



FORMING A MUTUAL DOMESTIC WATER CONSUMERS ASSOCIATION

INTRODUCTION

Water systems in New Mexico operate under different types of ownership. There are both public and private water systems. Private water systems can be either for-profit or not-for-profit. There are advantages and disadvantages to each ownership type.

This document discusses key factors to consider before forming a Mutual Domestic Water Consumers' Association (MDWCA). It also outlines the steps required to form an MDWCA. The intended audience for the document is communities that are considering creating a new MDWCA, and existing non-profit water systems that are considering reorganizing as an MDWCA.

WHAT IS AN MDWCA?

Historically, many rural communities in New Mexico relied on surface water or shallow wells for their drinking water supplies. In the early 1900's, it became clear that unsanitary drinking water was contributing to high infant mortality rates and short life spans in New Mexico. In response to this public health crisis, the New Mexico legislature passed the Sanitary Projects Act in 1947, which authorized the creation of MDWCAs (NMSA 1978, § 3-29-1 to -21). Section 3-29-3 outlines the purpose of the Act:

The purpose of the Sanitary Projects Act is to improve the public health of rural communities in New Mexico by providing for the establishment and maintenance of a political subdivision of the state that is empowered by the state to receive public funds for acquisition, construction and improvement of water supply, reuse, storm drainage and wastewater facilities in communities, and to operate and maintain such facilities for the public good.

It is important to highlight that this section defines an MDWCA as a subdivision of the state, or a "local government". MDWCAs are therefore eligible for public funding sources, but they also have significant responsibilities under the law, as described below.

Today, a new MDWCA cannot be created by original incorporation (or by reorganization unless the preceding entity was in existence on January 1, 2000) if the association's proposed service area includes property contiguous to an incorporated municipality, an unincorporated area currently served by a municipality, or a water and sanitation district.¹

ADVANTAGES OF MDWCAS

The key advantage of an MDWCA is that, as a local government, it is eligible for public funding. Public funding can take the form of a grant, a loan with below-market interest rates, or a combination of the two. Funding sources include the Drinking Water State Revolving Loan Fund, the USDA Rural Development Water and Waste Disposal Program, the Water Trust Board Water Project Fund, the

¹ This restriction does not apply if the contiguous incorporated municipality or water and sanitation district does not or cannot provide services at or below the cost proposed by the MDWCA.

Colonias Infrastructure Fund, the Community Development Block Grant program, the Rural Infrastructure Revolving Loan Program, and the Public Project Revolving Fund.

MDWCAs also have certain tax benefits. MDWCAs pay the governmental Gross Receipts Tax rate of 5%, instead of the local (county) rate. An MDWCA, as a local government, is also exempt from paying property tax.

RESPONSIBILITIES OF MDWCAS

Water systems have different obligations under the law, depending on their organization type. This section provides an overview of the legal requirements applicable to MDWCAs.

I. Legal requirements applicable to all water systems in New Mexico

A. Federal and state drinking water regulations

All public water systems must comply with the federal and state drinking water regulations.² These include requirements that systems have a certified operator, collect required samples, provide water that meets water quality standards, and report to their customers on their water quality. For more information on drinking water regulations, go to the Drinking Water Bureau's web site at www.env.nm.gov/dwb, or call the Drinking Water Bureau at 1-877-654-8720.

B. Water rights

All water systems that produce their own water must own or lease water rights. Water rights in New Mexico are overseen by the Office of the State Engineer. Systems must regularly report their water usage to the State Engineer, and they must ensure that their water use does not exceed their water rights. For more information on water rights, see the Office of the State Engineer Water Rights Division web site at www.ose.state.nm.us or call 1-800-928-3766.

C. Taxes

All water systems that produce their own water are required to pay the Water Conservation Fee (3 cents per 1,000 gallons of water produced). The fee pays for the analysis of all compliance samples that are required under drinking water regulations. It also pays for the New Mexico Environment Department Drinking Water Bureau staff to collect some compliance samples. All water systems must also pay gross receipts tax. As a subdivision of the state, the tax rate for MDWCAs is 5%. Tax collection is overseen by the NM Taxation and Revenue Department.

II. Legal requirements specific to local governments (and other public bodies) in New Mexico

A. Open Meetings Act

The Open Meetings Act (NMSA 1978, § 14-2-1 to -12) requires that all public bodies in New Mexico conduct business in an open meeting that can be attended by the public. The Act sets out requirements for the meeting notice, agenda, and minutes. The New Mexico Attorney General's Office publishes an excellent Open Meetings Act Compliance Guide, available at: www.nmag.gov.

² A public water system serves at least 25 people or 15 service connections for at least 60 days out of the year.

B. Inspection of Public Records Act

The Inspection of Public Records Act (NMSA 1978, § 10-15-1 to -4) gives the public the right to review and obtain copies of public records maintained by public bodies in New Mexico. The Act specifies how and in what time frame the public body must respond to public records requests. The Attorney General's Office also publishes an Inspection of Public Records Act Compliance Guide, available at: www.nmag.gov.

C. Procurement Code

The Procurement Code (NMSA 1978, § 13-1-28 to -199) stipulates requirements for the process public bodies must use to purchase goods and services. There are fewer controls on small purchases, and more stringent controls on large purchases. These requirements are intended to ensure the procurement process is fair and open, and that the public body gets good value for the public funds expended.

D. Reporting to the Department of Finance and Administration Local Government Division

Local governments must submit annual budgets and quarterly reports to the Department of Finance and Administration Local Government Division, if they take in more than \$10,000 in revenue in a year (NMSA 1978, § 6-6-1 and -2). For more information, contact the Division at (505) 827-4950.

E. Audit Act

The Audit Act (NMSA 1978, -12-6-1 to -14) requires local public bodies to submit annual financial reports to the Office of the State Auditor. Reporting requirements under the Audit Act are tiered; more reporting is required of systems earning more revenue. For more information, contact the State Auditor's Office at (505) 476-3800 or www.saonm.org.

III. Legal requirements specific to MDWCAs

A. Sanitary Projects Act

The State law that applies solely to MDWCAs is the Sanitary Projects Act (NMSA 1978, § 3-29-1 to -21). Any community that is considering becoming an MDWCA should thoroughly understand the requirements of the Act, most of which relate to water system governance and administration. The Act outlines the powers and responsibilities of Boards; criteria for association membership; requirements for the association's certificate of association, bylaws, and rules; reporting requirements; and the New Mexico Environment Department's powers over MDWCAs.

In summary, MDWCAs enjoy the advantage of being eligible for public funding. However, MDWCAs are also subject to State laws that require accountability and transparency in exchange for access to public funding. It is important to keep in mind that many of these requirements reflect practices that are recommended for all water systems. For example:

- All water systems benefit from adhering to clear and carefully-crafted governing documents (e.g. Certificate of Association, Bylaws, and Rules). The Sanitary Projects Act provides requirements for these documents that ensure they address some of the most important managerial and financial functions of a governing body.

- All water system boards benefit from transparency and accountability to their customers, as required by the Open Meetings Act and Inspection of Public Records Act.
- All water systems benefit from annual budgets, reserve funds, and periodic rate analyses, as required by the Sanitary Projects Act.
- All water systems benefit from using a prescribed process for purchasing items that ensures the best price and equal treatment of vendors, as required by the Procurement Code.

STEPS TO FORMING AN MDWCA

The steps to form an MDWCA differ depending on whether the community is creating a new MDWCA by original incorporation or reorganizing an existing entity as an MDWCA. Only cooperative associations or non-profit corporations can reorganize as MDWCAs. Other organization types (e.g. for-profit corporations) must create a new MDWCA.

I. Creating a new MDWCA

To create a new MDWCA, the individuals organizing the association must draft a Certificate of Association that is in compliance with the requirements of the Sanitary Projects Act. It is highly recommended that they then invite members of the community to a meeting, at which they conduct a vote on whether to create the MDWCA and approve the draft Certificate of Association. The Certificate of Association must be filed with the Office of the Secretary of State (http://www.sos.state.nm.us/Business_Services/Corporations_Overview.aspx); note there is filing fee. The association must hold an election to seat a board, and create Bylaws and Rules that comply with the requirements in Sanitary Projects Act. NMED can provide example governing documents to use as a reference upon request.

New water systems must be approved by the Drinking Water Bureau before they begin operation. This requires submittal of an application form, plans and specifications, an engineering design summary, a disinfection and sampling plan, an inventory of contamination sources, and information on how the water system will be managed and financed. More information on requirements for new systems is available at: www.env.nm.gov/dwb/watersystemmodificationdesignconstruction.htm.

II. Reorganizing as a MDWCA

The requirements for reorganizing an existing cooperative or non-profit corporation into an MDWCA are described in the Sanitary Projects Act (3-29-20 NMSA 1978). The Act requires that the water system create a Certificate of Association, Bylaws, and Rules that comply with the requirements for governing documents in the Sanitary Projects Act. The Certificate of Association must state that it supersedes the Articles of Incorporation of the cooperative association or the non-profit corporation. Reorganization must be approved by a majority vote of a quorum of the members. This vote must occur at an open meeting. Notice of the meeting and a copy of the proposed Certificate of Association must be sent to each member at their last known address at least 15 days prior to the meeting. The Certificate of Association must be filed at the Office of the Secretary of State (www.sos.state.nm.us/Business_Services/Corporations_Overview.aspx). It is strongly recommended that the Bylaws and Rules be written and approved prior to filing the Certificate of Association with the Secretary of State because, once the Certificate of Association is filed, the system is an MDWCA and must operate as an MDWCA.

For more information, contact the Drinking Water Bureau at 1-877-654-8720 or www.env.nm.gov/dwb.