

STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD



IN THE MATTER OF PROPOSED  
REPEAL AND REPLACEMENT OF  
20.7.11 NMAC  
*Liquid Waste Treatment and Disposal Fees*

No. 19-42(R)

New Mexico Environment Department,  
Environmental Protection Division,  
Environmental Health Bureau,

Petitioner.

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**ORDER AND STATEMENT OF REASONS**

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This matter comes before the Environmental Improvement Board (“Board”) upon a petition filed by the New Mexico Environment Department (“Department”) on October 7, 2019, to repeal and replace 20.7.11 NMAC, *Liquid Waste Treatment and Disposal Fees*. The Board met with a quorum on February 28, 2020, to conduct the public hearing, which was held in Santa Fe, New Mexico, in accordance with the rulemaking procedures, 20.1.1 NMAC. The public hearing was transcribed by Albuquerque Court Reporting Services.

Public notice of the February 28, 2020 hearing (“notice”) was published in English and Spanish in the *Albuquerque Journal* and the *Las-Cruces Sun-News* on December 17, 2019. (NMED Exhibits 8 through 11). Notice was published in English and Spanish in the *New Mexico Register* on December 17, 2019. (NMED Exhibits 12 and 13). Notice was published on the Environmental Improvement Board’s and Liquid Waste Program’s respective pages on the Department’s website on October 25 and 28, respectively. (NMED Exhibits 14 and 15). Notice was posted on the New Mexico Sunshine Portal on December 17, 2019. (NMED Exhibit 16). All

other public notice requirements under NMSA 1978, Sections 14-4-5.2 (2017), 74-1-9 (1971 as amended through 1974), and 20.1.1.301 NMAC were met. (NMED Exhibits 17 and 18).

During the hearing, the Board heard technical testimony from and questioned the Department's witnesses and admitted the Department's exhibits. The Board also heard technical testimony from and questioned Link Summers. The Board heard non-technical testimony from and questioned the Professional Onsite Wastewater Reuse Association of New Mexico ("POWRA"), which appeared as a party. Members of the public were present for the hearing and provided comment. The Board closed the record on February 28, 2020.

The Board deliberated the proposed repeal and replacement of 20.7.11 NMAC on February 28, 2020. After Deliberation, the Board voted unanimously to repeal and replace 20.7.11 NMAC, as proposed by the Department in NMED Exhibit 24 amended by the following changes: (1) proposed Paragraph F of Section 8 (20.7.11.8(F) NMAC) is struck from 20.7.11 NMAC in its entirety; and (2) proposed Section 19 (20.7.11.19) shall be replaced by 20.7.11.14 NMAC (2011).

The Board adopts the proposed repeal and replacement of 20.7.11 NMAC, with the above-described amendments, for the reasons that follow:

### **STATEMENT OF REASONS**

1. Pursuant to NMSA 1978, Section 74-1-8(A)(3) (1971 as amended through 2000), the proposed repeal and replacement of 20.7.11 NMAC is within the jurisdiction of the Board.

2. Pursuant to 20.1.1.300(A) NMAC, any person may file a petition with the Board to adopt, amend or repeal any regulation within the jurisdiction of the Board. The Department is a "person" under 20.1.1 NMAC.

3. On October 7, 2019, the Department filed a petition with the Board for a public hearing in this matter. On October 25, 2019, the Board granted the Department's request for a

hearing and scheduled a public hearing in this matter for February 28, 2020 and continuing thereafter as necessary. The Board appointed Dr. Benjamin Duval to serve as Hearing Officer in this matter pursuant to 20.1.1.107 NMAC.

4. Pursuant to the Scheduling Order filed on December 4, 2019, and Section 20.1.1.302 NMAC, the Department filed a Notice of Intent to Present Technical Testimony on February 7, 2020.

5. Pursuant to Section 74-1-7(A)(3) (1971 as amended through 2000), the Department's Liquid Waste Program ("LWP") has the responsibility to protect the health and welfare of present and future citizens of New Mexico by providing for the prevention and abatement of public health hazards and surface and ground water contamination from on-site liquid waste disposal practices. The LWP is managed by the Environmental Health Bureau ("Bureau"), an administrative unit of the Department.

6. The LWP regulates approximately two hundred twenty-five thousand (225,000) permitted liquid waste systems that handle up to five thousand gallons per day ("gpd"). These responsibilities require significant human and material resources. The LWP also has regulatory responsibility for an additional estimated one hundred thousand (100,000) unpermitted liquid waste systems statewide. (NMED Exhibits 3 and 5).

7. The residential liquid waste systems regulated by the LWP include single-family homes, mobile home and RV parks, apartment complexes, and campsites. There are approximately ten thousand lots statewide that can only be serviced through alternative liquid waste systems, which require more tracking than conventional systems in order to protect the environment and New Mexico residents. (NMED Exhibits 3 and 5).

8. Commercial liquid waste systems regulated by the LWP include restaurants and

light industry up to 5,000 gpd. The LWP regulates twenty-two (22) different types of alternative treatment and storage systems. (NMED Exhibits 3 and 5).

9. In addition to residential and commercial systems, the LWP has regulatory responsibility for liquid waste systems in schools, churches, rest homes, medical facilities, parks, retail outlets, hotels, and other entities. (NMED Exhibits 3 and 5).

10. The LWP ensures that septage haulers are properly licensed and disposing at approved facilities. The problem of unregulated septage haulers is an ongoing danger to the health of New Mexicans and the health of the environment and wildlife. Recently, the Department received a citizen complaint of a septage truck leaking onto the pavement within the city streets and heavy traffic. The individual complained that while riding his motorcycle the truck moved in front of him and some wastewater splashed into his mouth. Additionally, the Department has encountered illegal septage dumping in the Farmington, Española and Carlsbad areas, just to mention a few. In one recent incident, an operator was spotted dumping septage into the Embudo River, a tributary of the Rio Grande. (NMED Exhibits 3 and 5).

11. The LWP spends significant time tracking treatment systems and ensuring compliance with statutes and regulations for the hundreds of thousands of systems statewide. Bringing liquid waste systems into compliance is a time-intensive endeavor, and the LWP administers compliance assistance programs to help users come into compliance as a less coercive alternative to fines and permit termination. (NMED Exhibits 3 and 5).

12. The LWP administers a comprehensive application process that is detailed to ensure the safety of State residents and protection of the environment. (NMED Exhibits 3 and 5).

13. The LWP has a statutory duty to provide technical assistance to the Wastewater Advisory Committee (“WTAC”), helping the WTAC to “provide standardized objective

evaluation of wastewater treatment and disposal technologies for both large- and small-flow domestic, commercial and agricultural wastewater systems.” The LWP maintains for the public, lists of approved liquid waste treatment technologies. NMSA 1978, § 9-7A-15(D), (E) (2003).

14. New Mexico’s Permian Basin oilfields are currently producing approximately 885,000 barrels of oil per day, and are the busiest, most-productive oilfields in the United States. Oil production in this area has caused a population boom and a housing shortage in southeastern New Mexico, resulting in ad hoc worker camps with improvised and dangerous liquid waste storage systems. These systems are often leaking and overflowing, putting the area’s groundwater in danger of contamination. It is the LWP that is charged with the task of identifying, locating, inspecting, and enforcing compliance in these camps. It is straining the Department’s resources and is unsustainable in the long term. (NMED Exhibits 3 and 5).

15. In order to develop an effective strategy to deal with the threat of groundwater contamination by the camps, the LWP is currently developing a comprehensive database and mapping system to help identify and track the ad hoc, unpermitted wastewater storage systems. (NMED Exhibits 3, 5, and 22).

16. The LWP provides free water testing for nitrate, iron, and fluoride, and many other unpaid services and administrative functions in fulfillment of its responsibility to ensure that liquid waste produced in New Mexico is adequately treated for the health and safety of the State and its residents. (NMED Exhibits 3 and 5).

17. The Legislature has capped the liquid waste system fee amounts collectible by the Bureau at “no more than the average charged by the contiguous states to New Mexico for similar permits and services and to implement and administer an inspection and permitting program for on-site liquid waste systems.” NMSA 1978, § 74-1-8(A)(3).

18. In November 2018, the Bureau conducted a survey on the liquid waste fees charged by contiguous states and, in general, the fees charges by New Mexico were significantly lower than the fees charged by contiguous states. For example, the average fee charged in contiguous states for a liquid waste holding tank permit was five hundred fifty-five dollars (\$555.00), whereas New Mexico currently charges one hundred dollars (\$100.00). The average fee for a variance in contiguous states is two hundred eighty dollars (\$280.00), whereas New Mexico charges fifty dollars (\$50.00) for a variance. (NMED Exhibits 3, 5, 20 [pgs. 99-107], and 21).

19. The LWP's inability to collect adequate fees has necessarily resulted in understaffing and slower response times. In 2018 alone, the LWP received four thousand eight hundred sixty-six (4,866) applications for liquid waste permits statewide. These permits were processed start to finish by the LWP's sixty-five (65) employees spread among twenty-two (22) field offices across the State. The Albuquerque LWP field office had one employee that processed two hundred forty-five (245) permit applications in 2018. This problem is not unique to urban centers: The Raton field office has a single employee who processed one hundred sixty-five (165) applications in 2018. (NMED Exhibits 3 and 5).

20. The sixty-five LWP employees conducted over four thousand (4,000) on-site inspections of liquid waste systems across New Mexico; an enormous undertaking given that many of the liquid waste inspections take place in rural areas, requiring extended travel time for LWP inspectors. (NMED Exhibits 3 and 5).

21. In addition to their work for the LWP, the same sixty-five employees also have the responsibility to inspect swimming pools and food facilities for approximately seven thousand (7,000) restaurants, churches, public pools, hotels, and schools. (NMED Exhibits 3 and 5).

22. Prior to 2002, New Mexico did not charge fees for liquid waste permits,

inspections, and administration. In 2002, the Board promulgated the first set of fees, which have not been raised since the rule was adopted - a period of over seventeen (17) years. (NMED Exhibits 3 and 5).

23. The LWP's current fee structure generates four hundred thirty-five thousand dollars (\$435,000.00) annually. The LWP's remaining budgetary needs are met by the General Fund. Repealing and replacing 20.7.11 NMAC would allow the LWP to generate much needed revenue independent of the General Fund. (NMED Exhibits 3, 5, and 20 [pgs. 3-99]).

24. To offset the proposed fee, the repeal and replacement includes a provision to fund the Liquid Waste Disposal Assistance Fund with forty dollars (\$40.00) from each permit issued, up to the statutory maximum of two hundred thousand dollars (\$200,000.00). The Liquid Waste Assistance Fund was created by the legislature to assist indigent households and individuals construct, install, and maintain liquid waste systems. Although the fund was authorized in 2009 by Section 74-1-15.1 (2009) of the Environmental Improvement Act, it has only been funded once. It is currently not funded and has not been for a number of years. Adopting this provision will require the Department to build and administer the fund for the benefit of low-income families and individuals in New Mexico. (NMED Exhibits 3 and 5).

25. Repealing and replacing 20.7.11 NMAC is preferable to amending the current rules because the changes and additions are extensive. Repealing and replacing 20.7.11 NMAC would provide a streamlined process for changing fees under this part. (NMED Exhibits 3 and 5).

26. Pursuant to 1.24.10.18(B)(1) NMAC, the replacement regulations would retain the current part name, title, chapter, and part numbers, "20.7.11 NMAC."

27. Repealing and replacing 20.7.11 NMAC, would allow the Department to bring New Mexico's liquid waste fees to a level comparable with contiguous states, while still charging fees

below the average, as required by the Environmental Improvement Act. (NMED Exhibits 3 and 5).

28. Repealing and replacing 20.7.11 NMAC, would allow the Department to more fully staff the LWP, speeding up permit processing times and allowing for more timely inspections, to better protect the health of New Mexico residents. (NMED Exhibits 3 and 5).

29. Repealing and replacing 20.7.11 NMAC, would provide for a more precise description of persons required to pay liquid waste treatment and disposal fees and would provide greater clarity and ease of use of the rules. (NMED Exhibits 3 and 5).

30. Repealing and replacing the definitions in 20.7.11 NMAC, would more precisely describe the methods and technologies used to treat liquid waste, and better reflect national standards of terminology. (NMED Exhibits 3 and 5).

31. The Board has the “exclusive authority to establish on-site liquid waste system fees that are no more than the average charged by the contiguous states to New Mexico for similar permits and services and to implement and administer an inspection and permitting program for on-site liquid waste systems.” NMSA 1978, § 74-1-8(A)(3).

32. In considering the proposed amendments, the Board is required to give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to: (1) character and degree of injury to or interference with health, welfare, animal and plant life, property and the environment; (2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and (3) technical practicability, necessity for and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation. NMSA 1978, § 74-1-9 (B).



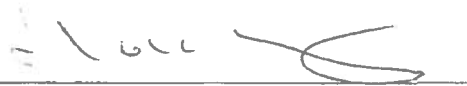
social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and (3) technical practicability, necessity for and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation. NMSA 1978, § 74-1-9 (B).

33. The Board considered all relevant facts and circumstances and concluded that the proposed repeal and replacement as adopted by the Board does not cause injury or interference with health, welfare, animal and plant life, property and the environment. The Board found the proposed repeal and replacement as adopted by the Board is technically practical, economically reasonable, and in the public interest.

**ORDER**

WHEREFORE, the Board hereby adopts the repeal and replacement of 20.7.11 NMAC which changes the liquid waste treatment and disposal fees, fee structure, and associated definitions, and provides for the funding of the Liquid Waste Disposal Assistance Fund, as proposed by the Department in NMED Exhibit 24 to the Department's Notice of Intent to Present Technical Testimony in this matter, as amended by the Board.

IT IS SO ORDERED.

  
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JOHN VOLKERDING, Chair  
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Date: 3/4/20