air Act (CAA) imposes responsibilities for its implementation on all levels of government. Among other things, the Act directs EPA to set ambient air quality standards, which are airborne pollutant levels that are sufficient to protect the public health and welfare. Each state must develop an implementation plan (SIP), describing how it will attain, maintain and enforce the air quality standards. Developing the SIP, and implementing its provisions for controlling direct and indirect emissions, is done in consultation with state air agencies and other government organizations.

Section 176(c) of the Act prohibits any federal assistance for an activity within a non-attainment or maintenance area that fails to conform to an applicable SIP. This broad provision reads in part:

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to a [State Implementation Plan].

42 U.S.C. § 7506(c)

### **Implementation in the SRF programs**

Section 176(c) is implemented through regulations published by the EPA (40 C.F.R. § 93.150 et seq (Determining Conformity of General Federal Actions to State or Federal Implementation Plans)). If a state has adopted its own set of general conformity regulations and EPA has approved them into the SIP, those regulations must be followed. The SRF assistance recipient must first determine the direct and indirect emissions from the proposed project. If a project's emissions for each nonattainment pollutant are below the de minimis thresholds set forth in the applicable regulation, no further analysis is necessary and the project is presumed to conform. If the total of direct and indirect emissions is above the applicable de minimis levels and the project is otherwise not exempt from a conformity determination, the project must be found to conform to the SIP pursuant to one of the criteria listed in the regulation. The SRF agency, in consultation with the responsible state air agency and others, must take public comment on a proposed conformity determination. Projects cannot proceed unless they are found to conform. The conformity analysis can be included in the environmental review documents.

### **Additional References**

- General Conformity Guidance: Question and Answers (July 13, 1994 and October 19, 1994 (which addresses issues with respect to SRF funded projects) found at [www.epa.gov/ttn/oarpg/genconformity.html](http://www.epa.gov/ttn/oarpg/genconformity.html).

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### **I . Safe Drinking Water Act**

**Pub. L. No. 93-523 (1974), as amended**

**42 U.S.C. 300f et. seq.**

In 1974, Congress passed the first comprehensive SDWA. The Act required water supply systems in the United States to meet certain minimum national standards to protect the public health. Under the Act, EPA is required to set standards for the wide range of contaminants that can be present in drinking water supplies. EPA's drinking water regulations are codified at 40 C.F.R. 141-143. The SDWA was significantly amended in 1976, 1986, and

1996.

In the 1974 Act, Congress emphasized preventing contamination of aquifers that are the sole source of drinking water for a community. Section 1424 of the SDWA directs EPA, upon determining that a sole source aquifer may be at risk of contamination, to publish notice of that determination in the Federal Register. In accordance with Section 1424(e) of the SDWA, 42 U.S.C. §300h-3(e), after the notice is published:

. . . no commitment for federal financial assistance (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator [of EPA] determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.

### **Implementation in the SRF Programs**

Before the SRF agency can approve project plans, SRF assistance recipients must contact state officials to determine whether a sole source aquifer is in the vicinity of the proposed project. If a sole source aquifer is in the project planning area, then the assistance recipient, in consultation with state ground water officials, must conduct investigations to determine if the aquifer could be contaminated by the project.

If the project could potentially affect ground water supplies, the assistance recipient, in consultation with ground water officials, must elect an alternative site or devise adequate mitigating measures. In the latter case, the state SRF agency must advise the EPA regional office of the assistance recipient's plans. If the EPA regional office requires additional mitigating measures, the SRF agency and the assistance recipient, with the assistance of the EPA regional office, must integrate these measures into the project's design.

### SECTION III: SOCIAL POLICY AUTHORITIES

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One way in which Congress and the Executive Branch have advanced certain social policy objectives is by linking the accomplishment of those objectives to federal assistance. For example, recipients of construction assistance under most federal programs must comply with the Executive Orders designed to ensure equal employment opportunity and to increase the participation of disadvantaged business enterprises (DBEs) in federally assisted programs and activities.

Prominent among the cross-cutting social policy authorities are four anti-discrimination laws that have special status in federally assisted programs or activities and in the SRF programs. Title VI of the Civil Rights Act of 1964 (Title VI), and the three anti-discrimination laws that were modeled on it — Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), the Age Discrimination Act of 1975 (Age Discrimination Act), and Title IX of the Education Amendments of 1972 (Title IX),<sup>22</sup> — prohibit discrimination in any federally assisted program on the basis of race, color, national origin, sex, handicap, or age. Unlike other cross-cutting authorities that apply only to the federally funded program or activity, the prohibitions of these laws generally apply to the entire operation of the organization receiving the assistance. For example, if a local school system receives federal funds to upgrade its libraries, it must comply with the civil rights laws in other aspects of its programs, including those that do not receive federal financial assistance. The legislative history of the Civil Rights Restoration Act also makes clear that, where one level or department of government receives federal financial assistance for distribution to another level or department of government, both recipients must comply with the civil rights laws.

Consequently, the state SRF agency and all recipients of SRF assistance, must comply with Title VI, the Rehabilitation Act, and the Age Discrimination Act. The CWSRF recipients must also comply with Section 13 of the federal Water Pollution Control Act Amendments of 1972 (Section 13), which prohibits sex-based discrimination in CWA programs. Section 13 of the CWA instructs EPA to enforce its requirements according to rules similar to those used to enforce the requirements of the other civil rights laws.

Because the details of implementing these four laws are the same, they will be treated collectively in this section. Implementation of the other social policy authorities will be discussed individually.

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<sup>22</sup> Title IX of the Education Act Amendments applies only to education programs and therefore will not be discussed.

**A. Civil Rights Laws (i.e., Super Cross-Cutters)**

**Title VI of the Civil Rights Act of 1964**

**42 U.S.C. § 2000d**

**Section 13 of the Federal Water Pollution Control Act Amendments of 1972**

**33 U.S.C. § 1251**

**Section 504 of the Rehabilitation Act of 1973**

**29 U.S.C. § 794**

**The Age Discrimination Act of 1975**

**42 U.S.C. § 6102**

These four laws prohibit discrimination in the provision of services or benefits, on the basis of race, color, national origin, sex, handicap or age, in programs or activities receiving federal financial assistance. If, for example, a municipality receives SRF assistance to build a wastewater treatment plant, it may not decline to provide service from that plant to a particular neighborhood because of its racial composition. As the preface to this section noted, Title VI, the Rehabilitation Act, and the Age Discrimination Act were amended in 1988 to clarify that their anti-discrimination provisions apply to the entire operations of an assistance recipient, not just to the specific program, project, or activity that is the objective of the assistance. The reach of these statutes and Section 13, which contains language instructing EPA to treat its sex discrimination provisions in a manner similar to the Civil Rights Act, extends beyond that of other cross-cutting authorities.

The following excerpts from the four laws demonstrate their prohibition of various forms of discrimination that are prohibited in federally assisted programs and activities:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

*Title VI*

No person in the United States shall, on the ground of sex be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal assistance under . . . the federal Water Pollution Control Act. . . .

*Section 13*<sup>23</sup>

(n)o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance . . . .

*Rehabilitation Act*

(n)o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving financial assistance.

*Age Discrimination Act*

### Implementation in the SRF Programs

Because of the extraordinary reach of the civil rights laws, all assistance recipients must comply with these “super cross-cutters.” Pursuant to EPA’s regulations on “Nondiscrimination in Programs receiving Federal Assistance from the Environmental Protection Agency,” the SRF agency must agree, and require all assistance recipients to agree, not to discriminate on the basis of race, color, national origin or sex. 40 C.F.R. Part 7.<sup>24</sup>

Recipients of federal assistance are required to collect and maintain information to show compliance with the laws. This information includes a list of discrimination complaints, reports of any compliance reviews conducted by other agencies, descriptions of any pending discrimination-based lawsuits, and data on the racial, ethnic, national origin, sex, and handicap characteristics of populations served. If there is “reason to believe” that discrimination may be occurring based on this review, the matter will be referred to the EPA Regional Director of Civil Rights for appropriate action.

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<sup>23</sup>Section 13 only applies to the CWSRF.

<sup>24</sup>The fact that the regulations do not address discrimination on the basis of age *does not* exempt recipients from compliance with the later-enacted Age Discrimination Act.

## **B. Equal Employment Opportunity**

### **Executive Order No. 11246 (1965)**

Through a series of Executive Orders, and a decision by the Equal Employment Opportunity Commission, the federal government has established a national policy designed to battle discrimination based on race, color, sex, religion, and national origin in federal assistance programs and to enhance hiring, training, and promotion opportunities for minorities and women in construction programs financed, in part, by federal dollars. Chief among these directives is Executive Order No. 11246, which requires all federal contracting agencies to include certain nondiscrimination and "affirmative action" provisions in all contracts and to require the recipients of federal contracts to include these provisions in subcontracts. The provisions commit the contractor or subcontractor to maintain a policy of non-discrimination in the treatment of employees, to make this policy known to employees, and to recruit, hire, and train employees without regard to race, color, sex, religion, or national origin.

Executive Order No. 11246 was signed by President Johnson on September 24, 1965 and has been amended by subsequent administration directives. Part III of the order applies equal employment opportunity principles to federally assisted construction programs.

#### **PART III - NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS**

Sec. 301. Each executive department and agency which administers a program involving federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract,<sup>25</sup> that the applicant for federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the federal government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order . . . .

Section 202 contains seven clauses that must be included in construction contracts. These clauses commit the contractor or subcontractor to refrain from discrimination in its treatment of employees and to undertake certain affirmative action practices.

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<sup>25</sup> The Executive Order defines "Construction contract" as "any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property." Executive Order 11246, §302(a).

The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor is responsible for implementing the Executive Order and for providing guidance and regulations for use by other agencies of the federal government. Contracting agencies are authorized to conduct compliance reviews and to cancel, terminate, or suspend contracts if these reviews or investigations of complaints reveal that contractors or subcontractors are failing to abide by the provisions of the Executive Order.

### **Implementation in the SRF Programs**

The SRF agency must agree to require recipients of assistance for projects whose cumulative funding equals the amount of capitalization grants to include in contracts the seven equal employment opportunity clauses of Executive Order No. 11246. This requirement does not apply to exempted contracts; typically those under \$10,000.

If the contract is to be performed in an area that has been designated by the OFCCP for special treatment, mainly metropolitan areas, contractors and subcontractors must agree to undertake affirmative action programs in accordance with regulations and other directives promulgated by that Office.

### **Additional References**

- 41 C.F.R. Part 60 (1997): Department of Labor Regulations on Equal Employment Opportunity.

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## **C. Disadvantage Business Enterprise Provisions**

### **Promoting the Use of Small, Minority, and Women-owned Businesses Executive Orders No. 11625, 12138, and 12432**

### **Section 129 of the Small Business Administration Reauthorization and Amendment Act of 1988 Pub. L. No. 100-590**

### **Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993 Pub. L. No. 102-389**

Since the early 1970s, the federal government has pursued a policy designed to increase the participation of disadvantage business enterprises (DBEs) in the financial

assistance programs of federal agencies and in contracts awarded by state and local recipients of federal assistance.

The inception of this policy was Executive Order No. 11625, which was signed by President Nixon on October 13, 1971. The Executive Order directed the Secretary of Commerce to coordinate the activities of all federal agencies in promoting opportunities for minority-owned business. This directive was followed by President Carter's Executive Order No. 12138 (May 18, 1979), which extends the policy to include business enterprises owned by women and prohibited discrimination against these entities by recipients of federal assistance. President Reagan's Executive Order No. 12432 (July 14, 1983) sets forth in more detail the responsibilities of federal agencies for monitoring, maintaining data, and reporting on the results of their efforts related to minority business development.

The Executive Orders impose far-reaching responsibilities on agencies and departments of the Federal Government, first through the Secretary of Commerce, who:

(W)ith the participation of other federal departments and agencies as appropriate, (is authorized to) develop comprehensive plans and specific program goals for the minority enterprise program, establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of federal support in achieving the objectives established by this order.

*(Executive Order No. 11625, §1(b)(1))*

Later Executive Orders impose obligations directly upon each federal agency and department. For example, President Carter's National Women's Business Enterprise Policy requires that:

(E)ach department or agency empowered to extend federal financial assistance to any program or activity shall issue regulations requiring the recipient of such assistance to take appropriate action in support of women's business enterprise and to prohibit actions or policies which discriminate against women's business enterprise on the ground of sex.

*(Executive Order No. 12138, §1-101(c))*

EPA's fiscal year 1993 Appropriations Act, Pub. L. No. 102-389, is the primary source of the Agency's DBE program for procurement under federal financial assistance. In the Appropriations Act, Congress established a goal of eight percent DBE participation in procurement under EPA financial assistance programs.

Following the Supreme Court decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), federal affirmative action programs that use racial or ethnic criteria as a basis for decision-making are subject to strict judicial scrutiny. In response to *Adarand*, EPA has

modified its DBE program to replace the 8% statutory goal with a fair share goal for procurement under assistance that is negotiated with recipients based on the availability of DBE businesses in the relevant geographic market. EPA is currently revising its various specific DBE regulatory provisions to reflect the narrow tailoring requirements of *Adarand* which will be promulgated as a new Part 33.

### **Implementation in the SRF Programs**

Requirements for states to encourage participation by disadvantaged businesses in the SRF programs are set forth in the EPA's regulations at 40 C.F.R. §35.3145(d) and (e)(CWSRF) and 40 C.F.R. § 35.3575(d). Generally, recipients of assistance in an amount equal to the capitalization grant must take "six affirmative steps" that are intended to promote the participation of disadvantaged business enterprises in their projects and activities, and thereby increase the likelihood that the state will achieve its fair share objective. During the procurement phase for the project, the assistance recipients must, to the extent practicable:

- place qualified disadvantaged businesses on solicitation lists;
- assure that disadvantaged businesses are solicited whenever they are potential sources;
- divide project requirements into smaller tasks when possible to maximize participation by disadvantaged businesses;
- establish delivery schedules that encourage disadvantaged business participation;
- obtain assistance from Federal offices responsible for promoting disadvantaged business participation and;
- require prime contractors to follow the previous steps when awarding subcontracts.

There may be additional SRF-specific provisions of the new DBE Part 33 once it has been finalized.

## SECTION IV: ECONOMIC AND MISCELLANEOUS AUTHORITIES

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The primary aim of the authorities discussed in this section differs somewhat from that of the environmental and social authorities. Where Congress and the Executive Branch seek to accomplish certain national goals by requiring compliance with cross-cutting environmental and social policy authorities, the objective of cross-cutting economic and miscellaneous authorities is to more directly regulate the expenditure of federal funds. Thus, these authorities prohibit providing assistance to a facility that has enjoyed an economic advantage from its failure to comply with the CAA or the CWA, (Executive Order No. 11738, 3 C.F.R. 799 (1973)), or prohibit assistance recipients from entering into a procurement contract with a corporation that has been barred or suspended from doing business with the federal government.

The sources for many of the economic and miscellaneous authorities are Executive Orders, Congressional appropriations, and government-wide policies promulgated by the Office of Management and Budget (OMB). These authorities typically serve as the source for rules governing the operations of federal agencies rather than as the roots of significant national policy.

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### **A. Prohibitions Relating to Violators of the Clean Air Act and the Clean Water Act with Respect to Federal Contracts, Grants, or Loans**

**Executive Order No. 11738 (1973)  
Section 306 of the Clean Air Act,  
42 U.S.C. § 7606, and  
Section 508 of the Clean Water Act,  
33 U.S.C § 1368**

Both the CAA and the CWA prohibit federal agencies from procuring goods or services from—or extending assistance by way of grant, loan or contract to — persons who have been convicted of violations of either law. Executive Order No. 11738 was issued to coordinate enforcement of these provisions by conferring certain responsibilities on the EPA Administrator. Under section 2(b) of Executive Order No. 11738, the Administrator

shall. . . designate facilities which have given rise to a conviction for an offense under (the criminal provisions of the CAA and the CWA).

The Executive Order also prohibits federal agencies from extending assistance to facilities that are not in compliance with either Act. Section 3(b) of Executive Order No. 11738 provides that:

(N)o federal agency authorized to extend federal assistance by way of grant, loan or contract shall extend such assistance in any case in which it is to be used to support any activity or program involving the use of a facility then designated by the Administrator pursuant to section 2.

The prohibition of section 3(b) does not apply if the purpose of the assistance is to remedy the cause of the CAA or CWA violation.

### **Implementation in the SRF Programs**

The SRF agency must agree to advise assistance recipients that they may not procure goods, services, or materials from listed suppliers. The state must also certify that assistance to facilities that are not in compliance with the laws will be extended to remedy the problems giving rise to the violation.

### **Additional References**

- Excluded Parties Listing System: <http://epls.arnet.gov/>

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### **B. Debarment and Suspension Executive Order No. 12549 (1986)**

On February 18, 1986, the White House instructed OMB to coordinate a government-wide policy for excluding certain individuals and businesses from participation in federal assistance programs. OMB responded to Executive Order No. 12549 by issuing guidelines for development of a "common rule" on debarment and suspension in non-procurement activities. Agencies were required by OMB to adopt the common rule to provide uniformity, but were allowed to make additions to suit specific needs. EPA's version of the common rule was published at 53 Fed. Reg. 19195 (1988 ) and is codified at 40 C.F.R. Part 32 (1997).

It is the policy of the Executive Order and regulations issued thereunder to protect the federal interest, and thereby the interest of the public, by excluding individuals and businesses who, by their actions, have relinquished their claim to certain federal assistance programs. A person or business can be debarred from participation in assistance programs for conviction or for civil judgments for offenses such as fraud, antitrust violations, embezzlement or theft, or for serious violations of the terms of public agreements or transactions. There are other causes as well that can be established administratively by a preponderance of the evidence. Suspension can be imposed when adequate evidence exists that a person or business is engaging in activities that would give rise to debarment.

The regulations specify the programs and activities covered by the Executive Order, the

minimum due process standards that the EPA must follow before finding a person ineligible, including the appeal process, and the consequences of a debarment or suspension action — the exclusion for a period of time from participation in any similar assistance programs administered by any federal agency.

### **Implementation in the SRF Programs**

A company or individual who is debarred or suspended cannot participate in primary and lower tiered covered transactions. These transactions include SRF loans and contracts and subcontracts awarded with SRF loan funds.

Under 40 C.F.R. 32.510, the SRF agency must submit a certification stating that it shall not knowingly enter into any transaction with a person who is proposed for debarment, suspended, declared ineligible, or voluntarily excluded from participation in the SRF program. This certification is reviewed by the EPA regional office before the capitalization grant is awarded.

A recipient of SRF assistance directly made available by capitalization grants must provide a certification that it will not knowingly enter into a contract with anyone who is ineligible under the regulations to participate in the project. Contractors on the project have to provide a similar certification prior to the award of a contract and subcontractors on the project have to provide the general contractor with the certification prior to the award of any subcontract.

In addition to actions taken under 40 C.F.R. Part 32, there are a wide range of other sanctions that can render a party ineligible to participate in the SRF program. Lists of debarred, suspended and otherwise ineligible parties are maintained by the General Services Administration and should be checked by the SRF agency and all recipients of funds directly made available by capitalization grants to ensure the accuracy of certifications.

### **Additional References**

- 40 C.F.R. Part 32: EPA Regulations on Debarment and Suspension.
- Excluded Parties Listing System: <http://epls.arnet.gov/>

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### **C. Demonstration Cities and Metropolitan Development Act Pub. L. No. 89-754 (1966), as amended 42 U.S.C. § 3331 *et. seq.***

During the 1960s, as the pace of growth in the nation's urban areas quickened, a host of federal programs were established to provide assistance in these areas for housing, roads, hospitals, water supply, and wastewater treatment. The sheer number of these programs

began to complicate the planning efforts of local officials.

In 1966, Congress enacted the Demonstration Cities and Metropolitan Development Act, title II of which instructed federal agencies to consult with local officials to ensure smoother coordination of their assistance programs and to ensure that projects funded under federal programs are consistent with local planning requirements.

The coordination and consultation directions (42 U.S.C. § 3334(a)) read in part:

(a) All applications . . . for federal loans or grants to assist in carrying out open-space land projects or for the planning or construction of . . . water supply and distribution facilities, sewerage facilities and waste treatment works . . . and water development projects . . . within any metropolitan area shall be submitted for review—

(1) to any area wide agency which is designated to perform metropolitan or regional planning for the area . . . and which is, to the greatest practicable extent, composed of or responsible to the elected officials . . . .

### **Implementation in the SRF Programs**

Responsibility for following intergovernmental review procedures in the SRF program rests with the SRF agency. The SRF agency must contact the state's single point of contact as early as possible to determine whether capitalization grant applications are subject to the state's intergovernmental review process and what materials must be submitted. Single points of contact and other reviewers should send their comments concerning applications for capitalization grants to the grant applicant who will include them in the grant application package submitted to the EPA regional office no later than 60 days after receipt of an application and other required materials for review. The state may require the SRF agency to submit individual assistance agreements to the single point of contact for review as well.

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#### **D. Uniform Relocation Assistance and Real Property Acquisition Policies Act Pub. L. No. 91-646 (1971), as amended 42 U.S.C. §§ 4601-4655**

The Uniform Relocation Assistance and Real Property Acquisition Policies Act establishes a uniform policy for fair and equitable treatment of persons who are displaced from their homes, farms, or businesses to make way for federal or federally assisted projects. It provides basic guidelines for negotiating the acquisition of real property by the federal government. The Act also requires agencies to reimburse individuals for actual and reasonable expenses incident to relocation, such as moving costs, direct loss of tangible personal property associated with moving or discontinuing a business, and expenses involved in searching for a replacement home or business site.

Section 305 of the Act prohibits federal agencies from:

approv(ing) any program or project or any grant to, or contract or agreement with, a state agency or person provided such authority by regulation under which federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property . . . unless (the state provides assurances) that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under state law, by the land acquisition policies (of title III of the Act), and

(2) property owners will be paid or reimbursed for necessary expenses as specified (in the title III provisions).

*(42 U.S.C. § 4655 (1988))*

The Act was significantly amended in 1987 by the Surface Transportation and Uniform Relocation Assistance Act, Pub. L. No. 100-17, 101 Stat. 132 . The 1987 Amendments assigned implementation responsibility to the Department of Transportation. The amendments also enhanced state and local autonomy by authorizing certification of state and local programs which are carried out in accordance with state laws that are consistent with the Act. (42 U.S.C. § 4606 (1988)).

The Act was further amended in 1997 to provide that a displaced person is not eligible to receive relocation payments or any other assistance under the Act if the displaced person is an alien not lawfully present in the United States, unless such ineligibility would result in exceptionally and extremely unusual hardship to the alien's spouse, parent, or child and such relative is a citizen or an alien admitted for permanent residence. (42 U.S.C. § 4605).

### **Implementation in the SRF Programs**

Projects or activities receiving SRF assistance in an amount equal to the capitalization grant must comply with the Act's implementing regulations at 49 CFR 24.101 through 24.105. The cost of complying with the Act is an eligible cost that can be included in the SRF loan. The state SRF agency must certify that state rules governing land acquisition and relocation assistance are consistent with the purposes of the Uniform Relocation Act or that SRF assistance recipients will comply with federal law, and that assistance recipients will be required to comply with the appropriate rules. A key aspect of the law is to require use of a professional appraisal to determine the fair market value as a basis for establishing the offer price. In the DWSRF program there is a specific requirement in the SDWA that any land acquired must be from a willing seller. SDWA §1452(a)(2)). The term "willing seller" means that the property owner voluntarily agrees to the terms and conditions of the purchase without compulsion to sell.

### Additional References

- 49 C.F.R. Part 24 (Department of Transportation regulations incorporated by reference at 40 C.F.R. Part 4)

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## **E. Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects**

### **Executive Order No. 13202 (2001), as amended by Executive Order No. 13208 (2001)**

Executive Order No. 13202, signed February 17, 2001 and amended April 4, 2001, requires all executive agencies that award construction contracts, issue grants or otherwise fund construction contracts after February 17, 2001 to ensure Government neutrality toward contractors' labor relations. The Executive Order prohibits discrimination against contractors and their employees in construction contracts based upon labor affiliation or lack thereof. In addition, the executive agency must not insist upon, nor forbid, project labor agreements. More concretely, bidding specifications, project agreements and other controlling documents must not require, prohibit or otherwise discriminate, with respect to labor affiliation or lack thereof. However, the Executive Order does not prohibit contractors and subcontractors from affiliating with labor organizations or voluntarily entering into labor agreements. Section 3 of the Executive Order addresses grant recipients specifically, mandating that:

To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1 (a) or (b) of this order.

### **Implementation in the SRF Programs**

Grants awarded to SRF assistance recipients after February 17, 2001 are subject to the provisions of Executive Order No. 13202. Grants awarded between January 25 and October 18, 2002, the period during which the OMB suspended implementation of the Order, are not subject to its provisions.

SRF assistance recipients must ensure that bid specifications, project agreements, and other controlling documents for construction contracts awarded after February 17, 2001 do not require or prohibit agreements with labor organizations. Further, SRF assistance recipients and any construction manager acting upon their behalf must not otherwise discriminate against bidders, offerors, contractors, or subcontractors for entering into, or refusing to enter into,

agreements with labor organizations.

SRF assistance recipients otherwise subject to the provisions of the Executive Order may qualify for an exemption. Under Subsection 5(c), EPA must find that the recipient of federal funding was a party to a project labor agreement or other controlling agreement as of the date of the original Order and one or more construction contracts have been awarded under such agreement as of the date of the original Order.