

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 20-~~5~~7(R)

PETITION FOR REGULATORY CHANGE

The New Mexico Environment Department ("Department") hereby petitions the Water Quality Control Commission ("WQCC") to revise 20.7.5 NMAC – *Wastewater Facility Construction Loans* pursuant to NMSA 1978, Section 74-6-4(B). 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 WQCC 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 WQCC schedule a hearing at its earliest convenience, in conjunction with its regular meeting and respective of public notice requirements. The Department anticipates that its testimony regarding the proposed revisions will require roughly two hours.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

/s/ Christopher Atencio

Christopher Atencio
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102-3400
Telephone: (505) 222-9554
christopher.atencio@state.nm.us

STATEMENT OF REASONS

In order to continue to provide competitive loans, and grant subsidies in certain situations, the Bureau proposes that the Water Quality Control Commission (“WQCC”) remove codified interest rates, redefine interest rate conditions, and remove a restriction on providing subsidies to only rural communities. In support of this petition to amend 20.7.5 NMAC and request a public hearing, the Construction Programs Bureau (“Bureau”) of the New Mexico Environment Department states as follows:

The Wastewater Facility Construction Loan Act (“Act”) (NMSA 1978, Sections 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 Bureau administers the CWSRF pursuant to the Wastewater Facility Construction Loans Act, NMSA 1978, Sections 74-6A-1 to -15, and regulations established by the WQCC at 20.7.5 NMAC.

Congress also set aside funds for grants for the construction of necessary publicly owned treatment works. 33 U.S.C. § 1285. These funds are also managed by the Bureau pursuant to NMSA 1978, Section 74-6A-4.1 (2007).

The Bureau proposes that the WQCC revise the definition of the base interest rate and grant the Bureau authority to establish other interest rates and interest rate conditions through policy. The base rate, or highest available interest rate, is set by the WQCC who may revise it at the beginning of each fiscal

year. 20.7.5.14(G) NMAC. The Bureau will report to the Commission, at the beginning of each fiscal year, the local authority interest rates and rate conditions.

Actions taken by the New Mexico Finance Authority (“NMFA”) in recent years have highlighted difficulties that the Bureau has in responding to real world dynamic conditions. As mentioned above, the hardship criteria and rates are codified at 20.7.5.14(H) NMAC. Further, the current base rate is codified in the table located at 20.7.5.14(H) NMAC; to change the base rate as allowed in 20.7.5.14(G) NMAC or the local authority criteria and rates, the WQCC must conduct a rulemaking to amend 20.7.5 NMAC, yet neither federal law nor state statute requires these criteria to be codified in rule. *See* 33 U.S.C. § 1383(d) and (i); NMSA 1978, §§ 74-6A-8(A), (D), and (E).

In comparison, NMFA administers the Drinking Water State Revolving Loan Fund (“DWSRLF”) and establishes hardship criteria and rates through policy and procedures. The Drinking Water State Revolving Loan Fund Act, NMSA 1978, Sections 6-21-A-1 to -10, states that financial assistance may be made at an annual interest rate less than the market rate as determined by NMFA procedures and reported annually in the Intended Use Plan. NMSA 1978, § 6-21A-6(E) (1997). NMFA currently lists the interest rates for the DWSRLF in Section VII of the DWSRLF Loan Management Policy.

Similarly, the Act requires the WQCC to determine an annual interest rate not to exceed five percent. NMSA 1978, § 74-6A-8(D). Federal statute requires that the interest rate be at or below the current market rate. 33 U.S.C. § 1383(d)(1)(A). There is no requirement for this to be in regulation, and it prevents the Bureau from being as flexible as NMFA in adjusting to real world conditions. Allowing the Bureau to establish other interest rates through policy will provide flexibility to help increase annual drawdown of the CWSRF. Annual reporting to the WQCC, similar to the DWSRLF, will provide oversight for the WQCC to monitor the Bureau’s criteria determination.

Additionally, the Bureau requests that the WQCC remove confusing and potentially restrictive language from 20.7.5 NMAC. In administering the CWSRF, the Bureau found a discrepancy in a discrete

paragraph in 20.7.5 NMAC that may restrict its ability to effectively disburse grant, not loan, funds pursuant to the CWA and federal regulations. Generally, 20.7.5.14 NMAC governs administration of the CWSRF, and specifically, Subsection (H) governs approval of local authority rates when certain conditions are met, as discussed above. However, Paragraph (3) of Subsection (H) arguably places a restriction on the combined use of loan and grant funds for rural communities. *See* 20.7.5.14(H)(3) NMAC.

Federal law governing grant disbursement specifies that states should give high priority to projects in priority water quality areas in developing a priority system. 33 U.S.C. § 1296; 40 C.F.R. § 35.2015(b). Indeed, a state's priority system ranking must include:

- Ranking criteria based on the impairment of classified water uses resulting from existing municipal pollutant discharges; and
- Ranking criteria based on the 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).

The federal regulations place importance on water quality consideration and pollution reduction but make no mention of population. *See* 40 C.F.R. § 35.2015(b). The Bureau interprets 20.7.5.14(H)(3) NMAC as restricting grant awards based on population rather than water quality merits. Further, this could also improperly base hardship interest rates on population rather than financial considerations for each applying community.

To resolve these issues, the Bureau proposes to remove Subsection (H) while maintaining full consideration of all criteria through a combination of the factors in 20.7.5 NMAC, the Affordability Criteria developed by the Bureau, and the Priority System approved by the WQCC. NMED Exhibit B. The Bureau will:

- Continue to consider socioeconomic factors for low- to no-interest loans through per capita income statistics in 20.7.5.14(H) NMAC.

- Pursuant to 33 U.S.C. § 1383(i)(2) and 20.7.5.12.B NMAC, seek WQCC approval for changes to the Priority System to focus priority for projects on water quality aspects.
- Consider socioeconomic factors and population through the Affordability Criteria as required by 33 U.S.C. § 1383(i)(2) and revised in 2015, attached hereto as Exhibit C. All communities previously able to receive subsidization as part of their CWSRF Loan will continue to have access to financial assistance. Cities and municipalities with a population of less than 20,000 and counties with a population of less than 200,000 will continue to receive maximum points in their affordability score.

With these protections in place, the Bureau is confident that the proposed revision will allow it to fully consider the appropriate factors as contemplated by Congress, the New Mexico Legislature, and the WQCC. Further, the proposed revision will allow the Bureau the flexibility to offer competitive and beneficial assistance to local authorities in New Mexico. As such, the Bureau respectfully requests that the WQCC schedule a public hearing to consider the proposed revision.

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; A, 09/29/2018]

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 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. "Base Rate" means the highest loan interest rate.

~~[C.]~~**D.** "Clean Water Act" means the federal Clean Water Act of 1977 and its subsequent amendments or successor provisions.

~~[D.]~~**E.** "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.]~~**F.** "Commission" means the water quality control commission.

~~[F.]~~**G.** "Department" means the New Mexico environment department.

~~[G.]~~**H.** "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.

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

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

~~[J.]~~**K.** "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.

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

~~[L.]~~M. "Fund" means the wastewater facility construction loan fund established in Section 74-6A-4 NMSA 1978 of the act.

~~[M.]~~N. "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.

~~[N.]~~O. "Payment" means a disbursement from the fund directly to the qualified borrower.

~~[O.]~~P. "Priority list" means the list of eligible projects ranked according to the priority system pursuant to the act.

~~[P.]~~Q. "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.

~~[Q.]~~R. "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.]~~S. "State agency" means an agency or department of the executive branch of government.

~~[S.]~~T. "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.

[20.7.5.7 NMAC - Rp, 20.7.5.7 NMAC, 12/16/2015; A, 09/29/2018; A, __/__/2020]

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 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, 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 eligible project so that the 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 qualified borrower has or will acquire proper title, easements and rights-of-way to the property upon or through which the eligible project proposed for funding is to be constructed or extended;
 - (5) require the contractor of the 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
 - (7) provide such information to the department as required in order to comply with the provisions of the Clean Water Act and state law.

D. Financial assistance shall be made only to 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; A, 09/29/2018]

20.7.5.11 APPLICATION PROCEDURES FOR PRIORITY LIST PLACEMENT:

- A. Applications for financial assistance shall be made by the 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 qualified borrower of any inadequacies in the submittal. The 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; A, 09/29/2018]

20.7.5.12 PRIORITY SYSTEM AND PRIORITY LIST:

- A. Financial assistance shall only be made to 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; A, 09/29/2018]

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 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 qualified borrowers that employ or contract with a New Mexico licensed professional engineer to provide and be responsible for engineering services on the project. Such services include, but are not limited to 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) 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 fees.
[20.7.5.13 NMAC - Rp, 20.7.5.13 NMAC, 12/16/2015; A, 09/29/2018]

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 Paragraph 10 of Subsection A of Section 74-6A-9 NMSA 1978 of the 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 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 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 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 [H.] 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 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 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.

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%	Per capita income less than three-fourths of the statewide per capita income and the average user cost is greater than one and eighty-two hundredths percent of the local authority's per capita income. (H.)(4)(a)(b)]

Local authority interest rates and interest rate conditions shall be determined by the department and reported to the commission at the beginning of each state fiscal year.

I. The interest rate for a state agency shall be the lowest interest rate available above zero percent in Subsection H of Section 14 of 20.7.5 NMAC[~~and~~].

J. [the] The interest rate for all other eligible borrowers will be the base rate at the time the loan agreement is executed.

[J.] K. 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.

[K.] L. 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.

~~L.~~M. In the event of default by the 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; A, 09/29/2018; A, 01/___/2020]