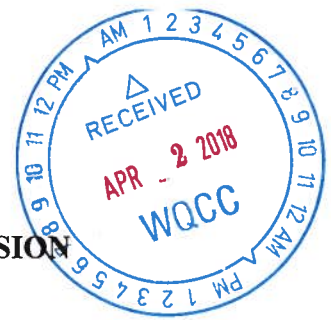


STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF PROPOSED  
REVISIONS TO: 20.7.5 NMAC –  
Wastewater Facility Construction Loans

No. WQCC 18-<sup>01</sup>(R)

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PETITION FOR REGULATORY CHANGE

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The New Mexico Environment Department ("Department"), pursuant to 20.1.6 NMAC, petitions the Water Quality Control Commission ("Commission") to revise 20.7.5 NMAC – *Wastewater Facility Construction Loans*. A statement of reasons in support of this petition is attached as Exhibit A. The Department's proposed regulatory revision is attached as Exhibit B. The Commission is authorized to adopt these regulations by the Wastewater Facility Construction Loan Act, NMSA 1978, Section 74-6A-9(A)(10).

The Department requests that the Commission schedule the hearing for August 14, 2018, in conjunction with the Commission's regular meeting. The Department anticipates that its testimony regarding the proposed revisions will require roughly one and one-half hours.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT  
OFFICE OF GENERAL COUNSEL

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## STATEMENT OF REASONS

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The Wastewater Facility Construction Loan Act (“Act”) (NMSA 1978, §§ 74-6A-1 to -15 (1986)) creates the Wastewater Facility Construction Loan Fund, which is also referred to as the Clean Water State Revolving Loan Fund (“CWSRF”). The purpose of the CWSRF is to provide low-cost financing for wastewater and storm water drainage projects that protect surface and ground water, including projects that control nonpoint source water pollution and projects involving solid waste and septic tank installations. The CWSRF is funded through a mixture of federal and state dollars pursuant to a capitalization grant agreement. 33 U.S.C. § 1382. The CWSRF is administered by the Construction Programs Bureau (“Bureau”) of the New Mexico Environment Department (“Department”) pursuant to regulations established by the Water Quality Control Commission Commission at 20.7.5 NMAC.

During the 2017 New Mexico Legislative Session, Representatives Randall Crowder and Rodolpho Martinez sponsored House Bill 415 (“HB 415”), which added state agencies to the list of entities eligible to apply for CWSRF funding. *See* Chapter 114, 53<sup>rd</sup> Legislature, 1<sup>st</sup> session, Laws of New Mexico (2017). Specifically, HB 415 amended NMSA 1978, Section 74-6A-8(A) to allow state agencies, in addition to local authorities, to receive financial assistance. *Id.* While there are other requirements to be met in determining state agency eligibility for a CWSRF loan, including compliance with Article 9, Section 8 of the New Mexico Constitution, this amendment allowed state agencies to apply for CWSRF funding in certain circumstances. Governor Martinez signed HB 415 on April 6, 2017.

On June 10, 2014, President Obama signed the Water Resources Reform and Development Act of 2014 (“WRRDA”). WRRDA, H.R. 3080, 113<sup>th</sup> Cong. (2014). The United States Environmental Protection Agency (“EPA”) issued guidance on September 18, 2014, and again on January 6, 2015, to aid states in administering CWSRF funds. Generally, the EPA’s guidance expands the entities eligible for CWSRF funding as well as the potential eligible projects. During the 2018 New Mexico Legislative Session, Representative Randall Crowder sponsored House Bill 66 (“HB 66”), which proposed amendments to the Act that expanded the scope and eligibility of borrowers and projects for the CWSRF beyond the addition of state agencies in 2017. *See* Chapter 19, 53<sup>rd</sup> Legislature, 2<sup>nd</sup> Session, Laws of New Mexico (2018). Most importantly, HB 66:

- 1) Amended the definition of an eligible project in NMSA 1978, Section 74-6A-3(H) to specify that eligible projects and activities are those allowed pursuant to Section 603(c) of the Clean Water Act, Section 1383 of Title 33 of the United States Code;
- 2) Amended the definition of a qualified borrower in NMSA 1978, Section 74-6A-3(Q) to include any creditworthy borrower with an identified and verifiable repayment source eligible to receive funding pursuant to the Clean Water Act;
- 3) Restructured and revised the definitions in NMSA 1978, Section 74-6A-3 to alphabetical order and for consistency with the amendments to eligible projects and qualified borrowers;
- 4) Amended language throughout the Act to accommodate the expanded scope of eligible projects and borrowers as well as accounting for the related practical considerations in administering the CWSRF; and
- 5) Amended NMSA 1978, Section 74-6A-8(E) to change the financial criteria for a zero-percent loan from an average user cost of at least \$15 per month or higher to an average user cost greater than one and eighty-two hundredths percent of the local authority’s per

capita income and from a median household income of less than three-fourths of the statewide nonmetropolitan median household income to per capita income. *Id.*

HB 66 aligns the statutory grant of authority to the Commission for the CWSRF with the EPA's expanded interpretation of WRRDA. Through this more expansive grant of authority, the Bureau may be able to better use existing balances within the CWSRF for infrastructure development within the state. Governor Martinez signed HB 66 on February 28, 2018.

The Bureau's proposed amendments to 20.7.5 NMAC will enable the Bureau to expand the list of potential eligible applicants for CWSRF as well as potential projects. This will allow for greater drawdown of currently available funds and fulfillment of the purposes of the Act.

**TITLE 20 ENVIRONMENTAL PROTECTION**  
**CHAPTER 7 WASTEWATER AND WATER SUPPLY FACILITIES**  
**PART 5 WASTEWATER FACILITY CONSTRUCTION LOANS**

**20.7.5.1 ISSUING AGENCY:** Water Quality Control Commission.  
[20.7.5.1 NMAC - Rp, 20.7.5.1 NMAC, 12/16/2015]

**20.7.5.2 SCOPE:** This part applies to financial assistance and actions pursuant to the Wastewater Facility Construction Loan Act.  
[20.7.5.2 NMAC - Rp, 20.7.5.2 NMAC, 12/16/2015]

**20.7.5.3 STATUTORY AUTHORITY:** Wastewater Facility Construction Loan Act, Sections 74-6A-1 to -15 NMSA 1978, as amended.  
[20.7.5.3 NMAC - Rp, 20.7.5.3 NMAC, 12/16/2015]

**20.7.5.4 DURATION:** Permanent.  
[20.7.5.4 NMAC - Rp, 20.7.5.4 NMAC, 12/16/2015]

**20.7.5.5 EFFECTIVE DATE:** December 16, 2015, unless a later date is cited at the end of a section.  
[20.7.5.5 NMAC - Rp, 20.7.5.5 NMAC, 12/16/2015]

**20.7.5.6 OBJECTIVE:** The objective of this part is to establish a program to provide low cost financial assistance to state agencies, local authorities, interstate agencies, and other qualified borrowers for the acquisition, construction, or modification of wastewater facilities or other eligible projects or activities pursuant to the act.  
[20.7.5.6 NMAC - Rp, 20.7.5.6 NMAC, 12/16/2015]

**20.7.5.7 DEFINITIONS:** as used in this part:

- A. "Act" means the Wastewater Facility Construction Loan Act.
- B. "Administrative fee" means a fee assessed and collected by the department from the [~~local authority~~] qualified borrower on each loan and expressed as a percentage per year on the outstanding principal amount of the loan, payable by the borrower on the same date that principal and interest on the loan are due, for deposit in the clean water administrative fund.
- C. "Clean Water Act" means the federal Clean Water Act of 1977 and its subsequent amendments or successor provisions.
- D. "Clean water state revolving loan administrative fund" means a separate fund created outside the wastewater facility construction loan fund/clean water state revolving fund designated solely for the costs of administering the clean water state revolving loan fund, in accordance with the Clean Water Act. Money remaining in the fund at the end of any fiscal year shall not revert to the general fund but shall accrue to the loan administrative fund and shall be used explicitly for the purpose above.
- E. "Commission" means the water quality control commission.
- F. "Department" means the New Mexico environment department.
- G. "Eligible project" means any project or activity that is eligible for funding assistance under Section 603(c) of the Clean Water Act, Section 1383 of Title 33 of the United States Code, as of January 1, 2018, including a wastewater facility project, a nonpoint source water pollution control project, and a watershed project that meet the criteria of the Clean Water Act.

[G.]~~H.~~ "Final loan agreement" means an agreement executed by the [~~local authority~~] qualified borrower and the department upon completion of the project in order to [~~evidence~~] document the permanent financing of the final loan amount.

[H.]~~I.~~ "Final loan amount" means the aggregate amount of the principal disbursed by the department to the [~~local authority~~] qualified borrower during the construction of the [~~wastewater facility~~] eligible project, together with accrued and unpaid interest on the aggregate principal thereof.

[I.]~~J.~~ "Financial assistance" means loans, combination loan/grants, the purchase or refinancing of existing state agency or local political subdivision obligations, loan guarantees, credit enhancement techniques to reduce interest on loans and bonds, bond insurance and bond guarantees, or any combination of these purposes.

[J.]~~K.~~ "Force account construction" means construction performed by the employees of a local authority rather than through a contractor.

~~[K.]L.~~ “Fund” means the wastewater facility construction loan fund established in Section 74-6A-4 of the ~~[Wastewater Facility Construction Loan Act]~~ act.

~~[L.]M.~~ ~~“Local authority” means any municipality, county, water and sanitation district or any similar district, recognized Indian tribe, mutual domestic water consumers association as defined by the Sanitary Projects Act, or other issuing agency created pursuant to a joint powers agreement acting on behalf of any entity listed in this subsection.~~ “Local authority” means a municipality, intermunicipal agency, county, incorporated county, mutual domestic water consumers association as defined by the Sanitary Projects Act, sanitation district, water and sanitation district or any similar district, recognized Indian tribe, or other issuing agency created pursuant to a joint powers agreement acting on behalf of any entity listed in this subsection.

~~[M.]N.~~ “Payment” means a disbursement from the fund directly to the ~~[local authority]~~ qualified borrower.

~~[N.]O.~~ “Priority list” means the list of eligible projects ranked according to the priority system pursuant to the ~~[Wastewater Facility Construction Loan Act.]~~ act.

~~[O.]P.~~ “Priority system” means the system approved by the commission for ranking eligible projects for which financial assistance applications have been received pursuant to the act.

O. “Qualified borrower” means a creditworthy borrower with an identified and verifiable repayment source that is eligible for funding pursuant to the Clean Water Act, as of January 1, 2018, including a state agency, an interstate agency, and a local authority.

R. “State agency” means an agency or department of the executive branch of government.

~~[P.]S.~~ “Wastewater facility” means a publicly owned system for treating or disposing of sewage or wastes either by surface or underground methods, including any equipment, plant, treatment works, structure, machinery, apparatus or land in any combination, that is acquired, used, constructed or operated for the storage, collection, reduction, recycling, reclamation, disposal, separation or treatment of water or wastes, or for the final disposal of residues resulting from the treatment of water or wastes, such as pumping and ventilating stations, facilities, plants and works, outfall sewers, interceptor sewers and collector sewers, and other real or personal property and appurtenances incidental to their use or operation. ~~“Wastewater facility” also includes a nonpoint source water pollution control or Brownfield redevelopment project as eligible under the Clean Water Act.~~

~~[Q.]T.~~ ~~Other terms will retain their definition as given in the act.~~

[20.7.5.7 NMAC - Rp, 20.7.5.7 NMAC, 12/16/2015]

**20.7.5.8 CONSTRUCTION:** This part shall be liberally construed to effectuate the purposes of the act. If any provision or application of this part is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

[20.7.5.8 NMAC - Rp, 20.7.5.8 NMAC, 12/16/2015]

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

[20.7.5.9 NMAC - Rp, 20.7.5.9 NMAC, 12/16/2015]

**20.7.5.10 ELIGIBILITY REQUIREMENTS FOR FINANCIAL ASSISTANCE:**

- A. Only ~~[local authorities]~~ qualified borrowers will be eligible for financial assistance from the fund.
- B. The project must appear on the current priority list at the time of the financial assistance award.
- C. To be eligible for financial assistance from the fund, ~~[local authorities]~~ qualified borrowers shall:
  - (1) meet the requirements of financial capability set by the department to assure sufficient revenue to operate and maintain the facility for its useful life, if applicable, and to repay the financial assistance;
  - (2) agree to operate and maintain the ~~[wastewater facility]~~ eligible project so that the ~~[facility]~~ project will function properly over its structural and material design life, if applicable;
  - (3) agree to maintain separate project accounts, to maintain project accounts properly in accordance with generally accepted accounting principles and to conduct an audit of the project's financial records;
  - (4) agree to provide a written assurance prior to construction, signed by an attorney, or other authorized representative, that the ~~[local authority]~~ qualified borrower has or will acquire proper title, easements and rights-of-way to the property upon or through which the ~~[wastewater facility]~~ eligible project proposed for funding is to be constructed or extended;
  - (5) require the contractor of the ~~[construction]~~ eligible project to post a performance and payment bond in accordance with the requirements of Section 13-4-18 NMSA 1978 and its subsequent amendments and successor provisions;

(6) provide a written notice of project completion [~~and start of operation of the wastewater facility~~]; and

(7) provide such information to the department as required [~~by the commission~~] in order to comply with the provisions of the Clean Water Act and state law.

D. Financial assistance shall be made only to [~~local authorities~~] qualified borrowers that establish one or more dedicated sources of revenue to repay the money received from the commission and to provide for operation, maintenance, and equipment replacement expenses.

[20.7.5.10 NMAC - Rp, 20.7.5.10 NMAC, 12/16/2015]

#### 20.7.5.11 APPLICATION PROCEDURES FOR PRIORITY LIST PLACEMENT:

A. Applications for financial assistance shall be made by the [~~local authority~~] qualified borrower on a form specified by the department.

B. Applicants for financial assistance shall provide the department with:

(1) a description of the scope of work of the project;

(2) a cost estimate of the project; and

(3) a target date for initiation of construction.

C. The department will review the application for eligibility, and technical merits. The department will notify the [~~local authority~~] qualified borrower of any inadequacies in the submittal. The [~~local authority~~] qualified borrower may correct any inadequacies and resubmit the application.

D. Upon determination by the department that an application is eligible and complete, the application will be ranked utilizing the priority system and will be placed on the priority list.

[20.7.5.11 NMAC - Rp, 20.7.5.11 NMAC, 12/16/2015]

#### 20.7.5.12 PRIORITY SYSTEM AND PRIORITY LIST:

A. Financial assistance shall only be made to [~~local authorities~~] qualified borrowers on the project priority list developed in accordance with the priority system as adopted by the commission.

B. The commission shall adopt a system for the ranking of projects for financial assistance.

C. The department shall prepare a priority list of applicants for financial assistance based on the priority system approved by the commission.

[20.7.5.12 NMAC - Rp, 20.7.5.12 NMAC, 12/16/2015]

#### 20.7.5.13 ELIGIBLE AND INELIGIBLE FINANCIAL ASSISTANCE ITEMS:

A. Eligible items for financial assistance made from state-only funds include but are not limited to the costs of engineering [~~feasibility~~] reports, contracted engineering design, inspection of construction, special engineering services, start-up services, contracted construction, materials purchased or equipment leased for force account construction, land, or acquisition of existing facilities. For financial assistance made from federal funds, eligible items are those identified pursuant to the Clean Water Act.

B. Financial assistance shall be made only to [~~local authorities~~] qualified borrowers that employ or contract with a [~~registered~~] New Mexico licensed professional engineer to provide and be responsible for engineering services on the project. Such services include, but are not limited to [~~an engineering report~~] engineering reports, construction contract documents, supervision of construction, and start-up services.

C. Ineligible for financial assistance made with state-only funds items include:

(1) the costs of water rights;

(2) [~~local authority~~] administrative costs;

(3) fulfillment or partial fulfillment of requirements made of a subdivider by the provisions of the Land Subdivision Act or the New Mexico Subdivision Act;

(4) force account construction; and

(5) administrative [~~fee~~] fees.

[20.7.5.13 NMAC - Rp, 20.7.5.13 NMAC, 12/16/2015]

#### 20.7.5.14 ADMINISTRATION OF THE LOAN PROGRAM AND FUND:

A. The loan program and fund is administered by the department as agent for the commission. Pursuant to Section 74-6A-9.A(10) of the [~~Wastewater Facility Construction Loan~~] act, the department shall develop new, and implement existing, policies, procedures, and guidelines necessary and appropriate to implement the provisions of the act and the Clean Water Act.

**B.** The necessary administrative expenses required of the board, the commission, and the department to implement the provisions of the act will be appropriated from the fund.

**C.** The department may impose and collect a fee from each ~~[local authority]~~ qualified borrower that receives financial assistance from the fund, which fee shall be deposited into the clean water state revolving loan administrative fund, and used solely for the costs of administering the fund as follows:

(1) an administrative fee may be assessed on all financial assistance provided after January 1, 1996, and will be assessed on the refinancing of financial assistance after October 1, 1993;

(2) if an administrative fee is assessed pursuant to Paragraph (1) of Subsection C of 20.7.5.14 NMAC above, the total administrative fee assessed shall not exceed five percent of the total loan amount; the fee will be assessed on the outstanding principal balance of the loan payable; these fees are due on the same dates the payment of principal and interest on the loans are due, and shall be charged to each borrower, unless waived from the requirement by the department; the department may determine, establish and revise from time to time, the precise amount of the administrative fee to be charged, based on the projected costs of administering the program and other revenue available to pay such costs; the administrative fee payments must be deposited in the clean water state revolving loan administrative fund as they are received; interest on the clean water state revolving loan administrative fund shall be transferred to the administrative fund as it is received; and

(3) an administrative fee of two percent of the unpaid principal balance of the refinanced loan will be assessed against the ~~[local authority]~~ qualified borrower and shall be paid into the clean water state revolving loan administrative fund at the time of closing of the refinancing.

**D.** Financial assistance agreements will be prepared by the department and executed by the ~~[local authority]~~ qualified borrower for the project which can be financed with available balances in the fund.

**E.** Repayment of the loan portion of the financial assistance shall begin no later than one year after completion of the project for which the loan was executed and shall be repaid in full no later than 30 years after completion of the project. All principal and interest on loan payments shall be deposited in the fund.

**F.** The interest rate for the loan portion of the financial assistance shall be the rate in effect when the final loan agreement is executed. The interest rate shall not change during the term of the financial assistance unless refinanced in accordance with Subsection I of 20.7.5.14 NMAC. The interest rate shall be the base rate provided in Subsection G of 20.7.5.14 NMAC unless the local authority qualifies for a hardship rate provided in Subsection H of 20.7.5.14 NMAC.

**G.** At the beginning of each state fiscal year, the commission may determine a base rate for the state fiscal year which is less than or greater than the current base rate.

**H.** Hardship rates shall be approved by the department when a local authority meets the associated conditions at the time the financial assistance agreement is executed:

(1) When the local authority's per capita income is less than the statewide per capita income based on the most current United States (U.S.) bureau of census statistics.

(2) The local authority's per capita income is less than three-fourths of the statewide per capita income based upon the most current U.S. bureau of census statistics.

(3) A combination of loan and grant funds in those years when grant funding is available for assistance to rural communities.

(4) An interest rate of zero percent when:

(a) ~~the local authority's average user cost is [at least fifteen dollars per month or a higher amount as determined by the commission.]~~ greater than one and eighty-two hundredths percent of the local authority's per capita income. The calculation of average user cost shall be consistent with a statewide methodology established by the department; and

(b) the local authority's ~~[median household income]~~ per capita income is less than three-fourths of the statewide ~~[non-metropolitan median household income]~~ per capita income based upon the most current U.S. bureau of census statistics.

Interest Rate	Local Authority Criteria
2.375%	Per capita income equal to or above statewide average; base interest rate. (G.)
1.2%	Per capita income less than that statewide average. (H.)(1)
0.6%	Per capita income less than ¾ of the statewide average. (H.)(2)
0%	<del>[Median household income]</del> <u>Per capita income less than ¾] three-fourths [if] of the statewide [median household income] per capita income and the average user cost is [equal to or greater than \$15.00 per month] greater than</u>



	<u>one and eighty-two hundredths percent of the local authority's per capita income. (H.)(4)(a)(b)</u>
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I. The interest rate for a state agency shall be the lowest interest rate available above zero percent in 20.7.5.14 H, and the interest rate for all other eligible borrowers will be the base rate at the time the loan agreement is executed.

[I.]J. A local authority may refinance the loan portion of the financial assistance if the local authority later qualifies for a reduced rate. The refinancing may only occur at or after the execution of a final loan agreement.

[J.]K. Financial assistance recipients shall comply with all applicable federal, state, and local laws and regulations, including but not limited to:

- (1) procurement;
- (2) record keeping;
- (3) accounting;
- (4) audit and inspection;
- (5) occupational health and safety;
- (6) environmental review; and
- (7) non-discrimination.

[K.]L. In the event of default by the ~~[local authority]~~ qualified borrower, the department as agent for the commission may enforce its rights by suit or mandamus or may utilize all other available remedies under state law. [20.7.5.14 NMAC - Rp, 20.7.5.14 NMAC, 12/16/2015; A, 05/30/2017]

**HISTORY OF 20.7.5 NMAC:**

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

WQC Rule 67-2, Regulations Governing Water Pollution Control in New Mexico, filed 12/5/1967.

WQC Rule 72-1, Water Quality Control Commission Regulations, filed 8/4/1972.

WQCC Rule 77-1, Amended Water Quality Control Commission Regulations, filed 1/18/1977.

WQCC Rule 81-2, Water Quality Control Commission Regulations, filed 6/2/1981.

WQCC Rule 82-1, Water Quality Control Commission Regulations, filed 8/19/1982.

**History of Repealed Material:**

20.7.5 NMAC, Wastewater Facility Construction Loans, filed 6/16/2000 - Repealed effective 12/16/2015.

**Other History:**

That applicable portion of WQCC Rule 82-1, Water Quality Control Commission Regulations (filed 8/19/1982) was renumbered, reformatted and replaced by 20 NMAC 7.5, Wastewater and Water Supply Facilities - Wastewater Facility Construction Loans, effective 11/30/1995.

20 NMAC 7.5, Wastewater and Water Supply Facilities - Wastewater Facility Construction Loans (filed 10/25/1995) renumbered, reformatted, amended, and replaced by 20.7.5 NMAC, Wastewater and Water Supply Facilities - Wastewater Facility Construction Loans, effective 7/16/2000.