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STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED REVISIONS
TO 20.7.5 NMAC, WASTEWATER
FACILITY CONSTRUCTION LOANS

WQCC No. 20-07 (R)

New Mexico Environment
Department,

Petitioner.

STATEMENT OF REASONS AND ORDER

STATEMENT OF REASONS

1. This matter came before a quorum of the New Mexico Water Quality Control Commission (“Commission”) on the Petition for Regulatory Change filed by the New Mexico Environment Department (“Department”) on February 12, 2020, and docketed as WQCC No. 20-07 (R). *See*, Petition for Regulatory Change.
2. At a public meeting held on March 10, 2020, in compliance with the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4, and other applicable requirements, the Commission after due deliberation granted the Petition for Regulatory Change and scheduled a public hearing to consider the proposed changes for July 14, 2020. *See* Order Setting Public Hearing on Proposed Regulatory Change and Designating Hearing Officer.
3. Due to the ongoing COVID-19 public health emergency, restrictions in place by the Governor’s Executive Orders and public health emergency orders, and other agency concerns, the Commission held the public hearing on the Petition for Regulatory Change using a Cisco

WebEx platform, beginning at 9:00 a.m. on Tuesday, September 8, 2020. *See* Public Notice and Order Setting Hearing Date signed August 5, 2020.

4. The Department provided proper notice of the public hearing, in accordance with 20.1.6.201 NMAC. NMED Exhibit 1, pg. 1.

5. The Department published the public notice in the New Mexico Register in Spanish and English on May 5, 2020. NMED Exhibit 5.

6. The Department published the public notice in Spanish and English in the Albuquerque Journal, a state newspaper of general circulation, on May 15, 2020. NMED Exhibits 6 and 7.

7. The Department sent the public notice to the New Mexico Small Business Regulatory Advisory Commission on May 20, 2020. NMED Exhibit 8.

8. On May 12, 202, the Department sent the public notice to the interested parties on the list maintained for the Commission. NMED Exhibit 9.

9. The Department published the notice on the Department webpage. NMED Exhibit 10.

10. The Department sent the public notice for posting on the New Mexico Sunshine Portal on May 15, 2020. NMED Exhibit 11.

11. The Department sent the public notice to the Legislative Council Service for distribution to the appropriate legislative committees on May 12, 2020. NMED Exhibit 12.

12. The Department was unable to post public notice at its offices because they were closed to public access due to the ongoing COVID-19 pandemic. NMED Exhibit 13.

13. The Department filed a Notice of Intent to Present Technical Testimony on June 29, 2020.

See, NMED Notice of Intent to Present Technical Testimony.

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14. No other parties submitted a Notice of Intent to Present Technical Testimony in the rulemaking proceeding. *See* Administrative Record.

15. The Albuquerque Bernalillo County Water Utility Authority (“ABCWUA”) provided written public comment supporting the proposed changes to 20.7.5 NMAC. *See*, June 30, 2020 ABCWUA Letter.

16. NMSA 1978, § 74-6A-4 of the Wastewater Facility Construction Loan Act (“Act”), NMSA 1978, §§ 74-6A-1 to -15, creates the revolving “Wastewater Facility Construction Loan Fund, “which is also referred to as the Clean Water State Revolving Loan Fund (“CWSRF”).

17. The legislative purpose of the Act is to provide low-cost financial assistance in the construction of wastewater and storm water drainage projects that protect surface and ground waters, including projects that control nonpoint source water pollution and projects that involve solid waste and septic tank installations. *See*, NMSA 1978, § 74-6A-2; NMED Exhibit 1, pg. 1.

18. The CWSRF is funded through a mixture of federal and state dollars pursuant to a capitalization grant agreement between the State and the Administrator. 33 U.S.C. § 1382; NMED Exhibit 1, pg. 1.

19. The CWSRF is administered by the Construction Programs Bureau (“Bureau”) of the Department pursuant to procedures established and regulations adopted by the Commission at 20.7.5 NMAC (“Wastewater Facility Construction Loans”). *See*, NMSA 1978, § 74-6A-4(A); NMED Exhibit 1, pg. 1.

20. Congress appropriates funds for fiscal years to be allotted for grants for constructing needed publicly owned treatment works in each State, 33 U.S.C. § 1285, which are administered

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as a dedicated fund by the Bureau as agent for the Commission, pursuant to NMSA 1978, § 74-6A-4.1.

21. “The [C]ommission may establish procedures, adopt regulations and set fees as required to administer the clean water administrative fund in accordance with the Clean Water Act and state law.” NMSA 1978, § 74-6A-4.1(A) (2007).

22. In administering the Act, the Commission is authorized “to adopt regulations necessary and appropriate to implement the provisions of the [Act].” NMSA 1978, § 74-6A-9(A)(10).

23. The Bureau submitted proposed amendments to 20.7.5 NMAC for the Commission’s consideration. NMED Exhibit 1, pg. 2; NMED Exhibit 2.

24. The Commission heard and considered testimony from Rhonda Holderman and Judi Kahl as to the administration of the CWSRF, the proposed amendments to 20.7.5 NMAC, and the federal grants for needed publicly owned treatment works. NMED Exhibits 1, 3, and 4.

25. . At the beginning of each State fiscal year, the Commission may determine a base rate for that fiscal year which is less than or greater than the current base rate, 20.7.5.14(G) NMAC, and financial assistance must be made with an annual interest rate of five percent or less, as determined by the Commission. NMSA 1978, § 74-6A-8(D).

26. Other available rates are lower than and are exceptions to the base rate. 20.7.5.14 NMAC; NMED Exhibit 1, pg. 2.

27. The associated conditions for alternative or hardship rates are set forth at 20.7.5.14(H) NMAC. NMED Exhibit 1, pg. 4.

28. Neither state nor federal law requires these rates to be set forth in the Wastewater Facility Construction Loans regulations issued by the Commission. NMED Exhibit 1, pg. 4 (citing 33 U.S.C. § 1383(d) and NMSA 1978, §§ 74-6A-8(A), (D), or (E)).

29. The New Mexico Finance Authority (“NMFA”) administers a similar revolving loan fund, the Drinking Water State Revolving Loan Fund, to provide local authorities in New Mexico with low-cost financial assistance in the construction and rehabilitation of necessary drinking water facilities through the creation of a self-sustaining revolving loan program so as to improve and protect drinking water quality and public health. NMSA 1978, § 6-21A-2; NMSA 1978, § 6-21A-24.

30. NMFA determines annual alternative interest rates through internal policy rather than through issued regulations, thereby providing a more flexible means of determining applicable annual interest rates periodically. *Cf.*, NMED Exhibit 1, pg. 4; NMED Exhibit 14, Section VI.

31. Removing the promulgation and issuance of annual interest rates by regulation allows the Commission and the Bureau flexibility in periodically establishing annual interest rates more reflective of current market conditions. *Cf.*, NMSA 1978, § 6-21A-2. NMED Exhibit 1, pp. 3-4.

32. Allowing the Bureau to determine hardship criteria and rates will also provide needed flexibility to drawdown current CWSRF balances. *See*, NMED Exhibit 1, pp. 4-5.

33. Conditions to be met by a local authority (as defined in NMSA 1978, § 74-6A-3(O)) for a zero-percent interest rate, including the local authority’s per capita income relative to the State’s per capita income, are set forth in NMSA 1978, § 74-6A-8(E).

34. The Bureau's proposed means of determining additional alternative rates is likewise based on per capita income which the Legislature has found to be an appropriate method of determining hardship rates. NMED Exhibit 1, pg. 5; *cf.*, NMSA 1978, § 74-6A-8(E).

35. As promulgated by the Commission, the associated conditions local authorities must meet for hardship rates, as set forth in 20.7.5.14(H)(3) NMAC, effectively limit financial assistance (grant subsidies) to rural communities. *See*, NMED Exhibit 1, pg. 5.

36. Applicable federal statutes and regulations on determination of the priority to be given for each category of projects for construction of publicly owned treatment works provide that "[t]he [State] priority system should give high priority to projects in priority water quality areas." *See*, 33 U.S.C. § 1296; 40 C.F.R. § 35.2015(b).

37. State priority ranking systems must include criteria for ranking projects including at least (a) "[t]he impairment of classified water uses resulting from existing municipal pollutant discharges," and (b) "[t]he extent of surface or ground water use restoration or public health improvement resulting from the reduction of pollution." 40 C.F.R. § 35.2015(b)(1)(i). 40 C.F.R. § 35.2015(b) places importance on water quality and pollution reduction, but makes no mention of population.

38. Removing the grant restriction will allow grants to be made based on water quality and pollution reduction, while still giving due consideration to population and socioeconomic factors through the affordability criteria. NMED Exhibit 1, p.5.

39. The Commission has the authority to approve these proposed amendments pursuant to NMSA 1978, Sections 74-6A-4.1(A) and 74-6A-9(A).

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40. The Commission noted a typographical error in the title for 20.7.5.13 NMAC and directed the Bureau to correct it prior to publication of the amended regulation.

ORDER

THEREFORE, IT IS ORDERED that, based on the foregoing Statement of Reasons, the proposed amendments to 20.7.5 NMAC as set forth in NMED Exhibit 1, pg. 2 and NMED Exhibit 2, were adopted on September 8, 2020, by a unanimous roll call vote of a quorum of the Commission. Those amendments, as corrected for the typographical error, and with any appropriate format or style corrections or other changes required by rule of the State Records Administrator, shall be filed with the New Mexico State Records Center. Notice of the Commission Action shall be completed pursuant to 20.1.6.307 NMAC. The regulatory changes adopted under this Order shall be effective on the date of publication in the New Mexico Register, as provided in NMSA 1978, § 14-4-5(D).

Dated this 29th day of September, 2020.

Digitally signed by Jennifer
Pruett
Date: 2020.09.29 08:48:31
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Jennifer Pruett
Jennifer J. Pruett, Chair
New Mexico Water Quality Control Commission

Certificate of Service

I hereby certify that on 9/29/20 a copy of the Statement of Reasons and Order was emailed to the persons listed below. A copy can be mailed via U.S. first-class mail upon request.

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